NORTH CAROLINA COURT OF APPEALS REPORTS

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THE COURT OF APPEALS
OF
NORTH CAROLINA

Chief Judge

JOHN C. MARTIN

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DISTRICT	JUDGES	ADDRESS
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7BC	Frank R. Brown	Tarboro
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4B	Charles H. Henry	Jacksonville
5	W. Allen Cobb, Jr.	Wilmington
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	Phyllis M. Gorham	Wilmington
8A	Paul L. Jones	Kinston
8B	Jerry Braswell	Goldsboro
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9	Robert H. Hobgood	Louisburg
	Henry W. Hight, Jr.	Henderson
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	Michael R. Morgan	Raleigh
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	Paul C. Ridgeway	Raleigh
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	Jack A. Thompson	Fayetteville
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	Douglas B. Sasser[1]	Whiteville
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16B	Robert F. Floyd, Jr.	Lumberton
	Gary L. Locklear	Pembroke
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	Richard W. Stone	Wentworth
17B	A. Moses Massey	Mt. Airy
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20B	Susan C. Taylor	Monroe
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	Ronald K. Payne	Asheville
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29B	Mark E. Powell	Rutherfordton
30A	James U. Downs	Franklin
30B	Janet Marlene Hyatt	Waynesville

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	JULIUS ROUSSEAU, JR.	North Wilkesboro
	THOMAS W. SEAY	Spencer

1. Appointed and sworn in 29 October 2007 to replace William C. Gore, Jr. who retired 31 July 2007.
2. Appointed and sworn in 31 October 2007 to replace John S. Arrowood who was appointed to the Court of Appeals.

DISTRICT COURT DIVISION

DISTRICT	JUDGES	ADDRESS
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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. Appointed as Chief Judge to replace Joyce A. Hamilton who retired 1 November 2007.
3. Appointed and sworn in to the Superior Court 29 October 2007 to replace William C. Gore who retired.
4. Appointed and sworn in 30 August 2007 to replace Ernest J. Harviel who retired 31 July 2007.
5. Appointed and sworn in 6 November 2007.

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Lauren M. Clemmons
John Congleton
Scott A. Conklin

Lisa G. Corbett
Douglas W. Corkhill
Allison S. Corum
Robert D. Croom
Laura E. Crumpler
William B. Crumpler
Joan M. Cunningham
Robert M. Curran
Tracy C. Curtner
Kimberly A. D'Arruda
Lisa B. Dawson
Clarence J. DelForge III
Kimberly W. Duffley
Patricia A. Duffy
Brenda Eaddy
Letitia C. Echols
Joseph E. Elder
Larissa Ellerbee
David L. Elliott
John C. Evans
Caroline Farmer
June S. Ferrell
Bertha L. Fields
Spurgeon Fields III
Joseph Finarelli
William W. Finlator, Jr.
Margaret A. Force
Tawanda N. Foster-Williams
Dana French
Terrence D. Friedman
Virginia L. Fuller
Amy L. Funderburk
Edwin L. Gavin II
Laura J. Gendy
Jane A. Gilchrist
Lisa Glover
Christine Goebel
Michael David Gordon
Richard A. Graham
Angel E. Gray
John R. Green, Jr.
Leonard G. Green
Alexandra S. Gruber
Mary E. Guzman
Melody R. Hairston
Patricia Bly Hall
Lisa H. Harper
Kathryne Hathcock
Richard L. Harrison
Jennie W. Hauser
Tracy J. Hayes
Ernest Michael Heavner
Thomas D. Henry
Clinton C. Hicks
Isham F. Hicks
Alexander M. Hightower
Tina L. Hlabse
Charles H. Hobgood
Mary C. Hollis
James C. Holloway
Susannah P. Holloway
Tenisha S. Jacobs
Creecy C. Johnson
Durwin P. Jones
Catherine F. Jordan
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Linda J. Kimbell
Anne E. Kirby
David N. Kirkman
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Amy C. Kunstling
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Donald W. Laton
Philip A. Lehman
Rebecca E. Lem
Anita Leveaux-Quigless
Floyd M. Lewis
Amanda P. Little
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John W. Mann
Quinita S. Martin
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Mary S. Mercer
Derick Mertz
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Katherine Murphy
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Yvonne B. Ricci
Charlene B. Richardson
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Joyce S. Rutledge
Kelly Sandling
Gary A. Scarzafava
John P. Scherer II
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Chris Z. Sinha
Scott T. Slusser
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Donna D. Smith
Robert K. Smith
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Iain M. Stauffer
Angenette R. Stephenson
Mary Ann Stone
LaShawn L. Strange
Elizabeth N. Strickland
Jennifer J. Strickland
Scott Stroud
Kip D. Sturgis
Sueanna P. Sumpter
Gary M. Teague
Kathryn J. Thomas
Jane R. Thompson
Douglas P. Thoren
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Jacqueline A. Tope
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Brandon L. Truman
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Gaines M. Weaver
Margaret L. Weaver
Elizabeth J. Weese
Oliver G. Wheeler
Robert M. Wilkins
Christopher H. Wilson
Mary D. Winstead
Donna B. Wojcik
Thomas M. Woodward
Patrick Wooten
Harriet F. Worley
Claude N. Young, Jr.
Michael D. Youth

DISTRICT ATTORNEYS

DISTRICT	DISTRICT ATTORNEY	ADDRESS
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2	Seth H. Edwards	Washington
3A	W. Clark Everett	Greenville
3B	Scott Thomas	New Bern
4	Dewey G. Hudson, Jr.	Jacksonville
5	Benjamin Russell David	Wilmington
6A	William G. Graham	Halifax
6B	Valerie M. Asbell	Murfreesboro
7	Howard S. Boney, Jr.	Tarboro
8	C. Branson Vickory III	Goldsboro
9	Samuel B. Currin	Oxford
9A	Joel H. Brewer	Roxboro
10	C. Colon Willoughby, Jr.	Raleigh
11	Susan Doyle	Smithfield
12	Edward W. Grannis, Jr.	Fayetteville
13	Rex Gore	Bolivia
14	David J. Saacks	Durham
15A	Robert F. Johnson	Graham
15B	James R. Woodall, Jr.	Chapel Hill
16A	Kristy McMillan Newton	Raeford
16B	L. Johnson Britt III	Lumberton
17A	Phil Berger, Jr.	Wentworth
17B	C. Ricky Bowman	Dobson
18	J. Douglas Henderson	Greensboro
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19C	William D. Kenerly	Salisbury
20A	Michael Parker	Monroe
20B	John Snyder	Monroe
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22	Garry W. Frank	Lexington
23	Thomas E. Horner	Wilkesboro
24	Gerald W. Wilson	Boone
25	James Gaither, Jr.	Lenoir
26	Peter S. Gilchrist III	Charlotte
27A	R. Locke Bell	Gastonia
27B	Richard L. Shaffer	Shelby
28	Ronald L. Moore	Asheville
29A	Brad Greenway	Rutherfordton
29B	Jeff Hunt	Hendersonville
30	Mike Bonfoey	Waynesville

PUBLIC DEFENDERS

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

CASES REPORTED WITHOUT PUBLISHED OPINIONS

CASES REPORTED WITHOUT PUBLISHED OPINIONS

GENERAL STATUTES CITED

GENERAL STATUTES CITED

NORTH CAROLINA CONSTITUTION CITED

RULES OF EVIDENCE CITED

RULES OF CIVIL PROCEDURE CITED

RULES OF APPELLATE PROCEDURE CITED

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

LESTER WRIGHT AND VIRGINIA WRIGHT, PETITIONERS v. THE TOWN OF MATTHEWS; THE TOWN OF MATTHEWS ZONING BOARD OF ADJUSTMENT; JOHN BOUTWELL, JEFF SOLADAY, DON WYKS, TOM WILLIAMS, JEANNE MOORE AND SCOTT VALLANDINGHAM, IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE TOWN OF MATTHEWS ZONING BOARD OF ADJUSTMENT, RESPONDENTS

No. COA05-239

(Filed 4 April 2006)

Easements; Highways and Streets— public streets—public right-of-way—implied dedication—erroneous map—prescription

The trial court erred by affirming a decision by the Zoning Board of Adjustment (Board) determining that defendant town had a public right-of-way across petitioners' real property based on its erroneous determination that Home Place was a public street, and the case is remanded for further findings detailing whether Home Place became a public street by means of implied dedication, because: (1) a private right-of-way or street may become a public street by one of three methods including a regular proceeding before a proper tribunal such as a condemnation action; by prescription; or through action by the owner such as a dedication, gift, or sale; (2) neither the Board nor the trial court made any findings regarding dedication, prescription, or any other method of acquiring a public interest in Home Place; (3) there is no evidence that Home Place was ever the subject of a condemnation proceeding or other proceeding regularly constituted before the proper tribunal; (4) there is no evidence that Home Place was ever the subject of a gift or sale by the property

owners; (5) there was no substantial, material, and competent evidence that Home Place was a part of Reverdy Lane, and erroneous labeling on a map by others cannot constitute an express offer of dedication to the public on the part of the property owners; (6) there was insufficient evidence to show that Home Place was part of the state-maintained system of highways; (7) although implied dedication may have been the theory under which the Board and trial court concluded Home Place became a public street, neither the Board nor the trial court made any findings regarding acquiescence in the public's use of the property under circumstances indicating that the use was not permissive, affirmative acts respecting the property, or other acts which to a reasonable person would appear inconsistent and irreconcilable with any construction except dedication of the property to public use; and (8) there was no substantial, competent, and material evidence that the state or defendant town maintained Home Place for the requisite twenty-year period to make Home Place become a public street by way of prescription.

Appeal by petitioners from an order entered 4 January 2005 by Judge Nathaniel J. Poovey in Mecklenburg County Superior Court. Heard in the Court of Appeals 21 September 2005.

Lester and Virginia Wright, petitioner-appellants, pro se.

Buckley, McCullen & Buie, P.A., by Charles R. Buckley, III, for respondent-appellees.

HUNTER, Judge.

Lester and Virginia Wright ("petitioners") appeal from an order of the trial court affirming a decision by the Zoning Board of Adjustment for the Town of Matthews ("the Board"). Petitioners contend the trial court erred in concluding that the Board's decision determining that the Town of Matthews had a public right-of-way across petitioners' real property was supported by competent, substantial, and material evidence in the whole record. Petitioners argue there was insufficient evidence to show that the street in Matthews upon which their home is located is a public street, rather than a private one. For the reasons set forth herein, we reverse the decision of the trial court and remand for further findings.

Petitioners' property is a 2.59-acre tract of land located in Mecklenburg County. Petitioners' property is bordered on two sides

by a street known as "Home Place." Home Place in turn branches off of a public street known as Reverdy Lane. Petitioners' property was once part of a larger tract of land owned by Richard M. Welling and his wife ("the Wellings"). In December of 1958, the Wellings and other property owners petitioned the Board of Commissioners of Mecklenburg County to request the State Highway and Public Works Commission "take over Reverdy Lane, a rural road running from the south side of Highway 51 at a point about 1.5 miles to the east of Highway 16 for a distance of 1 mile." The Board of Commissioners for Mecklenburg County thereafter requested the State Highway Commission add Reverdy Lane to the system of county roads maintained by the state. The length of Reverdy Lane was noted as "0.95 Mile." Reverdy Lane was thereafter accepted by the state and designated SR 3471.

In 1965, the Wellings conveyed to James and Jane W. Norman ("the Normans") by general warranty deed the property presently owned by petitioners. The general warranty deed to the Normans noted that the conveyance was subject to "the 60 foot right-of-way for Home Place for street purposes over the north side and the east side of said tract[.]"

Petitioners purchased this property on 6 June 1984. The general warranty deed to petitioners' property noted that "[t]his conveyance is subject to and there is excepted from said conveyance the right-of-way of Home Place for street purposes over the north side and east side of said tract, all as shown on the aforesaid survey of said property." On 8 June 1984, petitioners signed a document entitled "Acknowledgment," which states as follows:

> This is to acknowledge that although our Survey shows our property at 2032 Home Place, Matthews, N.C. being . . . located on a 60 foot wide street known as Home Place, and our Deed and prior Deeds refer to said street, which is shown as a public street on the Mecklenburg County tax Map; and although we have been advised by the Town of Matthews in connection with the recent annexation of said property into the Town of Matthews that Home Place will be maintained by Matthews; this will confirm that this situation has been discussed and that we have been advised by Eugene C. Hicks, III, Closing Attorney, that Home Place does not appear as a dedicated street on a recorded map, nor is he aware of a separate dedication of same or agreement as to upkeep of same, such that at some later date we could be called upon to join in the expense of upkeep, or to join in a dedi-

> cation of said street or to participate in some manner or proceeding to establish a right of way for access to and from our property, Reverdy Lane and Highway #51.

On 25 March 1985, the Town of Matthews passed a resolution requesting that the state delete from its system certain streets, including Reverdy Lane, in order to add the streets to the town's street system. The resolution recognized Reverdy Lane as "SR3471" and noted that its length was "8/10 of a mile." The resolution did not name Home Place as one of the streets to be added to the town's street system.

On 22 June 1994, several of the Wellings' children, as successors to property owned by the Wellings, filed for registration a document entitled "Withdrawal of Street Dedication." The document stated that, "to the extent any document may appear of record which may constitute an offer or proposal for dedication of all or any" extension or expansion of Reverdy Lane, such offer or proposal was withdrawn, "save and excepting as to those portions of Reverdy Lane, which have in fact been constructed, dedicated, and accepted by a municipal authority." The legal description attached as Exhibit A to the Withdrawal of Street Dedication referenced both Reverdy Lane and Home Place as having "a 60 foot private right of way[.]"

At some point, petitioners began inquiries into the status of Home Place. On 6 November 1992, Mr. Eugene Smith, Senior Deputy Attorney General at the North Carolina Department of Justice, on behalf of Attorney General Lacy Thornburg, sent a letter and affidavit to petitioners. The affidavit, signed by Mr. L. C. Smith, Supervisor of the Road Inventory Section of the Geographic Information System Branch of the North Carolina Department of Transportation ("DOT"), stated that "the street in the Town of Matthews known as 'Home Place' as shown on the 'Powell Bill Map' submitted to the Department of Transportation on July 22, 1992, is not now on the State Highway System, nor has it ever been on the State Highway System." Mr. L. C. Smith also drafted a memorandum concerning Home Place dated 3 November 1992. The memorandum stated as follows:

> Reverdy Lane in Mecklenburg Co. was added to the state-maintained system[] of roads for 1.00 mile in 1959 and given the secondary road number SR 3471. It was shown on the Meck. Co. [sic] map as basically a straight line until the 1976 map was printed. On the 1976 map, the southern end was changed to show what is the approximate alignment of Home Place. I have not been able to find any documentation deleting the southern end of

> the original alignment and adding the revised alignment which is Home Place. I believe that the alignment was inadvertently changed by the draftsman working on the Meck. Co. [sic] map.
>
> Although the alignment was changed on the map, that did not change the DOT's responsibility for maintenance from one road to the other because the change was not supported by any official documentation (road petition, Board approval, project, etc.).
>
> The Charlotte urban map that was produced in 1983 has Home Pl. lettered as SR 3471. However, I believe that this was done because the Meck. Co. [sic] map was incorrectly showing the Home Pl. alignment as SR 3471.
>
> In 1985 an agreement was entered into between the Town of Matthews and the DOT in which several secondary roads were transferred from the state system of roads to the town's system of roads. Reverdy Ln. was one of the roads listed in the documentation as being transferred. Though Home Pl. was not mentioned in the documentation, it was colored as one of the roads to be transferred. Again, I believe that this was the result of the incorrect showing of the Home Pl. alignment as a part of SR 3471.
>
> I have not been able to find any documentation that ever officially added Home Pl. to the state system of roads.

In a letter dated 14 January 1993, Mr. J. D. Goins ("Mr. Goins"), a division engineer at DOT, informed petitioners that

> according to our records, the road off Reverdy Lane in Matthews known as "Home Place" is not and never has been a part of the State Maintained System of Highways. Therefore, normal routine maintenance would not have been performed on this roadway. Occasional maintenance may have been performed as a courtesy to property owners due to damage caused by state equipment turning around on this portion of [the] non-state system street.

DOT sent another letter dated 28 February 2001 to petitioners confirming that the status of Home Place as attested to in the previous affidavit signed by Mr. L. C. Smith and later confirmed by Mr. Goins was "still valid."

By letter dated 14 January 2004, DOT informed petitioners that "the entire state-maintained portion, approximately 1.00 mile in length of Reverdy Lane (SR 3471) was finished being paved on September 30, 1965." Enclosed with the letter was a map of the area,

with Reverdy Lane highlighted in yellow and Home Place highlighted in red. The map labeled the length of Reverdy Lane as being "0.99L M" and Home Place as "0.86." The map designated the roads as two separate streets.

On 14 October 2002, petitioners sent a letter by electronic mail to Mr. Robert Brandon ("Mr. Brandon"), Zoning Administrator for Mecklenburg County, expressing their belief that the county violated a zoning ordinance when it issued building permits for houses built on Home Place from 1979 through 1983. In the letter, petitioners disputed the county's reference to Home Place as a "street." By letter dated 22 October 2002, Mr. Brandon informed petitioners that he had determined Home Place was a public street within the Town of Matthews. Petitioners appealed the determination to the Board.

The Board held a hearing on the matter on 5 February 2004. At the hearing, Ralph S. Messera ("Mr. Messera"), Public Works Director for the Town of Matthews, testified on behalf of the town. Mr. Messera stated that the Town of Matthews annexed petitioners' property on 31 December 1983. Referring to the 25 March 1985 resolution by the Town of Matthews, Mr. Messera agreed that "[t]he Town has continuously maintained the street known as Home Place since the adoption of that resolution in March 1985." Mr. Messera testified that the Town of Matthews paved Home Place in 1991 and "took action to add Home Place's mileage to the Powell Bill map that was filed with the State."

The Town also submitted into evidence a letter to petitioners from Garland B. Garrett, Jr. ("Secretary Garrett"), Secretary of DOT, dated 24 October 1996. In the letter, Secretary Garrett informed petitioners that DOT could "find no evidence of a recorded subdivision plat indicating a measured right-of-way easement for Home Place." The letter continued:

> However, your deed, survey plat and property corners recognize a 60 foot right-of-way all of which are evidence enough for legal certification, and your written approval for the paving of Home Place in 1990 was not required. The same is in evidence for other properties on Home Place. By our definition, this evidence provides a dedicated easement for Home Place.
>
> There is, also, considerable evidence to indicate the municipality was logically led to assume Home Place was state maintained. The North Carolina Department of Transportation maintenance

> map used to transfer Reverdy Lane to the Town of Matthews in 1985 indicated an alignment strikingly similar to that of Home Place. In fact, our state map was revised in 1976 to so indicate.
>
> Mr. D. W. Spence, District Engineer, met with Mr. Burnette and discussed at length the document Mr. Burnette signed in 1991, attesting that the North Carolina Department of Transportation forces did maintain Home Place. Mr. Burnette indicated that Home Place was graded and graveled by state forces in the early 1960s in anticipation of the paving of Reverdy Lane and the future addition of Home Place to the state road system.
>
> The soil removed from Home Place was placed on Reverdy Lane to improve the roadbed, according to Mr. Burnette, based on instructions from his supervisor. An aerial photograph taken in 1966 illustrates Home Place with a cleared easement (substantially wider than a driveway) along your entire frontage, which tends to give credence to Mr. Burnette's statements, as many of his former co-workers do not recall or are deceased.

Upon review of the evidence, the Board upheld Mr. Brandon's determination that Home Place was a public street. In support of its decision the Board found as follows:

> In the 1960's according to Department of Transportation's letter dated October 24, 1996 from Garland Garrett . . . Home Place was graded and graveled by State forces in the early 1960's in anticipation of Reverdy Lane and future addition of Home Place to the State road system. An aerial photograph . . . in 1966 illustrates Home Place with a cleared easement. That letter was set forth as evidence on behalf of the Town . . . . There has been mention of several deeds for example, one of which was Exhibit No. 1 by the Town, 1965 from the Wellings to the Normans that the description included Home Place and accepted the right-of-way. There was made mention of other deeds (Exhibits No[s]. 2, 3 & 4) that specifically talked about the public right-of-way. The deed to the [petitioners] clearly stated an exception of a public right-of-way. That in addition to the evidence the State was grading or graveling that road or maintaining it. In March of 1985 there was a resolution by the Town of Matthews to take over Home Place from the State system. Subsequently, there was an action by the State Dept. of Transportation to relinquish Home Place to the Town of Matthews. I believe testimony and the documents show that in 1991 that road was paved by the Town of Matthews. Since 1985

> Home Place has been maintained by the Town of Matthews. That at no point in time has the Town of Matthews or Board of Commissioners taken any act to relinquish control of Home Place as a public street and or to close it as a public street.

Petitioners petitioned the trial court for writ of certiorari to review the Board's decision. By order filed 4 January 2005, the trial court affirmed the decision of the Board. Petitioners now appeal to this Court.

I. Standard of Review

Upon review of a decision from a Board of Adjustment, the trial court should:

> "(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."

Knight v. Town of Knightdale, 164 N.C. App. 766, 768, 596 S.E.2d 881, 883 (2004) (citation omitted). On review of the trial court's order, this Court must determine whether the trial court correctly applied the proper standard of review. *Id.* This Court applies the "whole record" test to determine whether the findings made by the Board are supported by substantial evidence contained in the whole record. *Id.* "Substantial evidence is that which a reasonable mind might accept as adequate to support a conclusion." *Id.* " 'Where the petitioner alleges that a board decision is based on error of law, the reviewing court must examine the record *de novo*, as though the issue had not yet been determined.' " *Id.* (citation omitted).

Petitioners are challenging the Board's determination that Home Place is a public street pursuant to the zoning ordinance for the Town of Matthews, which defines a public street as:

> A public right-of-way not less than 30 feet in width set aside for public travel and either which has been accepted for maintenance by the State of North Carolina or by the Town of Matthews, has been established as a public street prior to the adoption date of this section, or which has been dedicated for public travel by the

> recording of a plat of subdivision which has been approved by the Board of Commissioners.

The zoning ordinance defines a private street as "an interior circulation road designed and constructed to carry vehicular traffic from public streets within or adjoining a site to private residences or to parking and service areas and which is not maintained by the public."

Issues of statutory construction are reviewed *de novo*. *A&F Trademark, Inc. v. Tolson*, 167 N.C. App. 150, 153-54, 605 S.E.2d 187, 190 (2004). " ' "The rules applicable to the construction of statutes are equally applicable to the construction of municipal ordinances." ' " *Darbo v. Old Keller Farm*, 174 N.C. App. 591, 594, 621 S.E.2d 281, 283-84 (2005) (citations omitted). " '[T]he basic rule of statutory construction "is to ascertain and effectuate the intention of the municipal legislative body." ' " *Id.* (citations omitted). In doing so, we look to the language of the ordinance, as well as to the spirit and purpose of the ordinance. *See id.* Where an ordinance is clear and unambiguous, its plain meaning will be enforced. *Id.*

Here, the zoning ordinance defines a public street as a "public right-of-way . . . set aside for public travel[]." We must therefore determine whether there is substantial evidence in the whole record to support the Board's determination that Home Place is a public right-of-way which has been set aside for public travel.

II. Private and Public Streets

Petitioners contend there was insufficient evidence to show that Home Place is a public street under the zoning ordinance. In its order affirming the decision of the Board, the trial court recited the following evidence as supporting the Board's decision:

> When Petitioners received their property, their Deed clearly contained language which excepted from the conveyance the right-of-way for Home Place for street purposes. The survey, which Petitioners admit they received when they purchased the property, reflects a 60-foot right-of-way for Home Place.
>
> The record before the Town Board further includes a resolution adding streets to the Matthews street system dated March 25, 1985, which included Reverdy Lane, State Road #3471. The testimony of Ralph Messera, Public Works Director for the Town of Matthews, indicates that the North Carolina Department of Transportation maintained Reverdy Lane until approximately

1985. After the Town adopted the resolution dated March 25, 1985, the North Carolina Department of Transportation took action to remove maintenance of the street from the State system, and at that time, the Town of Matthews took over maintenance of the street. There is further evidence that Home Place was a part of Reverdy Lane and that the resolution and actions affecting Reverdy Lane include Home Place. Mr. Messera testified before the Town Board that the Town of Matthews has continuously maintained Home Place since March 1985, paved the street in 1991, and took action to add Home Place's mileage to the Powell Bill map that was filed with the North Carolina Department of Transportation.

The record contains additional evidence to suggest and support the conclusion that the North Carolina Department of Transportation had maintained Home Place as a public street, possibly as early as 1979, and that the Town of Matthews maintained Home Place as a public street from 1985 until the present time. It thus appears both the North Carolina Department of Transportation and the Town of Matthews accepted Home Place for maintenance as a public street and that the evidence indicates Home Place falls within the definition of a public street according to the Matthews Code, Section 1-6.

Petitioners argue that the evidence is insufficient to support the Board's findings and conclusion that Home Place is a public street. We agree.

A private right-of-way or street may become a public street by one of three methods: (1) in regular proceedings before a proper tribunal (for example, a condemnation action, *see*, *e.g.*, N.C. Gen. Stat. § 136-103); (2) by prescription; or (3) through action by the owner, such as a dedication, gift, or sale. *See West v. Slick*, 313 N.C. 33, 54-55, 326 S.E.2d 601, 613-14 (1985); *Roten v. Critcher*, 135 N.C. App. 469, 473, 521 S.E.2d 140, 144 (1999); *see generally*, David M. Lawrence, *Property Interests in North Carolina City Streets*, 3-25 (1985).

It is unclear from the findings by the Board and order of the trial court by which of these three methods they concluded that Home Place became a public street. Neither the Board nor the trial court made any findings regarding dedication, prescription, or other method of acquiring a public interest in Home Place. There is no evidence in the record that Home Place was ever the subject of a con-

demnation proceeding or any other " 'proceeding regularly constituted before the proper tribunal[.]' " *West*, 313 N.C. at 54, 326 S.E.2d at 613 (citation omitted). Nor is there any evidence to suggest that Home Place was ever the subject of a gift or sale by the property owners. Thus, Home Place could only have become a public street by way of dedication or prescription. We first examine the law and the evidence in support of dedication.

A. Dedication

" 'A dedication of property to the public consists of two steps: (1) an offer of dedication, and (2) an acceptance of this offer by a proper public authority.' " *Department of Transp. v. Elm Land Co.*, 163 N.C. App. 257, 265, 593 S.E.2d 131, 137, *disc. review denied*, 358 N.C. 542, 599 S.E.2d 42 (2004) (citation omitted). " 'An offer of dedication can be either express, as by language in a deed, or implied, arising from the "conduct of the owner manifesting an intent to set aside land for the public." ' " *Department of Transp.*, 163 N.C. App. at 265, 593 S.E.2d at 137 (citations omitted). Whether express or implied, it is the owner's intent to dedicate that is essential.[1] *Id.*

1. Express Dedication

In the present case, there is insufficient evidence of an express dedication of Home Place. " 'In easements, as in deeds generally, the intention of the parties is determined by a fair interpretation of the grant.' " *Borders v. Yarbrough*, 237 N.C. 540, 542, 75 S.E.2d 541, 543 (1953) (quoting 17 Am. Jur., *Easements*, § 25). The evidence in support of the intent of an owner to dedicate an easement should be " 'clear and unmistakable.' " *Green v. Barbee*, 238 N.C. 77, 81, 76 S.E.2d 307, 310 (1953) (citation omitted). The deed to petitioners noted that there was excepted from the conveyance "the 60 foot right-of-way for Home Place for street purposes over the north side and the east side of said tract[.]" The deed failed to specify whether such right-of-way was for purposes of a public or private street, however. As such, the language of the deed does not create a public right-of-way, but only a private one. *Compare Department of Transp.*, 163

1. We note that an offer of dedication of streets to the use of the public may also arise by the recording of a plat denoting lots and streets and a subsequent sale of a lot in a subdivision referring to such recorded plat. *See, e.g.*, N.C. Gen. Stat. § 136-66.10; *Blowing Rock v. Gregorie*, 243 N.C. 364, 367, 90 S.E.2d 898, 901 (1956); Lawrence, *supra*, at 5-8. Here, however, there is no evidence in the record that a dedication of Home Place arose through the recording of a subdivision plat. The 24 October 1996 letter from Secretary Garrett stated that DOT could "find no evidence of a recorded subdivision plat indicating a measured right-of-way easement for Home Place."

N.C. App. at 265-66, 593 S.E.2d at 137-38 (determining that the defendant's conveyances of property referencing a 100-foot right-of-way did not create either an express or implied dedication to the public); *Bumgarner v. Reneau*, 105 N.C. App. 362, 364-66, 413 S.E.2d 565, 567-68 (1992) (emphasis added) (holding that a clause in the defendants' deed which stated that " '[e]xcepting and reserving from this conveyance unto . . . *the general public*, the existing roadway' " constituted an express offer of dedication of the road to the general public). Thus, the trial court's findings regarding petitioners' deed and the excepted sixty-foot right-of-way for Home Place provide no support for its conclusion that Home Place was a public street. Similarly, the Board's finding that "[t]he deed to the [petitioners] clearly stated an exception of a public right-of-way" is unsupported by the evidence and therefore erroneous. We conclude that the language of the deed did not evince a "clear and unmistakable" intent to dedicate Home Place to the public.

Similarly, there was no mention of Home Place in the 1958 petition to the Board of Commissioners of Mecklenburg County submitted by the Wellings and other property owners for dedication of Reverdy Lane. Indeed, petitioners testified that Home Place did not exist at the time of the 1958 petition. Thus, this document could not have dedicated Home Place to public use.

There is also no evidence in the record of Home Place having been dedicated to public use through any statutory procedure. *See*, *e.g.*, N.C. Gen. Stat. § 46-17.1 (2005) (parties to a partition proceeding may move for the dedication of portions of the partitioned property for use as public streets); N.C. Gen. Stat. § 136-66.10 (2005) (dedication of right-of-way under local ordinances).

Contrary to the trial court's finding, there was no substantial, material, and competent evidence that Home Place was a part of Reverdy Lane. The 1985 resolution passed by the Town of Matthews did not name Home Place as one of the streets to be added to the Town of Matthew's street system. The length of Reverdy Lane is consistently depicted in the evidence as just under one mile. The 1985 resolution denotes Reverdy Lane as being "8/10 of a mile." The length of Home Place is noted to be "0.86." If Home Place were included as a part of Reverdy Lane, the length of the street would be nearly double in length. Although there was some evidence that Home Place may have been labeled as part of SR 3471 (Reverdy Lane) on the 1976 Mecklenburg County map and the 1983 urban map for Charlotte, such erroneous labeling by others cannot constitute an express offer of

dedication to the public on the part of the property owners. In his memorandum on the subject, Mr. L. C. Smith stated that the labeling was incorrect, and he opined that the mislabeling had arisen because "the alignment [of Home Place] was inadvertently changed by the draftsman working on the Meck. Co. [sic] map." Mr. L. C. Smith noted that, "[a]lthough the alignment was changed on the map, that did not change the DOT's responsibility for maintenance from [Reverdy Lane] to [Home Place] because the change was not supported by any official documentation." Any expansion of the dedication of Reverdy Lane was expressly disavowed by the "Withdrawal of Street Dedication" filed in 1994. It stated that, "to the extent any document may appear of record which may constitute an offer or proposal for dedication of all or any" extension or expansion of Reverdy Lane, such offer or proposal was withdrawn. *See* N.C. Gen. Stat. § 136-96 (2005) (providing for the recording of a declaration of withdrawal of a previous dedication of land for use as a public road). The document referred separately to both Reverdy Lane and Home Place and noted that each had "a 60 foot private right of way." Thus, there was insufficient evidence to support the trial court's finding that "Home Place was a part of Reverdy Lane and that the resolution and actions affecting Reverdy Lane include Home Place."

There was likewise no evidence to support the Board's findings that "[i]n March of 1985 there was a resolution by the Town of Matthews to take over Home Place from the State system" and "there was an action by the State Dept. of Transportation to relinquish Home Place to the Town of Matthews." As stated *supra*, the March 1985 resolution only named Reverdy Lane, and never designated Home Place as one of the streets to be taken over. We moreover conclude *infra*, in subsection B of Section II of the opinion, that there was insufficient evidence to show that Home Place was part of the state-maintained system of highways. We conclude there is insufficient material, competent, and substantial evidence of an express dedication of Home Place. *See Hall v. Fayetteville*, 248 N.C. 474, 483, 103 S.E.2d 815, 822 (1958) (holding that "the city of Fayetteville does not hold title to the disputed strip of land in trust for the use and benefit of the public, and has no rights to it. Therefore, this strip of land is not a public street").

2. Implied Dedication

An offer of dedication may also be implied through " ' "conduct of the owner manifesting an intent to set aside land for the public." ' " *Department of Transp.*, 163 N.C. App. at 265, 593 S.E.2d at

137 (citations omitted). "When proving implied dedication, where no actual intent to dedicate is shown, the manifestation of implied intent to dedicate must clearly appear by acts which to a reasonable person would appear inconsistent and irreconcilable with any construction except dedication of the property to public use." *Dept. of Transportation v. Kivett*, 74 N.C. App. 509, 513, 328 S.E.2d 776, 779 (1985).

> In general it appears that an implicit intention may be demonstrated by:
>
> —The owner's use of the putative street as a boundary in a deed, as long as the use was not for descriptive purposes only.
>
> —The owner's affirmative acts respecting the property.
>
> —The owner's acquiescence in the public's use of the property, under circumstances indicating that the use was not permissive.

Lawrence, *supra*, at 5 (footnotes omitted).

In the present case, implied dedication may have been the theory under which the Board and the trial court concluded that Home Place became a public street. However, neither the Board nor the trial court made any findings regarding "acquiescence in the public's use of the property, under circumstances indicating that the use was not permissive[,]" "affirmative acts respecting the property[,]" *id.*, or other acts "which to a reasonable person would appear inconsistent and irreconcilable with any construction except dedication of the property to public use." *Dept. of Transportation*, 74 N.C. App. at 513, 328 S.E.2d at 779.

> While there is evidence in the record that might support findings of fact which in turn might support a conclusion that the property in question was impliedly dedicated to public use, the [Board's and the] trial judge's failure to make definitive findings from the evidence, and to draw a proper conclusion therefrom, requires that there be a new [hearing] to determine the issue . . . .

Id. at 513-14, 328 S.E.2d at 779. We therefore reverse the decision of the trial court and remand this case for further findings detailing whether or not Home Place became a public street by means of implied dedication. We now examine whether a public easement in Home Place may have been created through prescription.

B. Prescription

> To establish an easement by prescription, a claimant must prove by the greater weight of the evidence that: (1) the use is adverse, hostile or under claim of right; (2) the use has been open and notorious such that the true owner had notice of the claim; (3) the use has been continuous and uninterrupted for at least twenty years; and (4) there is substantial identity of the easement claimed throughout the prescriptive period. Prescriptive easements are not favored in the law, and the burden is therefore on the claiming party to prove every essential element thereof.

Yadkin Valley Land Co., L.L.C. v. Baker, 141 N.C. App. 636, 639, 539 S.E.2d 685, 688 (2000) (citations omitted); *see also Hemphill v. Board of Aldermen*, 212 N.C. 185, 188, 193 S.E. 153, 155 (1937) (stating that, "[t]o establish the existence of a road or alley as a public way, in the absence of the laying out by public authority or actual dedication, it is essential not only that there must be twenty years['] use[] under claim of right adverse to the owner, but the road must have been worked and kept in order by public authority").

Here, there was some disputed evidence to indicate that the state may have maintained Home Place as early as the 1960s. The 1996 letter from Secretary Garrett, upon which the Board and the trial court appeared to have heavily relied, referenced a document signed by a Mr. Burnette in 1991. The 1991 document apparently attested that DOT graded and graveled Home Place in the early 1960s "in anticipation of the paving of Reverdy Lane and the future addition of Home Place to the state road system." The 1996 letter does not state that Home Place was actually added to the state road system, however. Notably, the 1991 document does not appear as part of the record, and it appears that it was never directly in evidence. Nor did Mr. Burnette testify.

Petitioners, on the other hand, submitted substantial direct evidence that DOT never maintained Home Place. Namely, petitioners submitted four separate letters and one memorandum from DOT stating that Home Place had never been a part of the state-maintained system of highways. The letter from Mr. Goins indicated that "[o]ccasional maintenance may have been performed [on Home Place] as a courtesy to property owners due to damage caused by state equipment turning around on this portion of [the] non-state system street."

We conclude that there was no substantial, competent, and material evidence that the state maintained Home Place for the requisite

twenty-year time period. Nor was there evidence that the Town of Matthews has maintained Home Place for twenty years. Although there was evidence that the Town of Matthews began maintenance of Home Place in 1985, the hearing before the Board took place on 5 February 2004, before expiration of the twenty-year time period. Neither the Board nor the trial court made any findings regarding prescription. We therefore conclude there was no material, substantial, and competent evidence that Home Place became a public street by way of prescription.

III. Conclusion

In conclusion, we determine that the findings made by the Board and the trial court do not support the conclusion that Home Place is a public street.[2] The Town of Matthews did not maintain Home Place for the requisite twenty-year time period to establish prescription. Nor can the Town of Matthews' reliance on an erroneous map create a dedication that was never made. The Board and the trial court made no findings of fact or conclusions of law whether Home Place was impliedly dedicated to the public. We therefore reverse the decision of the trial court and remand this case for further findings detailing whether or not Home Place became a public street by means of implied dedication.

Reversed and remanded.

Judges TYSON and STEELMAN concur.

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2. We note that this case is between petitioners and the Town of Matthews over whether Home Place is a public street under the zoning ordinance. We do not address the issue of whether the express reservation of the sixty-foot right-of-way in the deed for petitioners' property creates a private easement over their property. Adjoining property owners who may be using Home Place are not parties to these proceedings, and our decision in no manner adjudicates their rights to use Home Place as a private street.

STATE OF NORTH CAROLINA v. MELVIN EARL HAGANS

No. COA05-1090

(Filed 4 April 2006)

1. Firearms and Other Weapons— possession by felon—prior conviction for misdemeanor breaking and entering

A motion for appropriate relief filed with the Court of Appeals was granted and an indictment for possession of a firearm by a felon was dismissed where the underlying conviction was for misdemeanor rather than felonious breaking and entering.

2. Evidence— prior crime or bad act—robbery—plan or scheme—probative value outweighing prejudice

Evidence of a prior robbery in which defendant participated was properly admitted in a prosecution for assault with a deadly weapon and other firearms charges arising from a robbery where the similarities between the robberies indicated a plan, scheme, system, or design. Furthermore, the similarities between the robberies, which occurred within a week of each other, were sufficient to support a finding that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice.

3. Criminal Law— deadlocked jury—supplemental instructions

The trial court did not abuse its discretion by denying a mistrial where a jury deadlocked on one of seven charges and the court instructed the jurors to consider each of the seven charges separately. The court's supplemental instruction did not threaten to require unreasonably long deliberations and was not a dynamite charge.

4. Evidence— hearsay—explanation of subsequent conduct—not plain error

The trial court did not commit plain error by admitting uncorroborated hearsay statements from defendant's codefendants where the statements were admissible for the nonhearsay purpose of explaining subsequent conduct, were admissible as statements of a coconspirator in furtherance of the conspiracy, or did not rise to the level of prejudicial error.

5. Firearms and Other Weapons— firing at occupied vehicle—sufficiency of evidence

There was sufficient evidence that shots were fired at an occupied vehicle and liability for firing the shots and possessing the firearm are imputed to the defendant because the State proceeded under acting in concert. There was sufficient evidence of assault with a deadly weapon and related charges to go to the jury.

6. Sentencing— presumptive range—no comment on mitigating factors—no *Blakely* issue

The trial court did not abuse its discretion by sentencing defendant within the presumptive range for convictions for assault with a deadly weapon and firing a firearm into an occupied vehicle. The fact that the court imposed presumptive sentences without comment does not mean that mitigating factors were not considered, and *Blakely* does not apply because aggravating factors were neither presented nor found.

Appeal by defendant from judgments entered 17 December 2004 by Judge Cy A. Grant in Pitt County Superior Court. Heard in the Court of Appeals 15 March 2006.

Attorney General Roy Cooper, by Assistant Attorney General Philip A. Lehman, for the State.

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

TYSON, Judge.

Melvin Earl Hagans ("defendant") appeals from judgments entered after a jury found him to be guilty of: (1) possession of a firearm by a felon; (2) assault with a deadly weapon; (3) discharge of a firearm into an occupied vehicle; and (4) three counts of attempted discharge of a firearm into an occupied vehicle. We find no error in part, vacate in part, and remand for resentencing.

I. Background

A. State's Evidence

William Parker ("Parker") was assaulted and robbed at gunpoint upon arriving home on the evening of 20 June 2004. His assailants were two black males dressed in dark clothing and toboggan masks with the areas over the eyes cut out. One of the masks bore an NFL

team logo. One robber held a gun to Parker, demanded his briefcase, which Parker did not have, took his wallet, and removed items from the rear of his vehicle. The other robber removed items from the passenger side of Parker's vehicle.

One gunman forced Parker to lay face down in the grass, placed the gun to the back of Parker's head, and threatened his accomplice would kill Parker if he moved. The two robbers ran away. Although Parker lost sight of the men, he heard them running and heard their voices. Parker stood and observed the men enter a Cadillac and drive away.

Parker entered his vehicle, chased after the two men, and called 911. Parker soon caught up to the Cadillac. He observed a muzzle flash from inside the Cadillac and heard a gunshot. The Cadillac made a right turn. Parker followed and attempted to obtain the license plate number for the 911 dispatcher. The chase continued for several minutes during which an arm and pistol emerged from the rear passenger window four times. Seven shots were fired toward Parker's car.

The Cadillac eventually eluded Parker, but was stopped by Greenville Police Officer Robert Brewington ("Officer Brewington") shortly thereafter. After arriving home and inspecting his vehicle, Parker observed a small hole below the front grill of his vehicle, which appeared to be a bullet hole.

Upon stopping the Cadillac, Officer Brewington observed a black male wearing dark clothing exit the passenger side rear door and flee. Officer Brewington testified defendant, the driver of the vehicle, asked him what was going on and stated he had been stopped by two black males and ordered to drive. A stocking hat with a hole cut out was discovered in the right front passenger floor board of the Cadillac.

James Ham ("Ham") testified for the State. Ham was apprehended the following morning around 6:00 a.m. with a bandaged right hand. Ham testified he had known defendant for four to five years and previously shared a mobile home with him. About two weeks prior to the Parker robbery, Ham and defendant met with Lionel Grandy ("Grandy"). The three associated during the two weeks prior to the robbery. During that time, Ham and Grandy purchased a .38 revolver pistol.

On 20 June 2004, Ham borrowed his aunt's Cadillac. Defendant and Grandy went with Ham to visit Ham's parents' and grandparents' home in Aurora. After leaving the house, Grandy indicated he might have a "lick" for them or a "get-on move" to get some money. Grandy claimed he previously worked with Parker, who would carry a briefcase containing money to his home. The men drove by Parker's Barbecue in Greenville, where Grandy identified Parker's vehicle.

Grandy then drove to Parker's neighborhood and dropped off Ham and defendant. Ham wore a Carolina Panthers toboggan hat with eye holes cut out and carried the .38 revolver. When Parker arrived, Ham and defendant approached Parker's vehicle. Ham pointed his gun at Parker and demanded his briefcase. Ham took Parker's wallet and a gray plastic container from the back of the vehicle. Defendant went through Parker's vehicle and removed two black bags. Defendant and Ham returned to the Cadillac. Shortly after Grandy drove away, he stopped the vehicle and asked defendant to drive because defendant was the only one of the three men with a driver's license. Grandy was worried Parker would call the police. Grandy exited the vehicle and sat in the rear driver's side seat. Defendant moved over into the driver's seat.

When Parker's vehicle approached the Cadillac, Grandy and Ham grabbed the gun. The gun fired, shooting Ham in the right hand. Ham placed his hand outside the window and later bent over in the backseat, holding his hand. Grandy leaned over Ham and fired the gun out the rear passenger window toward Parker's vehicle. After eluding Parker, defendant stopped the car. Grandy fled carrying the gun. The Cadillac proceeded down the road and was stopped at an intersection by Officer Brewington. Ham jumped from the vehicle and fled. Ham was arrested and transported to the hospital the following morning. After discharge from the hospital, Ham was taken to the Greenville Police Department, where he voluntarily gave a statement.

Over defendant's objection, Ham testified to a prior robbery on 13 June 2004 involving defendant and Grandy pursuant to Rule 404(b). Ham testified he drove his aunt's Cadillac to a Pizza Hut in Zebulon around 2:00 a.m. on 13 June 2004. Defendant and Grandy exited the vehicle to rob the Pizza Hut. Ham waited in the front passenger's seat. Grandy carried the same .38 revolver that was later used in the Parker robbery. The men returned to the car carrying a clear plastic bag containing money. The men divided the money and Ham received $99.00. Defendant drove the Cadillac from the scene.

B. Defendant's Evidence

Defendant testified that on 20 June 2004 he drove the Cadillac to Aurora with Ham and Grandy as passengers. As they were leaving Aurora, Grandy received a call, cursed, and said he "was coming to get [his] things girl." Ham drove the men to a residence defendant believed to be Grandy's girlfriend's house. Defendant waited in the car until Ham and Grandy returned with two bags and a gray container. Grandy drove off with Parker chasing them. Ham replied, "I got him" and reached onto the floor. Ham shot himself in the hand as he came back up.

Defendant testified he thought the man pursuing them was Grandy's girlfriend's boyfriend and he never knew it was Parker behind them. He testified that Ham continued to shoot out the right rear passenger window with his left hand as they continued to flee from the vehicle pursuing them. After the men evaded Parker, Grandy drove the car into a cul-de-sac, exited the vehicle, and fled. Defendant slid over into the driver's seat and attempted to drive Ham to the hospital. After being stopped at the intersection, Ham told defendant that he and Grandy had robbed a man. Ham exited the vehicle and fled. Defendant denied having any knowledge about the robbery of the Pizza Hut in Zebulon on 13 June 2004.

Defendant was convicted of: (1) possession of a firearm by a felon; (2) assault with a deadly weapon; (3) discharge of a firearm into an occupied vehicle; and (4) three counts of attempted discharge of a firearm into an occupied vehicle. The jury failed to reach a unanimous decision on the armed robbery charge and the court declared a mistrial for that offense.

At the sentencing hearing, defendant offered the following mitigating factors: (1) assistance in the apprehension of another felon; (2) acknowledgment of wrongdoing; (3) being a person of good character and reputation in the community; (4) honorable discharge from the United States Army; (5) support of his family; (6) a support system in the community; and (7) positive employment history. The State offered no evidence or proffer in response. Defendant was sentenced to consecutive prison terms all within the presumptive ranges of: (1) forty-six to sixty-five months for discharging a weapon into an occupied vehicle; (2) sixteen to twenty months for the consolidated charges of possession of a firearm by a felon and assault with a deadly weapon; and (3) forty-six to sixty-five months for three consolidated counts of attempted discharge of a weapon into an occupied vehicle. Defendant appeals.

II. Issues

Defendant contends the trial court erred by: (1) allowing the admission of uncorroborated evidence of a different, earlier armed robbery under Rule 404(b); (2) accepting jury verdicts in six of seven charges and declaring a mistrial in the remaining count when all counts were joined and consolidated for trial; (3) admitting uncorroborated hearsay statements by a third co-defendant who was not on trial or available to testify and subject to cross-examination by the defense; (4) admitting Ham's written statement containing uncorroborated hearsay statements by a third co-defendant; (5) denying his motion to dismiss at the close of the State's evidence and renewed motion to dismiss at the close of all evidence for insufficiency of the evidence; and (6) failing to make findings of fact in support of its sentences and judgments where he presented uncontradicted evidence in support of several statutory mitigating factors and failing to consider those mitigating factors prior to sentencing him and entering judgment.

III. Motion for Appropriate Relief

[1] Defendant filed a motion for appropriate relief with this Court on 28 February 2006 seeking to vacate his possession of a firearm by a felon conviction. He argues the prior conviction upon which the possession of a firearm conviction rests is a misdemeanor rather than a felony. N.C. Gen. Stat. § 15A-1411 (2005) provides, "Relief from errors committed in the trial division, or other post-trial relief, may be sought by a motion for appropriate relief."

A prior felony conviction for breaking and entering is listed on defendant's indictment for possession of a firearm by a felon. The indictment alleges the breaking and entering offense is a Class H felony. Defendant was convicted of this offense on 30 November 1992 in Wake County and was sentenced to two years imprisonment, suspended upon probation.

Defendant filed the transcript of plea and judgment from the breaking and entering offense listed in the indictment with this Court. These documents reveal defendant pled guilty to and was convicted of misdemeanor, rather than felony, breaking and entering on 30 November 1992. The indictment for the offense of possession of a firearm by a felon offense is fatally defective and dismissed. No other felony to support the possession of a firearm by a convicted felon was alleged. Defendant's motion for appropriate relief is

granted. Defendant's conviction for possession of a firearm by a felon is vacated.

IV. Rule 404(b)

[2] Defendant asserts evidence of the prior Pizza Hut robbery on 13 June 2004 should have been excluded and argues: (1) this evidence was not corroborated; (2) this evidence did not concern a prior offense for which he had been convicted; and (3) the crime remained under investigation at the time of his trial.

A. Standard of Review

"The standard of review for this Court assessing evidentiary rulings is abuse of discretion." *State v. Boston*, 165 N.C. App. 214, 218, 598 S.E.2d 163, 166 (2004) (citing *State v. Meekins*, 326 N.C. 689, 696, 392 S.E.2d 346, 350 (1990)). "A trial court may be reversed for an abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision." *State v. Hayes*, 314 N.C. 460, 471, 334 S.E.2d 741, 747 (1985) (citing *State v. Wilson*, 313 N.C. 516, 538, 330 S.E.2d 450, 465 (1985)).

N.C. Gen. Stat. § 8C-1, Rule 404(b) (2005) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

Our Supreme Court recently stated:

> This rule is a clear general rule of inclusion of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but one exception requiring its exclusion if its only probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged. The list of permissible purposes for admission of other crimes evidence is not exclusive, and such evidence is admissible as long as it is relevant to any fact or issue other than the defendant's propensity to commit the crime.

State v. White, 340 N.C. 264, 284, 457 S.E.2d 841, 852-53 (internal quotation and citation omitted), *cert. denied*, 516 U.S. 994, 133 L. Ed. 2d 436 (1995). Upon a finding that evidence is admissible under Rule

404(b), the evidence may still be excluded if the trial court finds its probative value is substantially outweighed by the danger of undue prejudice to the defendant. N.C. Gen. Stat. § 8C-1, Rule 403 (2005).

In *State v. Davis*, the defendant was convicted of armed robbery of a pawnshop. 340 N.C. 1, 14, 455 S.E.2d 627, 633-34, *cert. denied*, 516 U.S. 846, 133 L. Ed. 2d 83 (1995). Our Supreme Court upheld the admission of evidence that the same perpetrators had robbed a restaurant one week earlier under Rule 404(b). *Id.* This evidence of a prior robbery was sufficiently similar to the crime charged to show the disputed element of intent. *Id.* at 14, 455 S.E.2d at 633.

In *State v. Suggs*, this Court upheld admission of evidence of a prior robbery by the defendant even though he had been charged but not convicted of the crime. 86 N.C. App. 588, 592, 359 S.E.2d 24, 27, *cert. denied*, 321 N.C. 299, 362 S.E.2d 786 (1987). We noted "[s]ince the scope of Rule 404(b) includes 'wrongs or acts,' the Rule does not on its face require such extrinsic acts result in criminal liability . . . we conclude conviction of other crimes is not a prerequisite to their admissibility under Rule 404(b)." *Id.* at 591-92, 359 S.E.2d at 26-27.

Here, as in *Davis*, evidence was admitted that defendant participated in an armed robbery a week prior to participating in the armed robbery at bar. 340 N.C. at 14, 455 S.E.2d at 633. The evidence tended to show: (1) the same three men participated in the earlier robbery; (2) the men wore dark clothing and covered their faces; (3) the same .38 revolver was used; (4) the same Cadillac was used; and (5) one man stayed behind in the car while the other two men robbed the store. Evidence of defendant's involvement in the Zebulon Pizza Hut robbery is sufficiently similar to be admitted for the purpose of showing defendant had a "plan, scheme, system or design" involving robbery. *Id.* Since "conviction of other crimes is not a prerequisite to their admissibility under Rule 404(b)," defendant not being charged with or convicted of the prior robbery is irrelevant to whether the Rule 404(b) evidence was properly admitted. *Suggs*, 86 N.C. App. at 592, 359 S.E.2d at 27.

B. Rule 403—Unfair Prejudice

Defendant also contends the trial court abused its discretion by failing to exclude the evidence. He argues the probative value of this evidence was substantially outweighed by the unfair prejudice of having to defend against uncharged conduct in the middle of a jury trial. " 'The ultimate test for determining whether such evidence is admis-

sible is whether the incidents are sufficiently similar and not so remote in time as to be more probative than prejudicial under the balancing test of N.C.G.S. § 8C-1, Rule 403.' " *Davis*, 340 N.C. at 14-15, 455 S.E.2d at 634 (quoting *State v. Boyd*, 321 N.C. 574, 577, 364 S.E.2d 118, 119 (1988)). The similarities between the robbery of the Pizza Hut and that of Parker, together with the one week time period between the two robberies, are sufficient to support a finding that the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. Defendant failed to show this evidence only shows "propensity or disposition" to commit the crimes or that the trial court abused its discretion in admitting the evidence of the prior robbery under Rule 404(b). These assignments of error are overruled.

V. Failure to Grant a Mistrial

[3] Defendant contends the trial court abused its discretion by accepting verdicts in six of seven charges joined and consolidated for trial particularly due to the trial court's additional charge to the jury to consider each charge separately after the jury deadlocked.

The standard of review for denial of a mistrial is whether the trial court abused its discretion. *State v. Upchurch*, 332 N.C. 439, 453, 421 S.E.2d 577, 585 (1992) (quotation omitted). As noted above, defendant must show the trial court's ruling "was so arbitrary that it could not have been the result of a reasoned decision" to warrant a new trial. *Id*.

N.C. Gen. Stat. § 15A-1063(2) (2005) provides, "Upon motion of a party or upon his own motion, a judge may declare a mistrial if: . . . (2) It appears there is no reasonable probability of the jury's agreement upon a verdict." N.C. Gen. Stat. § 15A-1235(c) (2005) states that if, during the course of jury deliberations:

> it appears to the trial judge that the jury has been unable to agree, the judge may require the jury to continue its deliberations and may also give or repeat the instructions which are provided in subsections (a) and (b). [However,] [t]he judge may not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.

In addition, "[i]f it appears that there is no reasonable possibility of agreement, the judge may declare a mistrial and discharge the jury." N.C. Gen. Stat. § 15A-1235(d) (2005).

Defendant contends the trial court abused its discretion by giving a supplemental instruction after the jury deadlocked on one of the charges. Defendant argues the court forced a verdict and cites *State v. Alston*, 294 N.C. 577, 243 S.E.2d 354 (1978). *Alston* reviewed a charge given to the jury, before deliberation, which included:

> (1) the court's mention of the inconvenience and expense of empaneling another jury to try the case[;] (2) the court's statement that an agreement would ease the tension within the jury but that disagreement would be the first step towards deadlock[;] (3) the court's admonition that the jury should not put up with any juror who wanted to discuss one point endlessly[;] and (4) an intimation by the court that any juror who found himself in the minority should question the correctness of his decision.

294 N.C. at 592, 243 S.E.2d 364. The situation here does not involve such a "dynamite charge." A supplemental instruction was provided after the jury informed the court they were deadlocked on one count. *Id.* at 593, 243 S.E.2d at 365.

After the jury had deliberated for approximately one full day without reaching a verdict, the trial court gave the following instruction:

> Members of the jury, as you know the defendant has been charged with seven separate crimes, and these seven charges have been consolidated into one trial for the convenience of parties and witnesses, but as jurors, you are to give separate and independent consideration to each charge as though each charge was being tried separately. Now members of the jury, I want you to return to the jury room to resume your deliberations with a view toward reaching a verdict. Thank you.

The trial judge did not threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals. N.C. Gen. Stat. § 15A-1235(c). Defendant has cited no authority that a jury instruction to consider each charge separately was error. Defendant has failed to show the trial court abused its discretion by providing a supplemental instruction and allowing the jury to deliberate further after one day. This assignment of error is overruled.

VI. Uncorroborated Hearsay Statements by Co-Defendant

[4] In consolidated assignments of error, defendant contends the trial court committed plain error by admitting uncorroborated hearsay statements of defendant's co-defendants. Defendant argues

the trial result would have been different had Ham not been permitted to testify to Grandy's statements. Grandy was not called as a witness and was not shown to be unavailable. Defendant also argues Ham should not have been allowed to read to the jury the written statement he had given to the police.

"The standard of review for this Court assessing evidentiary rulings is abuse of discretion." *Boston*, 165 N.C. App. at 218, 598 S.E.2d at 166 (citing *State v. Meekins*, 326 N.C. 689, 696, 392 S.E.2d 346, 350 (1990)). Defendant failed to object to the testimony at trial and asserts plain error. To award a new trial for plain error, a defendant must show a "*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done . . . ." *State v. Black*, 308 N.C. 736, 740, 303 S.E.2d 804, 806 (1983) (citations omitted).

Out of court statements are admissible to explain the subsequent conduct of the person to whom the statement was made. *State v. Coffey*, 326 N.C. 268, 282, 389 S.E.2d 48, 56 (1990) (citing *State v. White*, 298 N.C. 430, 437, 259 S.E.2d 281, 286 (1979)); *State v. Earhart*, 134 N.C. App. 130, 136, 516 S.E.2d 883, 887 (1999) (citations omitted). Statements made during the course of and in furtherance of the conspiracy are also admissible as an exception to the hearsay rule. *State v. Williams*, 345 N.C. 137, 141, 478 S.E.2d 782, 784 (1996) (citing N.C. Gen. Stat. § 8C-1, Rule 801(d)(E) (2005)). The State must prove a conspiracy independent of the declarations sought to be admitted in order to admit hearsay statements of a co-conspirator. *State v. Nichols*, 321 N.C. 616, 630, 365 S.E.2d 561, 570 (1988). Admission of hearsay testimony is not always prejudicial. The defendant carries the burden to show a reasonable possibility of a different result would have occurred at trial without the hearsay evidence. *State v. Hickey*, 317 N.C. 457, 473, 346 S.E.2d 646, 657 (1986).

Defendant argues Ham should not have been allowed to testify to Grandy's statements that Grandy: (1) had a "lick" for Ham and defendant; (2) knew Parker carried a suitcase full of money; (3) went to see if Parker's vehicle was parked at the restaurant; (4) could not rob Parker without being recognized; (5) demanded to know whether Ham and defendant knocked Parker out and kept saying Parker was following them; (6) had the idea to ditch the Cadillac; and (7) declared he had robbed the Pizza Hut on 13 June 2004.

The statements Grandy made about a "lick" and about Parker having a briefcase were admissible for the non-hearsay purpose of

explaining the subsequent conduct of Ham and defendant. *See State v. Gainey*, 355 N.C. 73, 87, 558 S.E.2d 463, 473 (2002) ("[O]ut-of-court statements that are offered for purposes other than to prove the truth of the matter asserted are not considered hearsay . . . statements are not hearsay if they are made to explain the subsequent conduct of the person to whom the statement was directed." (citations omitted)). The rest of the statements, with the exception of the statement regarding the Pizza Hut robbery, were admissible as statements of a co-conspirator in the course of and in furtherance of the conspiracy. *See Coffey*, 326 N.C. at 282, 389 S.E.2d at 56; N.C. Gen. Stat. § 8C-1, Rule 801(d)(E).

Ham's testimony that Grandy declared he had robbed the Pizza Hut on 13 June 2004 was not made during the course of and in furtherance of the conspiracy to rob Parker and does not explain the subsequent conduct of Ham and defendant. Admission of this statement does not rise to the level of plain or prejudicial error defendant must demonstrate after his failure to object or to warrant a new trial. Defendant failed to show a reasonable possibility of a different result at trial without admission of this hearsay evidence to warrant a new trial. *Hickey*, 317 N.C. at 473, 346 S.E.2d at 657. Other overwhelming evidence of defendant's guilt was admitted to sustain the verdicts and judgments. This assignment of error is overruled.

VII. Sufficiency of the Evidence

[5] Defendant contends the State presented insufficient evidence to support his convictions and the trial court erred by denying his motion to dismiss at the close of the State's evidence and renewed motion to dismiss at the close of all the evidence.

A. Standard of Review

When ruling on a motion to dismiss, the trial court must decide "whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (citing *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980)). Evidence is viewed "in the light most favorable to the State, giving the State the benefit of all reasonable inferences." *Id.* at 378-79, 526 S.E.2d 455 (citing *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992)). "The test for sufficiency of the evidence is the same whether the evidence is direct or circumstantial or both." *Id.* at 379,

526 S.E.2d at 455 (citing *State v. Bullard*, 312 N.C. 129, 322 S.E.2d 370 (1989)).

> 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.

Id. (citation and internal quotations omitted).

Defendant cites no authority to support his argument the State failed to present sufficient evidence to sustain a conviction. Defendant argues the evidence fails to show he fired the gun or that the gun was fired toward Parker's vehicle. Defendant also argues no evidence shows he actually or constructively possessed the firearm. We disagree.

B. Acting in Concert

The trial court instructed the jury on acting in concert as follows:

> If two or more persons join in a common purpose to commit a crime, each of them, if actually or constructively present, is not only guilty of that crime if the other person commits the crime but is also guilty of any other crime committed by the other in pursuance of the common purpose to commit the original crime or as a natural and probable consequence thereof.

In *State v. Mann*, our Supreme Court stated:

> If two persons join in a purpose to commit a crime, each of them, if actually or constructively present, is not only guilty as a principal if the other commits that particular crime, but he is also guilty of any other crime committed by the other in pursuance of the common purpose . . . or as a natural or probable consequence thereof.

355. N.C. 294, 306, 560 S.E.2d 776, 784 (citations and quotations omitted), *cert. denied*, 537 U.S. 1005, 154 L. Ed. 2d 403 (2002). If a person is close enough to be able to render assistance if needed and to

encourage the actual perpetration of the crime, then that person is constructively present during the commission of the crime. *Id.*

Here, the evidence tended to show defendant accompanied Ham to Parker's house where they robbed Parker at gunpoint. Further, defendant was present in the car during the pursuit while shots were fired at Parker's vehicle and throughout the conspiracy. Evidence presented supports a jury finding defendant acted in concert with Ham and Grandy in robbing Parker and in discharging and attempting to discharge a firearm into Parker's vehicle.

C. Discharge of a Firearm Into an Occupied Vehicle

Testimony from Parker, Ham, and defendant presented uncontradicted evidence that shots were fired from the robbers' vehicle at Parker's vehicle. Parker testified he saw the gun and heard shots fired toward him. Ham testified he grabbed for the gun to prevent Grandy from shooting Parker. Defendant testified several shots were fired from the Cadillac and he believed Ham was firing at Parker's vehicle. Parker found what appeared to be a bullet hole in the front of his vehicle and testified the hole was not there the day before. Viewed in the light most favorable to the State, this evidence is sufficient for the jury to conclude that shots were fired by the robbers at Parker's vehicle. This assignment of error is overruled.

VIII. Presumptive Sentencing

[6] Defendant contends the trial court erred by failing to make findings of fact to support its judgments. He argues uncontradicted evidence supports several statutory mitigating factors, and the trial court failed to consider those mitigating factors prior to entering judgment. We disagree.

Defendant filed a petition for writ of *certiorari* seeking review of this issue with this Court on 28 February 2006. *See* N.C. Gen. Stat. § 15A-1441(a1) (2005) ("A defendant who has been found guilty . . . [of] a felony, is entitled to appeal as a matter of right the issue of whether his or her sentence is supported by evidence introduced at the trial and sentencing hearing only if the minimum sentence of imprisonment does not fall within the presumptive range for the defendant's prior record or conviction level and class of offense. Otherwise, the defendant is not entitled to appeal this issue as a matter of right but may petition the appellate division for review of this issue by writ of certiorari.")

The standard of review for application of mitigating factors is an abuse of discretion. *State v. Butler*, 341 N.C. 686, 694-95, 462 S.E.2d 485, 489-90 (1995). "The court shall consider evidence of aggravating or mitigating factors present in the offense that make an aggravated or mitigated sentence as appropriate, but the decision to depart from the presumptive range is in the discretion of the court." N.C. Gen. Stat. § 15A-1340.16(a) (2005). "The court shall make findings of the aggravating and mitigating factors present in the offense only if, in its discretion, it departs from the presumptive range of sentences specified in G.S. 15A-1340.17(c)(2)." N.C. Gen. Stat. § 15A-1340.16(c) (2005).

Here, the trial court sentenced defendant within the presumptive range for each of his convictions. The fact the trial court, without comment, imposed consecutive presumptive sentences does not mean the trial court failed to consider the mitigating factors presented.

Defendant's notion that the court is obligated to formally find or act on proposed mitigating factors when a presumptive sentence is entered has been repeatedly rejected. *See State v. Allah*, 168 N.C. App. 190, 197, 607 S.E.2d 311, 316 (2005) (" 'Since the court may, in its discretion, sentence defendant within the presumptive range without making findings regarding proposed mitigating factors,' this Court has found no error in the failure to make such findings." (quoting *State v. Ramirez*, 156 N.C. App. 249, 258-59, 576 S.E.2d 714, 721 (2003)); *State v. Streeter*, 146 N.C. App. 594, 597-98, 553 S.E.2d 240, 242 (2001), *cert. denied*, 356 N.C. 312, 571 S.E.2d 211 (2002), *cert. denied*, 537 U.S. 1217, 154 L. Ed. 2d 1071 (2003); *State v. Chavis*, 141 N.C. App. 553, 568, 540 S.E.2d 404, 415 (2000) ("This Court has held the trial court is required to take 'into account factors in aggravation and mitigation *only* when deviating from the presumptive range in sentencing.' " (quoting *State v. Caldwell*, 125 N.C. App. 161, 162, 479 S.E.2d 282, 283 (1997)). The trial court did not abuse its discretion by failing to make formal findings or act on the proposed mitigating factors when sentences were imposed within the presumptive range for each conviction.

Defendant also contends the United States Supreme Court's decision in *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004) effectively nullifies the holding in *Streeter*. *Blakely* dealt only with the question of whether a trial court may *enhance* a defendant's sentence *above the presumptive range* by unilaterally imposing

aggravating factors. 542 U.S. at 301, 159 L. Ed. 2d at 412 (" 'Other 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.' " (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490, 147 L. Ed. 2d 435 (2000)). Because the State in this case did not present or argue for and the trial court did not find any aggravating factors, *Blakely* does not apply to the facts of this case. These assignments of error are overruled and defendant's petition is denied.

IX. Conclusion

Defendant's indictment for possession of a firearm by a felon is fatally defective because it alleges he was convicted of felony breaking and entering when he was in fact convicted of misdemeanor breaking and entering. Defendant's possession of a firearm by a felon conviction is vacated, and this case is remanded for resentencing consistent with this opinion.

In all other respects, defendant received a fair trial free from prejudicial errors he assigned and argued. The trial court did not abuse its discretion in admitting the evidence of the prior robbery under Rule 404(b). *Davis*, 340 N.C. at 14-15, 455 S.E.2d at 633-34. Similarities between the robberies of the Pizza Hut and Parker that occurred within one week of each other are sufficient evidence to support a finding that the probative value of the evidence of the Pizza Hut robbery was not substantially outweighed by the danger of unfair prejudice.

The trial court did not abuse its discretion by providing a supplemental instruction to the jury which did not threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals. N.C. Gen. Stat. § 15A-1235(c).

Ham's testimony of Grandy's statements was introduced for the non-hearsay purpose of explaining the subsequent conduct of Ham and defendant and as statements of a co-conspirator in the course of and in furtherance of the conspiracy. The trial court did not abuse its discretion in admitting the testimony. Presuming Grandy's hearsay statement claiming responsibility for the Pizza Hut robbery was improperly admitted, in the absence of an objection by defendant or showing a different result would have occurred at trial, the admission of the statement does not warrant a new trial under plain or prejudicial error review.

Viewed in the light most favorable to the State, the evidence was sufficient for the jury to reasonably conclude shots were fired at Parker's vehicle. Because the State proceeded under an acting in concert theory, liability for firing the shots and possession of the firearm are imputed to defendant, who was present in the vehicle and acted in concert with his co-conspirators.

The trial court did not commit an abuse of discretion by failing to sentence defendant in the mitigated range. All sentences were imposed within the presumptive ranges for each conviction. Defendant's petition for writ of *certiorari* is denied.

No Error in Part, Vacated in Part, and Remanded for Resentencing.

Judges McCULLOUGH and LEVINSON concur.

IN RE: BETTY NANTZ

No. COA05-965

(Filed 4 April 2006)

1. Appeal and Error— preservation of issues—appeal from board to superior court—sufficiency of findings and conclusions raised

An assignment of error was properly preserved for review where respondent filed in superior court a petition for judicial review of a decision of the North Carolina Appraisal Board revoking her certification as a real estate appraiser. Although the State asserts that the issue of permanent revocation was not raised in respondent's petition, an appeal from a final judgment may present the question of whether the judgment is supported by the findings and conclusions.

2. Occupations— real estate appraisal board—sanctions—findings and conclusions

The plain language of N.C.G.S. § 93E-1-12 is clear and does not require the North Carolina Appraisal Board to specifically make findings of fact and conclusions of law to support a particular penalty or sanction against a real estate appraiser.

3. Occupations— real estate appraisal board—power to permanently revoke certification

The plain and ordinary meaning of "revoke" and "suspend" in N.C.G.S. § 93E-1-12 shows a legislative intent to give the North Carolina Appraisal Board the power to permanently revoke a real estate appraiser's certification.

4. Real Estate— appraisal—standards violated—findings sufficient

Sufficient findings supported the North Carolina Appraisal Board's conclusion that its standards were violated by a real estate appraiser in making misleading reports, omitting essential information, and not indicating hypothetical conditions in her report. Although there was a clerical error in identifying one of the standards, that error was harmless.

5. Real Estate— appraisal—communication in fraudulent or misleading manner

Findings by the North Carolina Appraisal Board supported the conclusion that real estate appraisal results were communicated in a fraudulent or misleading manner. Despite respondent's argument that findings of intent to deceive are required, the Board's ethics rule is violated when the appraiser communicates the results in a fraudulent or misleading manner.

6. Appeal and Error— issue first raised on appeal—not heard

An argument concerning the sufficiency of the North Carolina Appraisal Board's notice of alleged violations was dismissed where the issue was raised for the first time on appeal.

Appeal by respondent from order entered 20 April 2005 by Judge Ronald K. Payne in Cabarrus County Superior Court. Heard in the Court of Appeals 9 March 2006.

Attorney General Roy Cooper, by Assistant Attorney General Roberta Ouellette, for petitioner-appellee North Carolina Appraisal Board.

Garlitz & Williamson, PLLC, by Thomas D. Garlitz, for respondent-appellant.

TYSON, Judge.

Betty Nantz ("Nantz") appeals from order entered affirming the North Carolina Appraisal Board's ("the Board") decision to revoke her certification as a real estate appraiser. We affirm.

I. Background

Nantz has been preparing real estate appraisals since the 1960s. When North Carolina required appraisers to be certified, she was certified as a residential appraiser in 1990 and as a general appraiser in 1992. Nantz prepared appraisals in Cabarrus and surrounding counties. The Board received four complaints against Nantz. A hearing on all four complaints was held on 20 May 2004 and 15 June 2004. The Board found as follows:

A. First Complaint

Nantz performed an appraisal of property located at 21 Cherry Street in Wadesboro, and estimated the indicated value of the property at $72,000.00 as of 23 May 2001. At the time of the appraisal, the public tax records identified the owner of the property as Leroy Lookabill, Jr. ("Lookabill"). Nantz stated in her appraisal report, "To my knowledge there have been no agreements, options, listings or prior sales of the subject or the comparables." Public records indicate Lookabill acquired the property in September 2000. This sale was neither mentioned nor analyzed in the appraisal report. On the first page of the appraisal report, Nantz stated the sales price as "N/A." Nantz stated at the hearing that "N/A" meant "Note Addendum." However, she used the same notation several other times in her appraisal reports and none of those items were addressed in an addendum.

Nantz's work file contained an MLS listing sheet indicating the property was listed for sale for $52,600.00 at the time of the appraisal report. Nantz failed to address or note this listing in her appraisal. The property sold on 29 June 2001 for $72,000.00. Nantz chose four sales as comparable to the subject property. Three of those sales were from superior locations than the subject property, yet Nantz made no adjustments for those differences. The Board also found more comparable sales were available that indicated a lower value for the property.

B. Second Complaint

Nantz performed an appraisal for property located at 12 Magnolia Street in Wadesboro, which she estimated the property's indicated

value at $80,000.00 as of 27 December 2001. At the time of the appraisal, public tax records identified the owner of the property as Lewis and Brownette Moore. Nantz's work file contained an MLS listing sheet for the property indicating it was listed for sale for $59,000.00 at the time of the appraisal. Nantz listed the sales price on the first page of her report as "N/A." On the second page of the report, Nantz states, "I have no knowledge other than the above pertaining to any sales, contracts or listings." In an addendum to the report, Nantz states, "Subject property is currently listed at $59,000.00 and has an offer to purchase for $55,000.00." The property did not sell after the appraisal report.

The Board found Nantz chose three sales as comparable to the subject property. All three of these sales were from areas that were superior to the subject property and Nantz made negative $4,000.00 adjustments for each of the sales for location. The Board found these adjustments were inadequate to address the differences in location between the comparable sales and the subject property and that more comparable sales were available, which indicated a lower value for the property. On the location map included in the appraisal report, Nantz showed the property being located within the city limits of Wadesboro when, in fact, it was not.

C. Third Complaint

Nantz performed an appraisal of property located at 52 S. Salisbury Street in Wadesboro, which she indicated a value of $102,000.00 as of 25 October 2000. At the time of the appraisal, the public tax records identified the owner of the property as Gail R. Ponds ("Ponds"). On the first page of the report, Nantz states the sales price as "N/A." Nantz left blank the section on the second page of the appraisal report regarding any current agreement of sale, option, or listing of the property. The property had sold to Ponds on 27 April 2000 for $26,000.00. This sale was not mentioned in Nantz's appraisal report. Ponds sold the property in January 2001 to Sophia Ingram ("Ingram") for $102,000.00. Ingram subsequently obtained a deed of trust on the property in the amount of $91,800.00.

Nantz used three comparable sales in her appraisal report. Although the subject property was located in a mixed-use area, all comparable sales Nantz chose were located in residential neighborhoods. The Board found the comparable residential houses were superior in quality and condition to the subject property, but Nantz made no adjustments to account for those differences. The Board

also found more comparable sales were available that would have indicated a lower value for the property.

D. Fourth Complaint

Nantz performed an appraisal of the property located at 617 Pee Dee Avenue in Albemarle, in which she indicated a value of the property of $210,000.00 as of 19 March 2001. Nantz identified the owner of the property as Ted C. Russell ("Russell"). At the time of the appraisal, the public records identified the owner of the property as the Bank of New York. The Bank of New York had acquired the property by a Trustee's Deed on 9 May 2000 for the sum of $98,600.00. At the time of the appraisal, the property was listed for sale for $90,000.00. On the first page of her report, Nantz stated the sales price as "N/A."

Russell acquired the property on 30 May 2001 for $90,000.00. Russell sold the property to Marilyn Turner ("Turner") on 27 June 2001 for $210,000.00. Turner subsequently obtained a loan on the property for $189,000.00, which later went into default and foreclosure. Nantz stated in the appraisal report that "To my knowledge there are no agreements of sale, options, listing [sic] of the subject or prior sales within one year of the date of the appraisal." Nantz testified she knew of the 9 May 2000 transfer for $98,600.00, but failed to note it in her appraisal report.

Nantz also failed to indicate in her appraisal report that the property was offered for a sale price of approximately $120,000.00 less than her appraised value and she failed to state and analyze the sales history of the property. Nantz asserted the improvements on the property contained 2,435 square feet. This conclusion included the square footage of a basement she determined was finished. The Board found the basement area was not finished, was below grade, should not have been included as finished floor area, and the correct square footage was 2,067.

The Board also found the comparable sales Nantz chose were all much larger and newer than the subject property and superior in location and condition. Nantz's appraisal contained no adjustments for these differences. The Board further found that more comparable sales were available that indicated a much lower value for the property.

The Board adjudged Nantz guilty of violating rules of the Uniform Standards of Professional Appraisal Practice ("USPAP") for real

estate appraisers. The Board permanently revoked Nantz's certification pursuant to N.C. Gen. Stat. § 93E-1-12(a)(9). This statute permits the Board to revoke an appraiser's license, certificate, or registration if the appraiser is found to have violated any of the standards of practice for real estate appraisers or any other rule promulgated by the Board.

Nantz filed a Petition for Judicial Review in Cabarrus County Superior Court seeking review of the Board's decision. On 20 April 2005, the trial court affirmed the Board's decision. Nantz appeals.

II. Issues

Nantz argues the trial court erred by: (1) affirming the Board's decision to permanently revoke her certification as an appraiser; (2) upholding the Board's conclusion that she violated USPAP Standards Rules 1-2(f), 1-4(b), and 2-1; (3) upholding the Board's conclusion that she violated the USPAP ethics rule by communicating her appraisal results in a "fraudulent manner;" and (4) upholding the Board's conclusion that she violated N.C. Gen. Stat. §§ 93E-1-12(a)(2), 93E-1-12(a)(8), 93E-1-12(a)(10), and 93E-1-12(a)(11).

III. Standard of Review

> When the Agency decision is on review before the superior court judge, his consideration of the case is that of an appellate court. *In re Faulkner*, 38 N.C. App. 222, 247 S.E.2d 668 (1978). The reviewing court, both trial and appellate, "while obligated to consider evidence of record that detracts from the administrative ruling, is not free to weigh all of the evidence and reach its own conclusion on the merits." *Savings and Loan Assoc. v. Savings and Loan Comm.*, 43 N.C. App. 493, 497, 259 S.E.2d 373, 376 (1979).

Little v. Board of Dental Examiners, 64 N.C. App. 67, 69, 306 S.E.2d 534, 536 (1983).

In *N.C. State Bar v. Talford*, our Supreme Court held a review under the whole record test requires three determinations whether: (1) there is adequate evidence to support the agency's findings of fact; (2) the findings of fact adequately support the conclusions of law; and (3) the findings of fact and conclusions of law support the agency's ultimate decision. 356 N.C. 626, 634, 576 S.E.2d 305, 311 (2003). "[I]n reaching its decision, the reviewing court is prohibited from replacing the Agency's findings of fact with its own judgment of how credi-

ble, or incredible, the testimony appears to them to be, so long as substantial evidence of those findings exist in the whole record." *Little*, 64 N.C. App. at 69, 306 S.E.2d at 536 (citation omitted). Questions of statutory interpretation and law are reviewed *de novo*. *Department of Transp. v. Charlotte Area Mfd. Housing, Inc.*, 160 N.C. App. 461, 464, 586 S.E.2d 780, 782 (2003) (citations omitted).

IV. Revocation of Nantz's Certification

Nantz argues the trial court erred by affirming the Board's decision to "permanently" revoke her certification. Nantz contends the Board: (1) failed to make findings of fact or conclusions of law to explain how it decided to impose such penalty; and (2) exceeded its authority in "permanently" revoking her certification. We disagree.

A. Preservation of Error

[1] The State argues Nantz failed to properly preserve this assignment of error for appellate review. Nantz filed a petition for judicial review of the Board's decision in Cabarrus County Superior Court. The State asserts the issue of permanent revocation was not raised in Nantz's petition. "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." N.C.R. App. 10(b)(1) (2005). "[A]n appeal duly taken from a final judgment may present for review, if properly raised in the brief, the question of whether the judgment is supported by the findings of fact and conclusions of law." *Anderson Chevrolet/Olds v. Higgins*, 57 N.C. App. 650, 653, 292 S.E.2d 159, 161 (1982). The State's argument is overruled.

B. Findings of Fact and Conclusions of Law Regarding Selection of the Penalty

[2] N.C. Gen. Stat. § 93E-1-12(a) (2005) provides the Board is authorized to "suspend or revoke" the certification of a real estate appraiser if the Board finds the appraiser has engaged in activities enumerated in and proscribed by the statute. The Board's decision cited fourteen conclusions of law, which set forth specific standards and laws Nantz purportedly violated. Nantz does not address any portion of the statute where the Board is required to make findings of fact or conclusions of law to support the Board's selection of the penalty or sanction.

> The primary rule of statutory construction is that the intent of the legislature controls the interpretation of a statute. The foremost task in statutory interpretation is to determine legislative intent while giving the language of the statute its natural and ordinary meaning unless the context requires otherwise. Where the statutory language is clear and unambiguous, the Court does not engage in judicial construction but must apply the statute to give effect to the plain and definite meaning of the language.

Carolina Power & Light Co. v. The City of Asheville, 358 N.C. 512, 518, 597 S.E.2d 717, 722 (2004) (internal citations and quotations omitted).

The plain language of N.C. Gen. Stat. § 93E-1-12 is clear, and it does not require the Board to specifically make findings of fact and conclusions of law to support a particular penalty or sanction. We decline to judicially impose this requirement on the Board when the legislature did not include it in the language of the statute. *See Correll v. Division of Social Services*, 332 N.C. 141, 145, 418 S.E.2d 232, 235 (1992) ("The wording of N.C.G.S. § 108A-55 is clear, and it does not include a requirement that a Medicaid applicant 'own' his or her primary place of residence before receiving the advantage of the statute's 'contiguous property' exclusion.").

C. Permanent Revocation

[3] The plain and definite meaning of the language contained in N.C. Gen. Stat. § 93E-1-12 determines whether the Board has the authority to "permanently revoke" Nantz's certification. The statute provides, "The Board may *suspend or revoke* the registration, license, or certificate granted to any person under the provisions of this Chapter or reprimand any registered trainee, licensee, or certificate holder" if the Board finds the appraiser to have committed any of the enumerated violations. N.C. Gen. Stat. § 93E-1-12(a).

The American Heritage Dictionary defines "revoke" as "to void or annul by recalling, withdrawing, or reversing." *The American Heritage Dictionary of the English Language* (4th ed. 2000). "Suspend" is defined as "to bar for a period from a privilege, office, or position, usually as a punishment." *The American Heritage Dictionary of the English Language* 1225 (4th ed. 2000). The plain and ordinary meanings of these words show the legislature's intent that "revoke" in the statute means the Board has the power to permanently revoke the certification. If "revoke" meant a period of time less than permanent, the word "suspend" would not have been

included in the statute. *See Builders, Inc. v. City of Winston-Salem*, 302 N.C. 550, 556, 276 S.E.2d 443, 447 (1981) ("It is presumed that the legislature intended each portion to be given full effect and did not intend any provision to be mere surplusage.").

V. The Board's Conclusions of Law

[4] Nantz argues the trial court erred in upholding the Board's conclusions of law that Nantz violated USPAP Rules 1-2(f), 1-4(b), and 2-1. We disagree.

We review whether substantial evidence supports the Board's findings and if those findings support its conclusions of law. *Talford*, 356 N.C. at 634, 576 S.E.2d at 311. The Board concluded:

> 7. The Respondent is adjudged to have violated Standards Rule 1-2(f) of USPAP when she failed to identify the scope of work necessary to complete the assignment. The Respondent excluded certain information from her appraisal that was relevant to her determination of the appraised value. She allowed the assignment conditions and/or other factors to limit the extent of research or analysis to such a degree that the resulting opinions and conclusions developed were not credible in the context of the intended use of the appraisal.

USPAP Standards Rule 1-2(f) requires an appraiser to "identify the scope of work necessary to complete the assignment." USPAP defines "scope of work" as "the amount and type of information researched and the analysis applied in an assignment." An appraiser should identify the appropriate scope of work and determine the appropriate research the particular assignment and property demands.

The Board found as fact:

> 4. Respondent knowingly made omissions and false statements concerning the identification of the property owner and the marketing and sales history of the subject properties, all of which made the property appear more favorable and provided artificial support for the inflated value placed on the subject.

This finding supports the Board's conclusion that Nantz violated Standards Rule 1-2(f) of USPAP.

Nantz argues the Board's conclusion that she violated Standards Rule 1-4(b) of USPAP was not supported by any findings of fact. The Board concluded:

> 8. The Respondent is adjudged to have violated Standards Rule 1-4(a) and (b) of USPAP when she failed to collect, verify and analyze all information applicable to the appraisal problem, given the scope of work identified in accordance with Standards Rule 1-2(f) of USPAP. In applying a sales comparison approach, the respondent failed to analyze comparable sales data that were available to indicate a value conclusion. She selectively chose the comparable sales based on the sales prices, which led to an inflated value for the subject properties.

USPAP Standards Rule 1-4 provides:

> In developing a real property appraisal, an appraiser must collect, verify, and analyze all information applicable to the appraisal problem, given the scope of work identified in accordance with Standards Rule 1-2(f).
>
> (a) When a sales comparison approach is applicable, an appraiser must analyze such comparable sales data as are available to indicate a value conclusion.
>
> (b) When a cost approach is applicable, an appraiser must:
>
> (i) develop an opinion of site value by an appropriate appraisal method or technique;
>
> (ii) analyze such comparable cost data as are available to estimate the cost new of the improvements (if any); and
>
> (iii) analyze such comparable data as are available to estimate the difference between the cost new and the present worth of the improvements (accrued depreciation).

Nantz does not argue that no findings of fact support the conclusion that she violated USPAP Standards Rule 1-4(a). She argues no findings of fact support a conclusion that she violated Rule 1-4(b). As the Board concedes, Nantz is correct. The reference to Rule 1-4(b) in the Board's conclusion appears to be a clerical mistake. We find this clerical error to be harmless.

Nantz argues the Board's conclusion that she violated USPAP Standards Rule 2-1(b) and (c) is not supported by any evidence. USPAP Standards Rule 2-1 provides:

> Each written or oral real property appraisal report must:
>
> . . . .

(b) contain sufficient information to enable the intended users of the appraisal to understand the report properly; and

(c) clearly and accurately disclose any extraordinary assumption, hypothetical condition, or limiting condition that directly affects the appraisal and indicate its impact on value.

Sufficient findings of fact support the Board's conclusion that Nantz violated USPAP Standards Rule 2-1(b) and (c). Finding of fact number 4, as stated above, states Nantz made omissions and false statements concerning several items. Finding of fact number 6 states Nantz made misrepresentations and issued misleading reports. Other findings of fact clearly indicate that Nantz omitted required or essential information from her appraisal reports. By omitting the listing or sales history, the intended users of the appraisals were not provided important information about the subject properties.

USPAP defines "hypothetical condition" as "that which is contrary to what exists but is supposed for the purpose of analysis." The Board found Nantz stated in the appraisal of the Pee Dee Avenue property that it contained 2,435 square feet in finding of fact number 45. She came to this conclusion by including an unfinished basement that she stated was finished square footage. Nantz failed to indicate this hypothetical condition in her appraisal report. The Board made sufficient findings of fact to support its conclusion that Nantz violated USPAP Standards Rule 2-1(b) and (c). This assignment of error is overruled.

VI. Communicating Appraisal Results in a Fraudulent Manner

[5] Nantz argues the trial court erred in affirming the Board's conclusion that by communicating her appraisal in a "fraudulent manner" she violated the USPAP ethics rule. We disagree.

The Board concluded, "1. Respondent is adjudged guilty of violating the Ethics Rule of the Uniform Standards of Professional Appraisal Practice . . . when she communicated the assignment results in a misleading or fraudulent manner . . . ."

Nantz argues that fraud requires an intent to deceive and the Board failed to make any findings that she intended to deceive anyone.

The Board found in finding of fact no. 4, "Respondent knowingly made omissions and false statements concerning the identification of

the property owner and the marketing and sales history of the subject properties . . . .” The Board further found:

> 5. Respondent was aware of the standards and law governing the appraisal profession in North Carolina and was aware that her acts and omissions in performing the appraisals of these four (4) properties violated the standards and laws.
>
> 6. Respondent made the misrepresentations and issued misleading reports with the knowledge that mortgage institutions and others relied on the information and value stated in the report as a basis upon which to approve or disapprove loans.

These findings of fact support the Board’s conclusion that Nantz communicated appraisal results in a fraudulent or misleading manner. The Board’s ethics rule is violated when the appraiser communicates the results in a fraudulent *or misleading* manner. This assignment of error is overruled.

VII. Notice

[6] Nantz argues the trial court erred in upholding the Board’s conclusion that she violated N.C. Gen. Stat. §§ 93E-1-12(a)(2), 93E-1-12(a)(8), 93E-1-12(a)(10), and 93E-1-12(a)(11) because the Board’s notice of hearing did not mention these sections of the statute and failed to give her notice that she was charged with violating these provisions.

Nantz raises the issue of whether the Board’s notice was sufficient for the first time in this appeal. This issue is not mentioned in Nantz’s petition for judicial review presented to the trial court. The trial court’s decision does not indicate that this issue was argued. N.C.R. App. P. 10(b)(1) requires, “In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context.” This assignment of error is dismissed.

VIII. Conclusion

The trial court properly affirmed the Board’s decision to revoke Nantz’s certification as an appraiser. The Board made sufficient findings of fact to support its conclusions of law.

Nantz failed to preserve the issue of whether she was given proper notice for our review. The order of the trial court affirming the decision of the Board is affirmed.

Affirmed.

Judges McCULLOUGH and LEVINSON concur.

DAISY ABBOTT, Plaintiff v. NORTH CAROLINA BOARD OF NURSING, Defendant

No. COA05-666

(Filed 4 April 2006)

1. Immunity; Nurses— sovereign immunity—Board of Nursing—wrongful termination

The trial court did not err by dismissing plaintiff's complaint against the N.C. Board of Nursing (Board) for wrongful termination on the basis of sovereign immunity because the legislative enactment, governmental appointment of members to defendant Board, and public purpose performed by the Board make the Board an agency of the state entitled to the defense of sovereign immunity.

2. Appeal and Error— preservation of issues—failure to make assignment of error in brief

Although plaintiff contends the trial court erred by relying on documentation submitted by defendant Board of Nursing (Board) in determining whether it is a state agency, this assignment of error is dismissed because: (1) this argument does not relate to plaintiff's assignments of error, and thus, is not a matter properly before the Court of Appeals; and (2) this assignment of error is irrelevant when the Court of Appeals has already determined that the Board is a state agency solely by examining the statutes.

3. Appeal and Error— preservation of issues—failure to raise issue

Although the dissent contends that plaintiff's complaint for wrongful termination states a claim for relief under N.C.G.S. § 9-32 which would waive sovereign immunity, this issue is not reached because it was never raised by the parties or addressed

by the trial court, and plaintiff failed to allege in her complaint that sovereign immunity had been waived.

4. Appeal and Error— preservation of issues—failure to state legal basis

Although plaintiff contends the trial court erred by failing to hear or consider plaintiff's other arguments regarding issues related to the Board of Nursing's motion to dismiss, this assignment of error is dismissed because plaintiff failed to state the legal basis upon which the error was assigned as required by N.C. R. App. P. 10(c)(1).

Judge WYNN concurring in part and dissenting in part.

Appeal by plaintiff from an order entered 12 November 2004 by Judge Stafford G. Bullock in Franklin County Superior Court. Heard in the Court of Appeals 10 January 2006.

Joyce L. Davis & Associates, *by Everette P. Winslow*, *for plaintiff-appellant.*

Parker Poe Adams & Bernstein, *by Renee J. Montgomery and Susan L. Dunathan*, *for defendant-appellee.*

HUNTER, Judge.

Daisy Abbott ("plaintiff") appeals from an order of the trial court dismissing on sovereign immunity grounds her claim for relief against her employer, the North Carolina Board of Nursing ("the Board"). Plaintiff contends the Board is not a state agency to which sovereign immunity applies. We affirm the order of the trial court.

On 27 May 2004, plaintiff filed a complaint in Franklin County Superior Court alleging, *inter alia*, that the Board wrongfully terminated her employment. The complaint contained no allegations regarding any waiver of sovereign immunity by the Board. The Board filed a motion to dismiss pursuant to Rules 12(b)(1), (2), and (6) of the North Carolina Rules of Civil Procedure. By order entered 12 November 2004, the trial court concluded that plaintiff's claims were barred by the doctrine of sovereign immunity and dismissed the complaint. Plaintiff appeals.

[1] Plaintiff argues that the trial court erred in dismissing her claims on the basis of sovereign immunity and in failing to hear or consider her other arguments prior to ruling. "Under the doctrine of sover-

eign immunity, the State is immune from suit absent waiver of immunity." *Meyer v. Walls*, 347 N.C. 97, 104, 489 S.E.2d 880, 884 (1997). The doctrine also applies to state agencies being sued for the performance of a governmental function. *Vest v. Easley*, 145 N.C. App. 70, 73, 549 S.E.2d 568, 572 (2001). Plaintiff contends that the Board is not a state agency and, therefore, sovereign immunity does not apply. We disagree.

The Board was created by the General Assembly. N.C. Gen. Stat. § 90-171.21 (2005). The Board's duties include: (1) licensing nurses in the state, (2) establishing criteria for nursing programs in the state, (3) prosecuting persons violating the Nursing Practice Act, (4) reviewing and approving nursing programs in the state, and (5) approving continuing education for nurses. N.C. Gen. Stat. § 90-171.23(b) (2005). The Governor and General Assembly appoint three members of the Board. N.C. Gen. Stat. § 90-171.21(b). The legislative enactment, governmental appointment of members to the Board, and public purpose performed by the Board make the Board an agency of the state entitled to the defense of sovereign immunity. *See Mazzucco v. Board of Medical Examiners*, 31 N.C. App. 47, 49, 228 S.E.2d 529, 531 (1976) (citation omitted) (stating that the Board of Medical Examiners was created by statute " 'to properly regulate the practice of medicine and surgery[,]' " and is a state agency). We therefore overrule this assignment of error.

[2] Plaintiff next argues that the trial court erred in relying on documentation submitted by the Board in determining whether it is a state agency. This argument does not relate to plaintiff's assignments of error. "[T]he 'scope of appellate review is limited to the issues presented by assignments of error set out in the record on appeal; where the issue presented in the appellant's brief does not correspond to a proper assignment of error, the matter is not properly considered by the appellate court.' " *Walker v. Walker*, 174 N.C. App. 778, 781, 624 S.E.2d 639, 641 (2005) (quoting *Bustle v. Rice*, 116 N.C. App. 658, 659, 449 S.E.2d 10, 11 (1994)). Moreover, as we have already determined that the Board is a state agency solely by examining the statutes, this assignment of error is irrelevant. Accordingly, this assignment of error is dismissed.

[3] The dissent contends that plaintiff's complaint states a claim for relief pursuant to section 9-32 of the General Statutes, which, the dissent would hold, waives the State's sovereign immunity. Although the dissent's interpretation of section 9-32 is compelling, we do not reach

this issue, as it was never raised by the parties. It was not the basis of any assignment of error; it was never addressed or argued by the parties, nor was it ever considered by the trial court. Indeed, plaintiff failed to allege in her complaint that sovereign immunity had been waived. *See Paquette v. County of Durham*, 155 N.C. App. 415, 418, 573 S.E.2d 715, 717 (2002) (citation omitted) (stating that, "[i]n order to overcome a defense of governmental immunity, the complaint must specifically allege a waiver of governmental immunity. Absent such an allegation, the complaint fails to state a cause of action"). Rather, the issue was raised for the first time by the dissent during oral argument of the case. The dissent's position in effect creates an appeal for plaintiff and places the Board at a distinct disadvantage. Indeed, the Board has filed a "Motion for Leave to File Additional Authority and Argument" in which it requests the opportunity to address the question of whether section 9-32 waives sovereign immunity, because when the issue was raised by the dissent at oral argument, "[c]ounsel had not researched this specific issue and were able only to provide discussion of generally applicable law in response to the Court's questions." "It is not the role of the appellate courts . . . to create an appeal for an appellant." *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005). "[T]he Rules of Appellate Procedure must be consistently applied; otherwise, the Rules become meaningless, and an appellee is left without notice of the basis upon which an appellate court might rule." *Id.*

The dissent nevertheless asserts that the Board moved to dismiss plaintiff's complaint pursuant to Rules 12(b)(1) (subject matter jurisdiction) and Rule 12(b)(2) (personal jurisdiction). The dissent reasons that, as jurisdictional issues may be addressed for the first time on appeal, we may therefore properly address the issue of waiver *ex mero motu*. However, the Board only moved to dismiss plaintiff's third claim, negligent infliction of emotional distress, pursuant to Rules 12(b)(1) and (2). The Board moved to dismiss plaintiff's statutory claim, violation of section 9-32, pursuant to Rule 12(b)(6) (failure to state a claim). On appeal, the parties moreover stipulated that the trial court had both subject matter jurisdiction and personal jurisdiction over the matter. Because the question of whether section 9-32 waives sovereign immunity was never addressed by the trial court or the parties, the issue is not properly before us.

[4] Plaintiff's remaining assignment of error states: "The lower court erred in failing to hear or consider [plaintiff's] other arguments regarding issues relating to [the Board's] motion to dismiss." This

assignment of error fails to state the "legal basis upon which error is assigned." N.C.R. App. P. 10(c)(1); *see also Walker*, 174 N.C. App. at 780, 624 S.E.2d at 641. We therefore dismiss this assignment of error.

The order of the trial court dismissing plaintiff's complaint is hereby affirmed.

Affirmed.

Judge JACKSON concurs.

Judge WYNN concurs in part and dissents in part in a separate opinion.

WYNN, Judge, concurring in part, dissenting in part.

Any modification or waiver of the doctrine of sovereign immunity which insulates the State from suit must come from the General Assembly. *See Steelman v. City of New Bern*, 279 N.C. 589, 595, 184 S.E.2d 239, 243 (1971). In this case, the trial court dismissed (on sovereign immunity grounds) Plaintiff's claim that her employer terminated her employment because of her jury duty obligations. I agree with the majority that the Nursing Board is a state agency; however, because the complaint alleges a cause of action under section 9-32 of the North Carolina General Statutes which makes an exception to the State's sovereign immunity with respect to employees terminated due to jury duty, I would hold that the trial court erred in dismissing Plaintiff's statutory claim for relief.[1]

From the outset, I point out that while the majority correctly notes that neither party addressed the issue of waiver in their arguments, this issue is nonetheless properly before this Court. Indeed, the Nursing Board moved to dismiss pursuant to Rule 12(b)(1) (lack of subject matter jurisdiction) and this Court can consider questions of subject matter jurisdiction regardless of whether the parties raise the issue in their briefs. Significantly, the question of subject matter jurisdiction may properly be raised for the first time on appeal. N.C. Gen. Stat. § 1A-1, Rule 12(h)(3) (2005). "Furthermore, this Court may raise the question on its own motion even when it was not argued by the parties in their briefs." *State v. Jones*, 172 N.C. App. 161, 163, 615 S.E.2d 896, 897 (2005) (quoting *Bache Halsey Stuart*,

1. I agree that Plaintiff's remaining arguments do not relate to her assignments of error and must be dismissed.

Inc. v. Hunsucker, 38 N.C. App. 414, 421, 248 S.E.2d 567, 571 (1978)); *see also Jenkins v. Winecoff*, 267 N.C. 639, 641, 148 S.E.2d 577, 578 (1966) (question of subject matter jurisdiction not argued in briefs but the Court considered the issue *ex mero motu*).

Moreover, this Court has held the defense of sovereign immunity is a matter of personal jurisdiction that falls under Rule 12(b)(2) of the North Carolina Rules of Civil Procedure. *Zimmer v. N.C. Dep't of Transp.*, 87 N.C. App. 132, 134, 360 S.E.2d 115, 116 (1987).[2] The standard of review to be applied by the trial court in deciding a motion under Rule 12(b)(2) is that "[t]he allegations of the complaint must disclose jurisdiction although the particulars of jurisdiction need not be alleged." *Bruggeman v. Meditrust Acquisition Co.*, 138 N.C. App. 612, 615, 532 S.E.2d 215, 217, *appeal dismissed and disc. review denied*, 353 N.C. 261, 546 S.E.2d 90-91 (2000). As Ms. Abbott's Complaint includes a claim for relief pursuant to section 9-32 of the North Carolina General Statutes, and section 9-32 allows the State to be sued, the issue of sovereign immunity or personal jurisdiction was disclosed in the Complaint. *See id*. Therefore, this Court can properly look at the Complaint as a whole to decide whether sovereign immunity bars the suit.

The facts presented in the pleadings show that: Plaintiff Daisy Abbott was employed by Defendant North Carolina Board of Nursing as a receptionist from 26 February 2001, until the Nursing Board terminated her on 28 May 2003. On or about 12 April 2003, Ms. Abbott received a summons from the Franklin County Clerk of Court informing her that she was to serve jury duty from 5 May 2003 until 9 May 2003. Ms. Abbott informed her supervisor Brenda McDougal and provided Ms. McDougal with a copy of the jury summons. Ms. Abbott arrived at the courthouse to begin serving jury duty at 2:30 p.m. on 5 May 2003. At approximately 4:30 p.m., she was released for the day but informed that she was not released from duty and must call the Jury Message System after 11:00 a.m. the next day to determine whether or not she was to serve. Ms. Abbott got through to the Jury Message System at approximately noon on 6 May 2003, and was informed that she was released from jury duty. Ms. Abbott telephoned Ms. McDougal and informed her that she had been released from jury duty and would report to work the next day.

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2. Our Supreme Court has yet to decide whether the defense of sovereign immunity is a matter of personal or subject matter jurisdiction. *Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 328, 293 S.E.2d 182, 184 (1982).

On 28 May 2003, the Nursing Board terminated Ms. Abbott for falsely claiming that she was serving on jury duty on 6 May 2003. On 29 May 2003, Alice Faye Hunter, Franklin County Clerk of Court, telephoned Polly Johnson, the Nursing Board's executive director, and informed her that Ms. Abbott was not released from jury duty until 6 May 2003. Ms. Hunter then sent a letter to Ms. Johnson confirming their conversation.

On 27 May 2004, Ms. Abbott filed a complaint claiming, *inter alia*, the Nursing Board violated section 9-32 of the North Carolina General Statutes. The Nursing Board filed a motion to dismiss pursuant to Rules 12(b)(1), (2), and (6) of the North Carolina Rules of Civil Procedure. By order entered 12 November 2004, the trial court concluded that Ms. Abbott's claims are barred by the doctrine of sovereign immunity and dismissed the complaint.

"Under the doctrine of sovereign immunity, the State is immune from suit absent waiver of immunity." *Meyer v. Walls*, 347 N.C. 97, 104, 489 S.E.2d 880, 884 (1997). The doctrine also applies to State agencies being sued for the performance of a governmental function. *Vest v. Easley*, 145 N.C. App. 70, 73, 549 S.E.2d 568, 572 (2001).

The doctrine of sovereign immunity is judge-made in North Carolina and was first adopted by our Supreme Court in *Moffitt v. City of Asheville*, 103 N.C. 237, 9 S.E. 695 (1889). Our Supreme Court has recently recited a brief history of the doctrine of sovereign immunity in North Carolina in *Corum v. Univ. of North Carolina*,

> The doctrine originated with the feudal concept that the king could do no wrong and culminated with its judicial recognition in the English case of *Russell v. Men of Devon*, 2 T.R. 667, 100 Eng. Rep. R. 359 (1788). North Carolina adopted the common law of England as it existed in 1776. Sovereign immunity was not a part of the common law of England at that time because the holding of *Men of Devon* with respect to sovereign immunity was not promulgated until 1788. Accordingly, early North Carolina decisions expressly rejected the doctrine. *Steelman v. City of New Bern*, 279 N.C. 589, 184 S.E.2d 239 (1971). Only with the *Moffitt* decision was sovereign immunity made a part of our law. It is, nevertheless, firmly established in the law of our State today and has been recognized by the General Assembly as the public policy of the State. The doctrine of sovereign immunity has been modified, but never abolished.

Corum v. Univ. of North Carolina, 330 N.C. 761, 785, 413 S.E.2d 276, 291 (1992); *see also Steelman*, 279 N.C. 589, 184 S.E.2d 239.

Under North Carolina law, any modification or waiver of the doctrine of sovereign immunity must come from the General Assembly. *See Guthrie v. N.C. State Ports Auth.*, 307 N.C. 522, 534, 299 S.E.2d 618, 625 (1983) ("It is for the General Assembly to determine when and under what circumstances the State may be sued." (emphasis and citation omitted)); *Steelman*, 279 N.C. at 595, 184 S.E.2d at 243 ("[A]ny further modification or the repeal of the doctrine of sovereign immunity should come from the General Assembly, not this Court.").

Indeed, the General Assembly has waived or modified sovereign immunity in numerous statutes. *See*, *e.g.*, *RPR & Assocs., Inc. v. State*, 139 N.C. App. 525, 528, 534 S.E.2d 247, 250 (2000), *aff'd per curium*, 353 N.C. 362, 543 S.E.2d 480-81 (2001) (sovereign immunity waived for actions involving contract claims against the State and its agencies pursuant to N.C. Gen. Stat. § 143-135.3 (1999)); *Faulkenbury v. Teachers' & State Emples. Ret. Sys. of N.C.*, 345 N.C. 683, 696, 483 S.E.2d 422, 430 (1997) (insofar as the state and local governments have sovereign immunity from paying interest, it is waived by N.C. Gen. Stat. §§ 135-1(2) and 128-21(2)); *Ferrell v. Dep't of Transp.*, 334 N.C. 650, 655, 435 S.E.2d 309, 313 (1993) (legislature has implicitly waived the Department of Transportation's sovereign immunity to the extent of the rights afforded in N.C. Gen. Stat. § 136-19 (1986)); *State v. Taylor*, 322 N.C. 433, 435, 368 S.E.2d 601, 602 (1988) (sovereign immunity waived to suits involving "claims of title to land" pursuant to N.C. Gen. Stat. § 41-10.1); *Minneman v. Martin*, 114 N.C. App. 616, 619, 442 S.E.2d 564, 566 (1994) ("The Whistleblower Act, in providing for specific remedies, represents a clear statutory waiver of sovereign immunity to redress violations of the nature proscribed in G.S. § 126-85."); *Zimmer v. N.C. Dep't of Transp.*, 87 N.C. App. 132, 134, 360 S.E.2d 115, 117 (1987) ("By enactment of the Tort Claims Act, . . . the General Assembly partially waived the sovereign immunity of the State to the extent that it consented that the State could be sued for injuries proximately caused by the negligence of a State employee acting within the scope of his employment." (citation omitted)).

Thus, the following question arises in this appeal: Did the General Assembly modify the State's sovereign immunity by enacting section 9-32 of the North Carolina General Statutes; thus allowing state and state agency employees to sue their employer for violations of the section? This question must be answered in the affirmative; section

9-32 expressly waives sovereign immunity, allowing Ms. Abbott to proceed with her complaint against the Nursing Board on the claim of violation of section 9-32 of the North Carolina General Statutes.

Section 9-32 provides in pertinent part:

> (a) No employer may discharge or demote any employee because the employee has been called for jury duty, or is serving as a grand juror or petit juror.
>
> (b) *Any employer who violates any provision of this section shall be liable in a civil action* for reasonable damages suffered by an employee as a result of the violation, and an employee discharged or demoted in violation of this section shall be entitled to be reinstated to his former position. The burden of proof shall be upon the employee.

N.C. Gen. Stat. § 9-32 (2005) (emphasis added). The purpose of this statute is to prevent the termination of all employees because they are called to serve on a jury, a vital role of our judicial system. *See* 1987 N.C. Sess. Laws 702. "[S]tatutory schemes conferring rights to citizens imply a waiver of sovereign immunity." *Ferrell*, 334 N.C. at 655, 435 S.E.2d at 313. Section 9-32 confers a right to citizens that they shall not be terminated or demoted by their employer for serving on a jury. This implies a modification of sovereign immunity as the General Assembly conferred a right to all citizens. *See id.*

The General Assembly explicitly stated that *any employer* who violated the statute shall be liable in a civil action. The State and state agencies are employers. The statute does not exempt the State from complying with section 9-32; therefore, section 9-32 applies to the State and state agencies. The General Assembly has modified the State's sovereign immunity for actions where the State, as an employer, discharges or demotes an employee for being called for jury duty. *See Steelman*, 279 N.C. at 595, 184 S.E.2d at 243. The General Assembly balanced two competing public policies—the need to protect employees whom are called to serve on a jury, a key role in our judicial system, and the need to protect the State from being sued due to its performance of a governmental function. *See State v. Cantwell*, 142 N.C. 604, 608, 55 S.E. 820, 821 (1906) ("It is impossible for the State to protect life, liberty, and property without the aid of juries. The system is a vital part of the machinery of government. It is the undoubted duty of the legislative department to provide for the selection of jurors in such way as shall best subserve the public wel-

fare." (citation omitted)). By modifying the State's sovereign immunity in this statute, the General Assembly effectuated its goal of protecting *all* employees who are called to jury service, not just those in the private sector.

Ms. Abbott named as a cause of action in her complaint a violation of section 9-32 of the North Carolina General Statutes. As the legislature had included the State and state agencies as being subject to suit in this section, Ms. Abbott did not need to include in her pleadings that the Nursing Board had waived its sovereign immunity, as there was no immunity to waive.

Accordingly, the trial court erred in granting the Nursing Board's motion to dismiss with regards to Ms. Abbott's first claim for relief, violation of section 9-32 of the North Carolina General Statutes. However, the trial court properly dismissed Ms. Abbott's second and third claims for relief pursuant to the doctrine of sovereign immunity.

STATE OF NORTH CAROLINA v. DONALD WILLIAM ANDERSON, JR.

No. COA05-1038

(Filed 4 April 2006)

1. Indecent Liberties; Sexual Offenses— sufficiency of indictment—time periods

The trial court did not err in a multiple indecent liberties and multiple first-degree sexual offense with a child under the age of thirteen years case by entering judgment against defendant even though he contends the indictments were fatally defective based on the fact they alleged only a year or a season for the dates of the offenses, because: (1) defendant admits he failed to object to the indictments at trial, and he also failed to move for a bill of particulars or for appropriate relief; (2) although defendant asserts insufficient time periods, it has been repeatedly stated that in the interests of justice and recognizing that young children cannot be expected to be exact regarding times and dates, the uncertainty as to time goes to the weight rather than the admissibility of evidence; and (3) the indictments provided a person of ordinary intelligence a reasonable opportunity to know what alleged conduct was prohibited.

2. Evidence— prior crimes or bad acts—cunnilingus

The trial court did not err in a multiple indecent liberties and multiple first-degree sexual offense with a child under the age of thirteen years case by denying defendant's motion to exclude evidence admitted under N.C.G.S. § 8C-1, Rule 404(b) that he performed a prior act of cunnilingus on the victim based on the fact that the incident did not occur within Cabarrus County, because: (1) the similarity of the 404(b) evidence to the offense and the temporal proximity to the other incidents to the offense may reveal defendant's opportunity, plan, and intent to take advantage of the minor victim; (2) following the first incident, defendant engaged in numerous other sexual acts with the victim in the seclusion of his bedroom while her mother was outside or away from the home; and (3) assuming arguendo that the evidence was improperly admitted, defendant failed to show a different result would have been reached absent this evidence in light of defendant's admissions and other evidence of defendant's guilt.

3. Sentencing— aggravating factors—took advantage of position of trust or confidence

The trial court did not abuse its discretion in a multiple indecent liberties and multiple first-degree sexual offense with a child under the age of thirteen years case by sentencing defendant in the aggravated range based on the jury finding beyond a reasonable doubt the aggravating factor that defendant stepfather took advantage of a position of trust or confidence.

Appeal by defendant from judgments entered 23 September 2004 by Judge Larry G. Ford in Cabarrus County Superior Court. Heard in the Court of Appeals 9 March 2006.

Attorney General Roy Cooper, by Assistant Attorney General Margaret A. Force and Assistant Attorney General Robert C. Montgomery, for the State.

Mercedes O. Chut, for defendant-appellant.

TYSON, Judge.

Donald William Anderson ("defendant") appeals from judgment entered after a jury found him to be guilty of three counts of indecent liberties with H.B., a minor child, and five counts of first-degree sexual offense with H.B., a child under the age of thirteen years. We find no error.

I. Background

A. State's Evidence

Defendant is H.B.'s stepfather. Defendant moved into H.B.'s mother's home when H.B. was attending third grade. Defendant and H.B.'s mother eventually married. Defendant moved out of the marital home after accusations arose in this case.

H.B. was born on 6 June 1990. She testified the first time a sexual incident occurred with defendant was when she was between the ages of six and eight years old. At that time, H.B. told defendant her "private area" was burning. Defendant told H.B. to remove her clothes and led her into a bedroom where he inserted his tongue into her vagina. Defendant told H.B. to not tell her mother what defendant had done at that time.

The next sexual incident also occurred when H.B. was in the third grade. H.B. testified defendant routinely asked her to lift up her shirt or blouse so he could look at her breasts and to take "naps" with him while H.B.'s mother was at work. When H.B. was between nine and ten years old, defendant requested H.B. to take naps with him approximately twice a month. During the naps, defendant would touch H.B.'s vagina and breasts over her clothes and place his hands under her clothes. H.B. testified defendant inserted his finger into her vagina.

When H.B. was between eleven and twelve years old, defendant took H.B. into his bedroom and placed H.B.'s hands onto his penis, while his pants were down. Defendant asked H.B. numerous times to pull up her shirt so that he could touch her breasts. Defendant assured H.B. he would not require her to do housework or homework in exchange for her granting his sexual requests. H.B. testified defendant commented, "[i]f you let me look, I won't make you do your chores."

H.B. testified when she was attending sixth grade she spoke with a guidance counselor at school about the incidents. She told other adults, as well. H.B.'s mother demanded defendant to move out of the marital home. Several months later, defendant moved back into the home. After defendant returned, H.B. testified defendant asked her on numerous occasions to pull up her shirt. She refused. She also testified defendant peered through her bathroom door and observed her taking a shower.

While H.B. was attending eighth grade, her teachers became concerned after she consistently failed to turn in her homework. When

H.B.'s teachers questioned her about her poor school performance, H.B. told them about her relationship with defendant. The school guidance counselor scheduled a meeting with two social workers. H.B. attended the meeting and informed them of the sexual encounters she had experienced with defendant.

Defendant's statements about some of the sexual incidents were consistent with H.B.'s statements. Toby Lester ("Lester"), a social worker for Cabarrus County Department of Social Services ("DSS"), testified defendant admitted he had touched H.B.'s "privates" and penetrated her "private" with his fingers. Defendant admitted he had performed the acts so often he could not state how many times they occurred. He also admitted he performed oral sex on H.B. and had ejaculated after he placed H.B.'s hands onto his penis. While defendant could not remember specific dates when the conduct occurred, he told Lester that it happened from the time H.B. was seven until one year before the trial.

Detective Scott Mason ("Detective Mason") of the Cabarrus County Sheriff's Department testified regarding a statement he took from defendant. Defendant admitted the first time he engaged in sexual touching of H.B. was when he was babysitting her during the summer of 1998, when H.B. was seven or eight years old. Defendant's account of the act was consistent with H.B.'s testimony. Defendant admitted he rubbed H.B.'s breasts and vagina while he took "naps" with her. Detective Mason wrote down defendant's statement. Defendant signed the statement and acknowledged it was true and accurate.

Dr. Greg Garraro at Suburban Pediatrics testified that he examined H.B. and found no physical evidence of the alleged abuses. Dr. Garraro stated physical evidence would not be expected to be present three years after acts of digital penetration.

B. Defendant's Evidence

Defendant testified at trial and admitted portions of his alleged conduct. He denied inserting his finger into H.B.'s vagina. Defendant testified he was intoxicated when he talked with Detective Mason. Defendant also testified he was distracted when he talked to Detective Mason because he possessed marijuana and was planning a method to get rid of it.

A jury found defendant to be guilty of three counts of indecent liberties with a minor child and five counts of first-degree sexual

offense with a child under the age of thirteen. Two counts of first-degree sexual offense were consolidated, and defendant was sentenced to a minimum of 244 months and a maximum of 302 months incarcerated. The remaining three counts of first-degree sex offense were consolidated, and defendant was sentenced to a minimum of 245 months and a maximum of 303 months to be served at the expiration of sentences imposed in 04 CRS 2409. Two counts of indecent liberties were consolidated, and defendant was sentenced to a minimum of eighteen and a maximum of twenty-two months to be served at the expiration of sentences imposed in 04 CRS 2411. For the remaining count of indecent liberties, defendant was sentenced to a minimum of eighteen and a maximum of twenty-two months to be served at the expiration of 04 CRS 2412. Defendant appeals.

II. Issues

Defendant argues the trial court erred when it: (1) entered judgment against him due to fatal defects in each indictment; (2) denied his motion to exclude evidence admitted under Rule 404(b); and (3) sentenced him in the aggravated range.

III. Indictments

A. Preservation of Error

[1] Defendant argues the trial court erred when it entered judgments on fatally defective indictments. We disagree.

Defendant contends because the indictments "provide only a year or a season for the date of the offense," the trial court failed to acquire "jurisdiction over [defendant] and the judgments against him are void." The indictments allege the following dates:

(1) First Degree Sex Offense, Summer 1999

(2) First Degree Sex Offense, Fall 1999

(3) First Degree Sex Offense, Winter 1999-2000

(4) First Degree Sex Offense, Spring 2000

(5) First Degree Sex Offense, Fall 2000

(6) Indecent Liberties with a Child, Summer 2000

(7) Indecent Liberties with a Child, Summer 2000

(8) Indecent Liberties with a Child, Winter 2000-2001

Defendant admits he failed to object to the indictments at trial. Defendant also failed to move for a bill of particulars or for appropriate relief. *See State v. Sturdivant*, 304 N.C. 293, 308, 283 S.E.2d 719, 729 (1981) ("G.S. 15A-1415(b)(2) provides that a motion for appropriate relief, which is based upon the trial court's lack of subject matter jurisdiction, may be asserted by a defendant 'any time' after verdict.").

Our Supreme Court has stated:

> It is well settled that a constitutional question which is not raised and passed upon in the trial court will not ordinarily be considered on appeal. An attack on an indictment is waived when its validity is not challenged in the trial court. However, where an indictment is alleged to be invalid on its face, thereby depriving the trial court of its jurisdiction, a challenge to that indictment may be made at any time, even if it was not contested in the trial court. As to the indictments challenged in defendant's motion for appropriate relief, this Court has held that a motion for appropriate relief filed while an appeal is pending properly raises the issue of an indictment's conferral of jurisdiction to a trial court. Although a motion for appropriate relief generally does not allow a defendant to raise an issue that could have been raised on direct appeal, a challenge to the trial court's jurisdiction may be raised by a motion for appropriate relief. Therefore, these issues are properly before this Court.

State v. Wallace, 351 N.C. 481, 503-04, 528 S.E.2d 326, 340-41 (internal quotations and citations omitted), *cert. denied*, 531 U.S. 1018, 148 L. Ed. 2d 498 (2000).

In *Sturdivant*, our Supreme Court held, "the failure of a criminal pleading to charge the essential elements of the stated offense is an error of law which may be corrected upon appellate review even though no corresponding objection, exception or motion was made in the trial division." 304 N.C. at 308, 283 S.E.2d at 729-30.

In *State v. McGaha*, our Supreme Court arrested judgment against the defendant. 306 N.C. 699, 700, 295 S.E.2d 449, 450 (1982). The Court found the indictment was fatally flawed because it charged the defendant with committing a first-degree sexual offense for engaging in a sexual act with a victim who was twelve years and eight months old, the statute forbidding such conduct with children "of the age of 12 years or less." *Id.* The Court stated:

> A motion in arrest of judgment is directed to some fatal defect appearing on the face of the record. It has been held that such a motion may be made for the first time on appeal in the Supreme Court. A motion in arrest of judgment is proper when it is apparent that no judgment against the defendant could be lawfully entered because of some fatal error appearing in: (1) the organization of the court, (2) the charge made against the defendant (the information, warrant or indictment), (3) the arraignment and plea, (4) the verdict, and (5) the judgment.

Id. at 702, 295 S.E.2d at 451 (internal citations omitted).

B. Sufficiency of Indictments

After reviewing sufficiency of indictments in child sexual abuse charges, this Court stated:

> Unless the date given in a bill of indictment is an essential element of the crime charged, the general rule in North Carolina, particularly in child sex abuse cases, is that an indictment is sufficient to charge a defendant with the specific statutory offense if it quotes the operative language of the statute. Moreover, in North Carolina, the statute under which a defendant is charged is considered sufficiently specific under both our federal and state constitutions if it gives a person of ordinary intelligence a reasonable opportunity to know what is prohibited.

State v. Blackmon, 130 N.C. App. 692, 693-94, 507 S.E.2d 42, 43-44 (internal quotations and citations omitted), *disc. rev. denied*, 349 N.C. 531, 526 S.E.2d 470 (1998).

Regarding testimony in child sexual abuse cases, our Supreme Court stated:

> We have stated repeatedly that in the interests of justice and recognizing that young children cannot be expected to be exact regarding times and dates, a child's uncertainty as to time or date upon which the offense charged was committed goes to the weight rather than the admissibility of the evidence. Nonsuit may not be allowed on the ground that the State's evidence fails to fix any definite time for the offense where there is sufficient evidence that defendant committed each essential act of the offense.

State v. Wood, 311 N.C. 739, 742, 319 S.E.2d 247, 249 (1984) (internal citations omitted).

Defendant only argues the indictments alleged insufficient time periods. He does not assert the indictments failed to allege an essential element of each offense. Defendant failed to either move for a bill of particulars or for appropriate relief. The indictments provided "a person of ordinary intelligence a reasonable opportunity to know what [alleged conduct was] prohibited." *Blackmon*, 130 N.C. App. at 693-94, 507 S.E.2d at 43-44. Defendant failed to preserve this issue for review. This assignment of error is dismissed.

IV. Rule 404(b) Evidence

[2] Defendant argues the trial court erred when it denied his motion to exclude evidence admitted under Rule 404(b). Defendant contends evidence he performed cunnilingus on the victim should not have been admitted because the incident did not occur within Cabarrus County and that charge had been dismissed. We disagree.

North Carolina Rule of Evidence 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C. Gen. Stat. § 8C-1, Rule 404(b) (2005).

Our Supreme Court stated Rule 404(b) is a:

> rule of inclusion of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but one exception *requiring 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.* Thus, even though evidence may tend to show other crimes, wrongs, or acts by defendant and his propensity to commit them, it is admissible under Rule 404(b) so long as it also is relevant for some purpose other than to show that defendant has the propensity for the type of conduct for which he is being tried.

State v. Coffey, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990) (emphasis supplied) (citations and internal quotations omitted), *cert. denied*, —— N.C. ——, 421 S.E.2d 360 (1992).

"The use of evidence under Rule 404(b) is guided by two constraints: similarity and temporal proximity." *State v. Bidgood*, 144

N.C. App. 267, 271, 550 S.E.2d 198, 201 (internal quotations and citation omitted), *cert. denied*, 354 N.C. 222, 554 S.E.2d 647 (2001). Also, Rule 403 provides a balancing test and states, "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." N.C. Gen. Stat. § 8C-1, Rule 403 (2005).

The similarity of the 404(b) evidence to the offense and the temporal proximity to the other incidents to the offense may reveal defendant's opportunity, plan, and intent to take advantage of H.B. After H.B. told defendant she was "burning" in her vaginal area, defendant took H.B. to a private bedroom and performed cunnilingus on her while her mother was not at home. The State's evidence also tended to show that following the first incident, defendant engaged in numerous other sexual acts with H.B. in the seclusion of his bedroom while her mother was outside or away from the home. These incidents occurred from the time H.B. was seven or eight years old until one year before the trial.

Presuming without deciding the Rule 404(b) evidence was improperly admitted, our standard of review becomes whether a reasonable possibility exists that the evidence, if excluded, would have altered the result of the trial. Our Supreme Court has stated, "[t]he burden is on the appellant not only to show error but also to show that there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial." *State v. Galloway*, 304 N.C. 485, 496, 284 S.E.2d 509, 516 (1981).

In light of defendant's admissions and other evidence admitted, defendant has failed to show in the absence of this evidence "a different result would have been reached at the trial." *Id.* This assignment of error is overruled.

V. Aggravated Sentencing

[3] Defendant argues the trial court erred when it interpreted the law to require sentencing him in the aggravated range. Defendant contends the trial court failed to exercise its discretion and failed to weigh the aggravating and mitigating factors in applying the sentencing statute. We disagree.

In *Blakely v. Washington*, the United States Supreme Court held, "[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." 542 U.S. 296, 301, 159 L. Ed. 2d 403, 412 (2004).

The State obtained superseding indictments alleging one aggravating factor for each offense; i.e., that defendant "took advantage of a position of trust or confidence."

N.C. Gen. Stat. § 15A-1340.16 (2005) was amended after *Blakely*, and provides:

> The court shall consider evidence of aggravating or mitigating factors present in the offense that make an aggravated or mitigated sentence appropriate, but the decision to depart from the presumptive range is in the discretion of the court.
>
> . . . .
>
> If the jury, or with respect to an aggravating factor under G.S. 15A-1340.16(d)(18a), the court, finds that aggravating factors exist or the court finds that mitigating factors exist, the court may depart from the presumptive range of sentences specified in G.S. 15A-1340.17(c)(2). If aggravating factors are present and the court determines they are sufficient to outweigh any mitigating factors that are present, it may impose a sentence that is permitted by the aggravated range described in G.S. 15A-1340.17(c)(4). If the court finds that mitigating factors are present and are sufficient to outweigh any aggravating factors that are present, it may impose a sentence that is permitted by the mitigated range described in G.S. 15A-1340.17(c)(3).

The jury found the existence of the aggravating factor beyond a reasonable doubt for each offense. Defense counsel, the district attorney, and the trial court discussed at length the trial court's weighing of the aggravating and the two mitigating factors, in light of *Blakely*. *Id*. The State asked the trial court "to accredit the jury's verdict and find this aggravating factor and then weigh it as appropriate against any mitigating factors that may be appropriate and then set an appropriate sentence." Immediately before imposing the aggravated sentences, the trial court indicated it would deviate from the presumptive range. The court stated, "I'm not going to defeat what the jury said here so I'm going to do something."

Defendant has failed to show any abuse in the trial court's discretion to sentence him in the aggravating range after the jury found the aggravating factors to exist beyond a reasonable doubt. This assignment of error is overruled.

VI. Conclusion

Defendant failed to object or to move for a bill of particulars or for appropriate relief to preserve his assignment of error concerning the indictments for appellate review. The indictments alleged each essential element of each offense. The trial court did not err when it denied defendant's motion to exclude evidence under North Carolina Rules of Evidence, Rule 404(b).

The trial court did not err when it sentenced defendant in the aggravating range after the jury found aggravating factors to exist beyond a reasonable doubt. The sentence was proper notwithstanding the trial court also finding two mitigating factors to exist. Defendant received a fair trial free from errors he assigned and argued.

No error.

Judges McCULLOUGH and LEVINSON concur.

ENTERPRISE LEASING COMPANY SOUTHEAST, D/B/A ENTERPRISE RENT-A-CAR, PLAINTIFF v. ANGELA WILLIAMS, DEFENDANT AND THIRD-PARTY PLAINTIFF v. VIRGINIA L. WILLIAMS AND DISCOVERY INSURANCE CO., THIRD-PARTY DEFENDANTS

No. COA05-865

(Filed 4 April 2006)

1. Appeal and Error— appealability—interlocutory order—substantial right—insurer's duty to defend

Although defendant/third-party plaintiff's appeal from the grant of summary judgment in favor of third-party defendant insurance company is an appeal from an interlocutory order since other claims remain outstanding in the trial court, notwithstanding dismissal of all claims involving the insurance company by virtue of the order, this appeal is properly before the Court of Appeals because the issue of the insurer's duty to defend involves a substantial right to both the insured and the insurer.

2. Insurance— leased vehicle—lessee not driver—insurer's duty to defend

An automobile policy issued to defendant provided no coverage and third-party defendant insurer had no duty to defend defendant insured with regard to an accident involving a car

leased by defendant and driven by her sister-in-law at a time when defendant was not in the car because: (1) the express terms of the policy provide that the insurance company has no duty to defend defendant in any suit for property damage not covered under the policy (damage to property leased to the insured is excluded from coverage); (2) defendant's sister-in-law does not fall within the policy definition of a family member; (3) even assuming arguendo that the sister-in-law qualified as a lessee of the vehicle, the insurance company would be under no duty to defend a suit against defendant because the sister-in-law was not a resident of defendant's household, and thus, would not qualify as a covered insured under the policy; (4) the policy is not ambiguous merely based on the fact that the insurance company promises to defend suits seeking property damage in one sentence and then qualifies that duty in another sentence; and (5) although defendant contends the rented vehicle was a non-owned auto for purposes of coverage, she did not have immediate charge or control over the leased automobile at the time of the collision as she was neither the driver nor passenger.

Appeal by defendant/third-party plaintiff from order entered 16 March 2005 by Judge Robert C. Ervin in Mecklenburg County Superior Court. Heard in the Court of Appeals 25 January 2006.

Edward J. McNaughton for defendant/third-party plaintiff-appellant Angela Williams.

Golding, Holden & Pope, L.L.P., by J. Scott Bayne, for third-party defendant-appellee Discovery Insurance Company.

JOHN, Judge.

Defendant and Third-Party Plaintiff Angela Williams ("Angela") appeals the trial court's 16 March 2005 order ("the Order") granting summary judgment in favor of Third-Party Defendant Discovery Insurance Company ("Discovery"). For the reasons discussed herein, we affirm the trial court.

Pertinent factual and procedural history includes the following: In January 2004, Third-Party Defendant Virginia Williams ("Virginia") arranged to rent an automobile from Plaintiff Enterprise Leasing Company d/b/a Enterprise Rent-A-Car ("Enterprise"). On 18 January 2004, Virginia was driven by her sister-in-law Angela to a Charlotte, North Carolina, branch of Enterprise to pick up the rented vehicle.

Enterprise rental agent Carolyne Westfall ("Westfall") handled Virginia's reservation. After Westfall prepared a rental agreement containing Virginia's name, address, telephone numbers, and other personal information, Virginia presented a credit card to Westfall for payment of the rental charge. However, Virginia's credit card was denied, and Westfall thereupon refused to rent her the vehicle.

Upon retrieving a credit card from her automobile, Angela offered to pay the rental charge. Westfall declined, explaining it was required that Angela be designated as "Renter" of the vehicle if she made payment. However, Westfall continued, Angela could list Virginia as an additional driver of the rented vehicle for an additional fee. According to Westfall, "Angela and Virginia then had a conversation, during which Virginia specifically stated to Angela, 'I'll just drive your car.' "

Angela thereafter informed Westfall she wished to rent a vehicle in her name, but did not want to list Virginia as an additional driver. Westfall then erased Virginia's personal information from the rental agreement ("the Agreement") and inserted Angela's address, telephone numbers, driver's license number and expiration date, and date of birth. However, Westfall failed to replace Virginia's name with that of Angela on the Agreement. Nevertheless, Angela reviewed the Agreement, initialed and signed it in the spaces designated "Renter," and provided her credit card in payment of the rental charges. Westfall then accompanied Angela outside, where the latter walked around the rental vehicle to examine it. She then signed the portion of the Agreement indicating the vehicle was in good condition. Angela departed the Enterprise lot driving the rental vehicle and Virginia drove Angela's personal vehicle off the Enterprise lot.

On 20 January 2004, Virginia was driving the rented vehicle on Interstate Highway 85 while returning to Charlotte from Raleigh. She accidently collided with a vehicle owned and operated by Thomas Matthew Snodgrass, causing substantial damage to both automobiles. Angela was not in the rented vehicle at the time, and Virginia was cited by the investigating officer for her "failure to reduce speed" to avoid the collision.

Angela was the named insured under a personal automobile insurance policy ("the Policy") issued by Discovery and in effect on the date of the accident. Angela subsequently received written notification from Southern Adjusters ("Southern") on 3 March 2004 that, under the terms of the Policy, Discovery was not required to provide

her with either liability coverage for the accident or physical damage coverage for the vehicle. On 1 April 2004, Enterprise wrote Angela that she was "legally liable for [a total of $11,175.32 in] damages and other related expenses" arising out of the collision.

Enterprise filed the instant complaint 4 June 2004 in Mecklenburg County District Court, alleging Angela's "allowance of an unauthorized driver to operate the rental automobile without [the] written consent [of Enterprise] constitute[d] a breach of contract" entitling Enterprise to $11,175.32 in damages as well as counsel fees. In her 17 August 2004 Answer and Third-Party Complaint, Angela admitted she "signed and initialed" the Agreement and that "some of the information recorded" upon it "relates to her." However, Angela claimed "this action was taken by her" and "this information was provided by her" at the request of Enterprise "for the sole benefit and purpose of allowing [Westfall] to complete and process the Rental Agreement between Enterprise and [Virginia]." Angela further alleged Enterprise was "aware [she] only intended to guarant[ee] payment by [Virginia] of the rental fees under the Rental Agreement," and denied she was the "Renter as defined by the Rental Agreement." By third-party cross-claims Angela asserted, *inter alia*, that Virginia's negligence caused the collision, that Discovery had a duty to defend Angela in the action, and that Angela was entitled to indemnity from both Discovery and Virginia. On 15 October 2004, Enterprise filed its Answer to the third-party complaint, denying the material allegations thereof and seeking transfer of the matter to superior court.

Subsequent to a January 2004 entry of default judgment against Virginia, the case was ordered transferred to Mecklenburg County Superior Court on 2 February 2005. A hearing was conducted 15 March 2005. The trial court thereafter entered the Order granting Discovery's motion for summary judgment and denying that of Angela, concluding "there exists no genuine issue of material fact regarding [Discovery's] insurance policy" and Discovery "has no coverage for th[e] accident and no duty to defend." Angela appeals.

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[1] Prior to reviewing the contentions of the parties, we note the instant appeal is interlocutory in that other claims remain outstanding in the trial court, notwithstanding dismissal of all claims involving Discovery by virtue of the Order. In *Lambe Realty Inv., Inc. v. Allstate Ins. Co.*, 137 N.C. App. 1, 4, 527 S.E.2d 328, 331 (2000), however, this Court stated:

> the duty to defend involves a substantial right to both the insured and the insurer. Accordingly, we conclude that the order of partial summary judgment on the issue of whether [the insurer] has a duty to defend [the insured] in the underlying action affects a substantial right that might be lost absent immediate appeal.

(citations and quotation marks omitted). Angela's appeal therefore is properly before us.

[2] Angela argues the trial court erred in granting summary judgment in favor of Discovery. She insists genuine issues of material fact remain regarding both the question of coverage and Discovery's duty to defend under the Policy. Angela's arguments are unpersuasive.

"In reviewing the propriety of summary judgment, the appellate court is restricted to assessing the record before it." *Waste Management of Carolinas, Inc. v. Peerless Ins. Co.*, 315 N.C. 688, 690, 340 S.E.2d 374, 377 (citation omitted), *reh'g denied*, 316 N.C. 386, 346 S.E.2d 134 (1986). "If on the basis of that record it is clear that no genuine issue of material fact existed and that the movant was entitled to judgment as a matter of law, summary judgment was appropriately granted." *Id.* at 690, 340 S.E.2d at 377 (citation omitted).

Regarding the correlation between the provisions of an insurance policy and the insurer's duty to defend its insured, our Supreme Court has previously stated that

> [g]enerally speaking, the insurer's duty to defend the insured is broader than its obligation to pay damages incurred by events covered by a particular policy. An insurer's duty to defend is ordinarily measured by the facts as alleged in the pleadings; its duty to pay is measured by the facts ultimately determined at trial. When the pleadings state facts demonstrating that the alleged injury is covered by the policy, then the insurer has a duty to defend, whether or not the insured is ultimately liable. Conversely, when the pleadings allege facts indicating that the event in question is not covered, and the insurer has no knowledge that the facts are otherwise, then it is not bound to defend.

Id. at 691, 340 S.E.2d at 377 (citations and footnotes omitted).

"An insurance policy is a contract and, unless overridden by statute, its provisions govern the rights and duties of the parties thereto." *Brown v. Lumbermens Mut. Casualty Co.*, 326 N.C. 387,

392, 390 S.E.2d 150, 153 (1990) (citation omitted). "As with all contracts, the goal of construction is to arrive at the intent of the parties when the policy was issued." *Woods v. Insurance Co.*, 295 N.C. 500, 505, 246 S.E.2d 773, 777 (1978). "Any ambiguity in the policy language must be resolved against the insurance company and in favor of the insured." *Brown*, 326 N.C. at 392, 390 S.E.2d at 153 (citation omitted). However,

> [n]o ambiguity . . . exists unless, in the opinion of the court, the language of the policy is fairly and reasonably susceptible to either of the constructions for which the parties contend. If it is not, the court must enforce the contract as the parties have made it and may not, under the guise of interpreting an ambiguous provision, remake the contract and impose liability upon the company which it did not assume and for which the policyholder did not pay.

Trust Co. v. Insurance Co., 276 N.C. 348, 354, 172 S.E.2d 518, 522 (1970) (citation omitted). Bearing these principles in mind, we proceed to an examination of the Policy to determine whether the trial court properly granted summary judgment on the issues of coverage and duty to defend.

Part A of the Policy, entitled "Liability Coverage," provides in pertinent part as follows:

> **INSURING AGREEMENT**
>
> We will pay damages for **bodily injury** or **property damage** for which **any insured** becomes legally responsible because of an auto accident. . . . We will settle or defend, as we consider appropriate, any claim or suit asking for these damages. . . . We have no duty to defend any suit or settle any claim for **bodily injury** or **property damage** not covered under this policy.
>
> . . . .
>
> **EXCLUSIONS**
>
> A. We do not provide Liability Coverage for any **Insured**:
>
> . . . .
>
> 3. For **property damage** to property:
>
> a. rented to;
>
> b. used by; or

c. in the care of;
that **insured**. . . .

(emphasis in all policy provisions cited herein in original).

Therefore, according to the express terms of the Policy, Discovery has no duty to defend Angela in any suit for property damage not covered under the Policy. More specifically, damage to property rented to the insured is excluded from coverage. Notwithstanding the foregoing, Angela baldly asserts "there remains the possibility that [she] would not be found the renter [of the vehicle damaged in the collision], in which case the exclusion [of the Policy] would not apply" and Discovery "would have a duty to defend [her] pursuant to *Part A* of the Policy. This argument is without merit.

As detailed above, coverage under the "Insuring Agreement" is expressly limited to "**property damage** for which any **insured** becomes legally responsible because of an auto accident." Part A defines the term "**insured**" in pertinent part as follows:

1. You or any **family member** for the ownership maintenance or use of any auto or **trailer**.

According to the "Definitions" section of the Policy, the term "**family member**" means "a person related to you by blood, marriage or adoption who is a resident of your household."

It is uncontradicted in the record that Virginia is not a resident of Angela's household even though the two are related by marriage. Virginia therefore does not meet the Policy definition of a "family member."

In her sworn affidavit, Westfall states she "erase[d] Virginia's information" from the Agreement, including Virginia's address and home phone number, and thereafter filled in Angela's own "information." More significantly, affidavits of service filed by Angela prior to the summary judgment hearing indicate Virginia resided at two separate addresses in 2004, neither of which correspond to Angela's home address. Further, in her response to Discovery's interrogatories and requests for information, Angela provides an address different from her own when asked to "list the residential address for [] Virginia Williams as of January 20, 2004[,]" the date of the accident. Accordingly, even assuming *arguendo* that Virginia qualified as "renter" of the vehicle, Discovery would be under no duty to defend a suit against Angela because Virginia, not "a resident of

[Angela's] household," would not qualify as a covered "insured" under the Policy.

In similar vein, Angela claims the language of the "Insuring Agreement" limiting Discovery's duty to defend to "any suit or . . . claim for . . . **property damage** . . . covered under" the Policy "[a]t best . . . creates an ambiguity when read with the immediately preceding affirmative promise to settle or defend all suits asking for property damages because of an accident." However, although "[t]he fact that a dispute has arisen as to the parties' interpretation of the contract is some indication that the language of the contract is at best, ambiguous," *St. Paul Fire & Marine Ins. Co. v. Freeman-White Assoc., Inc.*, 322 N.C. 77, 83, 366 S.E.2d 480, 484 (1988), "ambiguity . . . is not established by the mere fact that the plaintiff makes a claim based upon a construction of its language which the company asserts is not its meaning." *Trust Co.*, 276 N.C. at 354, 172 S.E.2d at 522.

Here, we are not persuaded the Policy is ambiguous merely because Discovery promises to defend suits seeking property damages in one sentence and then qualifies that duty in another sentence, both of which appear in the same paragraph and under the same contextual heading. To hold otherwise would violate general principles of insurance policy construction, which require courts to "construe[] [insurance policies] as a whole, giving effect to each clause, if possible." *Chavis v. Southern Life Ins. Co.*, 76 N.C. App. 481, 484, 333 S.E.2d 559, 561 (1985) (citation omitted), *aff'd*, 318 N.C. 259, 347 S.E.2d 425 (1986); *see Woods*, 295 N.C. at 506, 246 S.E.2d at 777 ("The various terms of the policy are to be harmoniously construed, and if possible, every word and every provision is to be given effect."). Accordingly, we reject Angela's assertion that the Policy is ambiguous on its face.

Lastly, Angela contends Part D of the Policy provides coverage for damages to the rented vehicle irrespective of the exclusion for rented property set forth in Part A. Part D of the Policy, entitled "Coverage For Damage To Your Auto," reads as follows:

> We will pay for direct and accidental loss to **your covered auto** or any **non-owned auto**, including their equipment. . . .

Citing the foregoing language, Angela reasons the rented vehicle was a "non-owned auto" for the purposes of coverage and that Discovery thus had a duty to defend the suit against her and pro-

vide coverage for Enterprise's damages. Angela's contention misses the mark.

"Automobile liability policies that provide coverage for non-owned autos are intended to provide coverage to a driver without additional premiums, for the occasional or infrequent driving of an automobile other than his own." *Nationwide Mut. Ins. Co. v. Walters*, 142 N.C. App. 183, 188, 541 S.E.2d 773, 776 (2001) (citation and quotation marks omitted). Here, Part D of the Policy defines "**Non-owned auto**" in pertinent part as follows:

> 1. Any private passenger auto, station wagon type, pickup truck, van or trailer not owned by or furnished or available for the regular use of you or any **family member** while in the custody of or being operated by you or any **family member**.

Although conceding she was neither the operator of nor a passenger in the rented vehicle at the time of the collision, Angela insists the vehicle was "in [her] custody" for the purpose of Part D. Angela is mistaken.

It is well established that "[i]n construing an insurance policy, 'nontechnical words, not defined in the policy, are to be given the same meaning they usually receive in ordinary speech, unless the context requires otherwise.' " *Brown*, 326 N.C. at 392, 390 S.E.2d at 153 (quoting *Grant v. Insurance Co.*, 295 N.C. 39, 42, 243 S.E.2d 894, 897 (1978)). Here, the term "custody" is not defined in the Policy. Turning then to the " 'meaning [the term would] usually receive in ordinary speech,' " *Brown*, 326 N.C. at 392, 243 S.E.2d at 153 (citation omitted), we note Merriam-Webster's Dictionary defines the noun "custody" as "immediate charge and control (as over a ward or a suspect) exercised by a person or an authority." *Merriam-Webster's Collegiate Dictionary* (10th ed. 1998).

Under the facts of this case, Angela did not have "immediate charge" or "control" over the rented automobile at the time of the collision, as it is undisputed that she was neither driver nor passenger. Indeed, the vehicle was being operated by Virginia on Interstate Highway 85. Further, despite Angela's contention to the contrary, giving the term "custody" the above-quoted meaning does not "make[] the or being operated by portion of the definition superfluous" or fail to give "every word and every provision [of the policy] effect," *Woods*, 295 N.C. at 506, 246 S.E.2d at 777. Indeed, had the vehicle actually been operated by Angela at the time of the collision, arguably it would qualify as a "non-owned auto" under the Policy. Our applica-

tion of the general meaning of the term "custody" found in the Policy merely anticipates such instances in which a non-owned auto is "not being operated" by an insured or its "family member," but rather is in the "immediate charge" or "control" of the insured or family member. *See Id.* (in construing the terms of an insurance policy, "the various terms of the policy are to be harmoniously construed").

In sum, after reviewing the pertinent case law and provisions of the Policy, we conclude no genuine issue of material fact remains regarding whether Discovery was required to provide coverage to Angela or defend her against the suit by Enterprise. Accordingly, the trial court did not err in granting summary judgment in favor of Discovery.

Affirmed.

Judges BRYANT and CALABRIA concur.

STATE OF NORTH CAROLINA v. ALEXANDER CRAIG CROMARTIE

No. COA05-1126

(Filed 4 April 2006)

1. Assault— no instruction on lesser offense—evidence of intent to kill present—no plain error

There was no plain error in a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury by not instructing on the lesser included offense of assault with a deadly weapon inflicting serious injury. The uncontradicted evidence was that defendant went into his home, retrieved a loaded gun, pointed the gun at the victim at close range, told the victim he was not leaving the alley that day, and then shot the victim in the back. Pointing the gun at the victim and pulling the trigger is evidence from which an intent to kill may be inferred, as well as shooting the victim in the torso, where most major organs are located. It is irrelevant that defendant shot the victim only once.

2. Criminal Law— joinder of offenses—assault and possession of firearm by felon—not prejudicial

The joinder of assault and firearms possession charges for trial did not unjustly or prejudicially hinder defendant's ability to

defend himself or to receive a fair hearing. Additionally, the evidence was not complicated and the trial court's instruction to the jury clearly separated the two offenses.

3. Evidence— prior crime or bad act—no limiting instruction—no plain error

A discussion of whether a pattern jury instruction was applicable did not constitute an objection to the instruction, and the trial court's failure to give a limiting instruction on defendant's prior conviction was not erroneous. Plain error review was waived because it was not argued in the brief. Even so, the instruction would not have been applicable because it involved evidence of prior crimes admitted for purposes other than those in this case.

4. Sentencing— prior record worksheet—used to minimize record—stipulated

A defendant cannot use the prior record worksheet to seek a lesser sentence during his sentencing hearing and then disavow this conduct on appeal. The evidence here supported the trial court's findings of prior record points during sentencing where the only evidence of prior convictions was a prior record level worksheet which defense counsel acknowledged by specific reference and then used to minimize defendant's record.

Appeal by defendant from judgment entered 4 August 2004 by Judge Ernest B. Fullwood in New Hanover County Superior Court. Heard in the Court of Appeals 8 March 2006.

Attorney General Roy Cooper, by Special Deputy Attorney General Daniel D. Addison, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Benjamin Dowling-Sendor, for defendant-appellant.

STEELMAN, Judge.

Defendant, Alexander Craig Cromartie, appeals his conviction of assault with a deadly weapon with intent to kill inflicting serious injury and the sentence imposed. For the reasons discussed herein, we find no error.

The evidence at trial tended to show that defendant shot and wounded Ricky Allen (Allen) with a handgun on 27 July 2002. Allen

testified he and defendant were neighbors and he had known defendant for seven or eight years. About three years before the shooting, defendant borrowed $100.00 from Allen. Defendant eventually repaid some of the money, but still owed the remainder. Allen occasionally asked defendant when he was going to repay the rest of the money, the last time being two weeks before the shooting.

On the morning of 27 July 2002, Allen was riding his motorcycle when defendant approached in a car. Allen pulled over to see what defendant wanted. Defendant told Allen to follow him to his mother's house. Allen agreed because he thought defendant was finally going to repay him. Once they arrived at his mother's house, defendant went inside and came out a few minutes later. Allen testified that when defendant came out he was holding a handgun, partially wrapped in a T-shirt. Defendant put the gun to Allen's head and said, "You not leaving out this alley today." Defendant then walked past Allen about fifteen feet and said "here go you mother— MF money" and shot Allen one time in the back. Allen slid off his motorcycle and ran towards his house. When he looked back, defendant was still standing in the same spot. As soon as Allen arrived home he called 911. He then went outside and sat on the grass and waited for the police to arrive. Allen told the police what happened and identified defendant as the person who shot him. Allen was taken to the hospital for treatment. The bullet from defendant's gun crossed Allen's spine, broke a rib and lodged under his shoulder blade.

In an interview with Detective Craig of the Wilmington Police Department following the shooting, defendant recounted the events leading up to the shooting. Approximately eight months after the shooting, police arrested defendant. He was indicted for one count of assault with a deadly weapon with intent to kill inflicting serious injury and one count of possession of a firearm by a felon. The matter came on for trial and the jury found defendant guilty on both charges. The trial court sentenced defendant to consecutive terms of imprisonment of 133 to 169 months for the assault and 16 to 20 months for possession of a firearm by a felon. Defendant appeals.

[1] In defendant's first argument, he contends the trial court committed plain error when it failed to instruct the jury on the lesser included offense of assault with a deadly weapon inflicting serious injury. We disagree.

Since defendant failed to object to the jury charge or any omission thereto before the jury retired to consider its verdict, our review

is limited to plain error. *State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 378-79 (1983). The plain error rule only applies in truly exceptional cases, such that where it is applied " '[i]t is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court.' " *Id.* at 661, 300 S.E.2d 379 (citations omitted). To constitute plain error, defendant bears the burden of convincing the appellate court that absent the error, the jury probably would have reached a different verdict. *Odom*, 307 N.C. at 661, 300 S.E.2d 379.

Defendant asserts the trial court committed plain error by failing to instruct the jury to consider whether defendant was guilty of assault with a deadly weapon inflicting serious injury, a lesser-included offense of assault with a deadly weapon with intent to kill inflicting serious injury. Defendant asserts the evidence concerning his intent to kill was equivocal; therefore, the judge should have instructed the jury on the lesser assault crime. Specifically, defendant argues that since he did not immediately shoot Mr. Allen, but walked past him and then shot him only one time in the back, rather than the head, this evidence raises a issue of intent to kill.

The only difference in what the State must prove for the offense of assault with a deadly weapon inflicting serious injury and assault with a deadly weapon with intent to kill inflicting serious injury is the element of intent to kill. *See State v. Grigsby*, 351 N.C. 454, 526 S.E.2d 460 (2000). "Where all the evidence tends to show a shooting with a deadly weapon with the intent to kill, the trial court does not err in refusing to submit the lesser included offense of assault with a deadly weapon." *State v. Riley*, 159 N.C. App. 546, 554, 583 S.E.2d 379, 385 (2003) (citing *State v. Oliver*, 334 N.C. 513, 523, 434 S.E.2d 202, 207 (1993)). " 'The defendant's intent to kill may be inferred from the nature of the assault, the manner in which it was made, the conduct of the parties, and other relevant circumstances.' " *Id.* (quoting *State v. James*, 321 N.C. 676, 688, 365 S.E.2d 579, 586 (1988)).

In *State v. Riley*, this Court held the trial court did not commit plain error in failing to instruct the jury on the misdemeanor of assault with a deadly weapon as a possible lesser included offense of the charge of felonious assault with a deadly weapon with the intent to kill. 159 N.C. App. at 553-54, 583 S.E.2d at 385. The only difference between the two charges was intent to kill. *Id.* We held there was sufficient evidence of the defendant's intent to kill where he fired a handgun in a crowd of people while only eighteen feet away and after

shouting words to the effect of "I got you now, I got you now[.]" *Id.* at 554, 583 S.E.2d at 385.

In the instant case, the uncontradicted evidence establishes that defendant went into his home, retrieved a loaded gun, pointed the gun at the victim at close range, told the victim he was not leaving the alley that day, and then shot the victim in the back. Where the defendant points a gun at the victim and pulls the trigger, this constitutes evidence from which intent to kill may be inferred. *See James*, 321 N.C. at 688, 365 S.E.2d at 586; *State v. Reives*, 29 N.C. App. 11, 12-13, 222 S.E.2d 727, 728 (1976). Moreover, defendant shot Mr. Allen in his torso, where the majority of his major organs are located. This also demonstrates an intent to kill since "an assailant 'must be held to intend the natural consequences of his deliberate act.' " *Grigsby*, 351 N.C. at 457, 526 S.E.2d at 462 (citations omitted). It is irrelevant that defendant only shot the victim one time. The lack of multiple shots fired does not negate intent to kill. *See State v. Larry*, 345 N.C. 497, 518, 481 S.E.2d 907, 919 (1997).

Defendant has failed to demonstrate to this Court that absent the alleged error, the jury would probably have reached a different result. This argument is without merit.

[2] In defendant's second argument, he contends the trial court erred in granting the State's motion for joinder for trial of the two charges, assault with a deadly weapon with intent to kill inflicting serious injury and possession of a firearm by a felon. Defendant argues that in proving he was a felon in possession of a firearm the State was permitted to introduce evidence of one of his prior felony convictions, which would have been inadmissible had he been tried separately on the assault charge.

N.C. Gen. Stat. § 15A-926(a) governs the joinder for trial of multiple charges against the same defendant. It provides that "[t]wo or more offenses may be joined for trial . . . when the offenses, whether felonies or misdemeanors or both, are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan." N.C. Gen. Stat. § 15A-926(a) (2005). The application of this rule requires a two-part analysis: "(1) a determination of whether the offenses have a transactional connection, and (2) if there is such a connection, consideration then must be given as to whether the accused can receive a fair hearing on more than one charge at the same trial." *State v.*

Perry, 142 N.C. App. 177, 180-81, 541 S.E.2d 746, 748 (2001) (internal quotation marks and citations omitted). It is within the trial judge's discretion whether to permit the consolidation of offenses against a defendant and we will not overturn that decision absent a clear showing of abuse of discretion. *Id.* at 181, 541 S.E.2d at 749. We note that the parties disagree which statute applies, N.C. Gen. Stat. § 15A-926 or § 15A-927 since defense counsel objected to the State's motion for joinder before the trial and renewed his objection at the close of the State's evidence. Regardless of which statute applies, the test is still the same. *See State v. Manning*, 139 N.C. App. 454, 458-59, 534 S.E.2d 219, 223 (2000) (reciting same test used to review motion made pursuant to N.C. Gen. Stat. § 15A-927).

Defendant concedes that the two charges arose from the same transaction, thereby satisfying the first part of the inquiry. However, he contends the trial court abused its discretion in permitting consolidation because it prejudiced his right to a fair trial on the assault charge. Defendant asserts there is inherent prejudice in joining a charge of firearm possession by a felon with another charge, particularly where that charge also includes the element of a dangerous weapon because the State is permitted to introduce evidence which would ordinarily not be admissible, *i.e.*, that defendant had a prior felony conviction.

In *State v. Floyd*, this Court joined for trial the charges of larceny, robbery with a dangerous weapon, possession of a firearm by a felon, and conspiracy to commit robbery with a weapon. 148 N.C. App. 290, 558 S.E.2d 237 (2002). This Court held the joinder of theses charges "did not 'unjustly or prejudicially' hinder defendant's ability to defend himself." *Id.* at 293, 558 S.E.2d at 239. After reviewing the evidence in the instant case, we conclude the joinder of the two charges did not unjustly or prejudicially hinder defendant's ability to defend himself or to receive a fair hearing. In addition, the evidence was not complicated and the trial court's instruction to the jury clearly separated the two offenses. *See State v. Bracey*, 303 N.C. 112, 118, 277 S.E.2d 390, 394 (1981). This argument is without merit.

[3] In defendant's third argument, he contends the trial court erred by failing to give a limiting instruction concerning the relevance of defendant's prior convictions.

"In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired

the court to make . . . ." N.C. R. App. P. 10(b)(1). In addition, the complaining party must "obtain a ruling upon the party's request . . . ." *Id.* The entire exchange between defense counsel and the judge concerning the limiting instruction was as follows:

> [Defense Counsel]: I don't have the text of these [jury instructions] in front of me. I'm going from the table of contents. Is 104.15 applicable, Your Honor, given the prior evidence of similar acts or crimes?
>
> The Court: I don't think that's appropriate.
>
> [Defense Counsel]: Okay . . .

This exchange did not constitute a "request" within the meaning of Rule 10(b)(1) of the Rules of Appellate Procedure. Rather, defense counsel was simply going down a list of instructions to see what applied. Moreover, counsel's response of "okay" to the judge's statement that he did not believe this instruction was applicable did not constitute an objection. Nor did defense counsel object to the absence of this instruction after the charge conference or after the judge instructed the jury. A party may not assign as error an omission from the jury instruction unless they object before the jury retires to consider the verdict. N.C. R. App. P. 10(b)(2). Since defendant did not properly preserve this issue for appellate review, our review is limited to plain error. *Odom*, 307 N.C. at 661, 300 S.E.2d at 378-79. While defendant assigned plain error, he failed to argue plain error in his brief. Thus, he has waived appellate review of this issue. N.C.R. App. P. 10(c)(4); *State v. Cummings*, 352 N.C. 600, 636-37, 536 S.E.2d 36, 61 (2000).

Even assuming *arguendo* that defendant properly preserved this issue for appeal, the trial court did not err in refusing to give the jury the instruction contained in N.C.P.I.—Crim. 104.15. This instruction relates to evidence of other crimes admitted pursuant to Rule 404(b) of the Rules of Evidence to show proof of motive, opportunity, intent, preparation, *etc.* In this case, the evidence of defendant's other crimes was not admitted pursuant to Rule 404(b) or for any of the purposes listed in N.C.P.I.—Crim. 104.15, but was admitted to establish one of the elements of a crime that the State was required to prove—possession of a firearm by a felon. Thus, a limiting instruction under N.C.P.I.—Crim. 104.15 was not appropriate and the trial court did not err in failing to give that instruction. This argument is without merit.

[4] In defendant's forth and final argument, he contends the trial court's findings regarding his prior record points and prior record level were unsupported by the evidence, and therefore, he is entitled to a new sentencing hearing. We disagree.

Defendant contends the State failed to meet the requirements to prove a defendant's prior conviction as set forth in N.C. Gen. Stat. § 15A-1340.14(f). Proof of a defendant's prior conviction may be done in one of four ways: "(1) Stipulation of the parties[;] (2) An original or copy of the court record of the prior conviction[;] (3) A copy of records maintained by the Division of Criminal Information, the Division of Motor Vehicles, or of the Administrative Office of the Courts[;] (4) Any other method found by the court to be reliable." N.C. Gen. Stat. § 15A-1340.14(f) (2005). The State bears the burden of proving by a preponderance of the evidence that a prior conviction exists and that the individual before the court is the same person named in the prior convictions. *State v. Eubanks*, 151 N.C. App. 499, 505, 565 S.E.2d 738, 742 (2002).

The record in the instant case indicates the only evidence presented by the State was a prior record level worksheet listing defendant's prior convictions. "There is no question that a worksheet, prepared and submitted by the State, purporting to list a defendant's prior convictions is, without more, insufficient to satisfy the State's burden in establishing proof of prior convictions." *Id.* Therefore, we must review the dialogue between counsel and the trial court to determine whether there was a stipulation of the prior convictions listed on the worksheet the State presented. *Id.* "Counsel need not affirmatively state what a defendant's prior record level is for a stipulation with respect to that defendant's prior record level to occur." *State v. Alexander*, 359 N.C. 824, 830, 616 S.E.2d 914, 918 (2005).

In the instant case the following pertinent exchange occurred during sentencing:

> [Defense Counsel]: I don't have the work sheet in front of me, but it is my recollection that most of Mr. Cromartie's offenses were nonviolent. The prior possession of a firearm by a felon was along with a prior concealed weapon offense. It is my recollection that he had some drug offenses, and I don't believe there were any serious assaults in his history. And again, Your Honor, I don't have the sheet in front of me, but I don't believe he's been convicted of anything since '97, Your Honor.

Defendant argues this statement cannot constitute a stipulation because he did not admit to any specific convictions. In *Alexander*, our Supreme Court found defense counsel had stipulated to the defendant's prior convictions even though he did not refer to any specific convictions, but instead stated, "up until this particular case [defendant] had no felony convictions, as you can see from his worksheet." *Id*. Our Supreme Court held this language constituted a stipulation to the five prior misdemeanor convictions shown on the worksheet. *Id*.

In the instant case, trial counsel acknowledged the worksheet by making specific reference to it. Counsel went further than counsel in *Alexander* by specifically acknowledging the prior convictions for possession of a firearm by a felon and drug offenses. Then counsel proceeded to use the information contained in the worksheet to minimize defendant's prior record as being "nonviolent." Finally, at no time did trial counsel dispute any of the convictions on the worksheet. *See Eubanks*, 151 N.C. App. at 506, 565 S.E.2d at 743. As our Supreme Court held in *Alexander*, defendant cannot "have his cake and eat it too." *Id*. Defendant cannot use the worksheet during his sentencing hearing to seek a lesser sentence and then have his appellate counsel disavow this conduct on appeal in order to obtain a new sentencing hearing.

We hold that under the rationale of *Alexander*, defense counsel stipulated to the convictions shown on the worksheet and found by the trial court to support a felony record level IV. This argument is without merit.

For the reasons discussed herein, we find no error in defendant's trial or sentencing.

NO ERROR.

Judges ELMORE and JACKSON concur.

IN RE S.N.H. & L.J.H.

[177 N.C. App. 82 (2006)]

IN RE: S.N.H. & L.J.H.

No. COA05-1138

(Filed 4 April 2006)

1. Termination of Parental Rights— not adjudicated within 90 days of filing—extension of time for counsel to prepare

Granting an extension of time to allow appointed counsel to prepare a defense in a termination of parental rights proceeding did not result in a lack of jurisdiction, even though the court did not then adjudicate the petition within ninety days of its filing. N.C.G.S. § 7B-1109(b).

2. Termination of Parental Rights— order not reduced to writing with 30 days—no prejudice

Respondent did not articulate prejudice from the failure to reduce a termination of parental rights order to writing within 30 days of completion of the hearing, and such failure does not constitute prejudice per se. The order was not vacated on appeal. N.C.G.S. § 7B-1109(e).

3. Termination of Parental Rights— guardian ad litem for parent—necessary allegations not present—no circumstances indicating incompetency

The trial court did not err by not appointing a guardian ad litem for the parent in a termination of parental rights proceeding where the petition referred to drug abuse and mental illness but did not contain allegations of inability to provide care for her children (which would have invoked a then-existing statutory requirement) and there were no allegations of circumstances raising a general question about respondent's competency. N.C.G.S. § 7B-1101; N.C.G.S. § 1A-1, Rule 17.

4. Termination of Parental Rights— prior dispositional orders—judicial notice

The trial court did not err in a termination of parental rights proceeding by taking judicial notice of prior disposition orders in a juvenile case, even where those orders were entered under a lower evidentiary standard. The trial court is presumed to have ignored incompetent evidence, and respondent stipulated to the introduction of evidence from the children's underlying juvenile files.

5. Termination of Parental Rights— order drafted by petitioner's attorney—no error

There was no error in the trial court assigning the drafting of proposed orders to petitioner's attorney in a termination of parental rights proceeding where the judge clearly stated that he found that the four grounds enumerated in the petition justified termination, directed petitioner's counsel to draft an order terminating parental rights, and enumerated specific findings.

Appeal by respondent from judgments entered 23 February 2005 by Judge Marvin P. Pope, Jr. in Buncombe County District Court. Heard in the Court of Appeals 8 March 2006.

Lisa M. Morrison, for petitioner-appellee Buncombe County Department of Social Services.

Michael N. Tousey, for Guardian Ad Litem.

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

STEELMAN, Judge.

Respondent appeals the district court's order terminating her parental rights to her children, S.N.H. and L.J.H. For the reasons discussed herein, we affirm.

Respondent has not assigned error to any of the trial court's findings of fact; therefore, they are binding on this Court on appeal. *In re J.A.A.*, 175 N.C. App. 66, 68, 623 S.E.2d 45, 46 (2005). Those findings establish the following facts. Respondent is the natural mother of S.N.H. and L.J.H. The minor children's legal father relinquished his parental rights on 16 April 2004 and is not a party to this appeal. Beginning in July 2001, the Buncombe County Department of Social Services (DSS) began receiving reports from Child Protective Services concerning allegations of drug use in the homes of respondent and the minor children's grandmother. It was also reported that respondent's younger brother was living in her home and had sexually assaulted another minor child living in the home. DSS substantiated these reports and began providing treatment services for the family.

On 30 May 2003, DSS received another report that L. J. H. had been admitted to the hospital with a head injury and bruising in varying stages of healing. Respondent took L.J.H., then five months old, to

see Dr. Susan Cohen, his pediatrician. Dr. Cohen testified as an expert witness in the field of pediatric medicine. She observed significant swelling on the right side of L.J.H.'s head and around his right ear, as well as fading yellowish bruises on his back. Dr. Cohen further observed fresh bruising on L.J.H.'s left ear, which she testified was indicative of an injury inflicted by pinching or twisting, rather than an accidental injury because the ear is a difficult location for a child to injure. L.J.H. was admitted to the hospital for further evaluation. A head CT scan revealed skull fractures on both the right and left sides of his head. Initially, respondent claimed she did not know how the injuries occurred because L.J.H. was in a swing for six hours while she was passed out from drugs. Later, she blamed the child's father, her brother, and then her mother. The trial judge found none of her explanations credible. The judge further found the injuries were not accidental, but were inflicted either directly by respondent or by someone in the home while she was passed out.

DSS substantiated the report of abuse and removed both children from respondent's home and DSS was granted non-secure custody on 6 June 2003. On 17 June 2003, the trial court adjudicated the children abused and neglected due to respondent's untreated abuse of prescription and illegal drugs. At this time, respondent was unemployed and homeless. The judge ordered respondent to comply with a case plan in order to facilitate reunification. As part of the plan, respondent was to participate in substance abuse treatment, parenting classes, domestic abuse education classes, vocational rehabilitation, and psychological evaluations. She failed to complete any of the programs. In addition, respondent was required to submit to and pass a drug test as a condition of visitation with her children. She failed or refused to take these required drug screenings, and as a result, she only had one visitation during the time the children were in DSS's custody.

On 21 July 2004, DSS filed petitions for termination of respondent's parental rights (TPR) to S.N.H. and L.J.H. The petition alleged the following grounds for termination: (1) respondent neglected the minor children (N.C. Gen. Stat. § 7B-1111(a)(1)); (2) she willfully left her children in foster care for more than twelve months without demonstrating she had made reasonable progress to correct the conditions which led to the removal of the children (N.C. Gen. Stat. § 7B-1111(a)(2)); (3) she willfully failed to pay a reasonable portion of the cost of care for the minor children while they were in the custody of DSS (N.C. Gen. Stat. § 7B-1111(a)(3)); and (4) she

willfully abandoned the minor children for at least six consecutive months immediately preceding the filing of the petition (N.C. Gen. Stat. § 7B-1111(a)(7).

The matter came on for hearing on 1 December 2004. The judge terminated respondent's parental rights to both children, finding as a basis each of the four grounds for termination alleged in the petition. The trial court further determined it was in the best interests of both children that respondent's parental rights be terminated. Respondent appeals.

[1] In her first argument, respondent contends the trial court lacked jurisdiction to rule on the petition to terminate her parental rights by failing to adjudicate the petition within ninety days as required by N.C. Gen. Stat. § 7B-1109. We disagree.

After a petition to terminate parental rights is filed, the trial court must hold the adjudicatory hearing "no later than 90 days from the filing of the petition or motion unless the judge pursuant to subsection (d) of [§ 7B-1109] orders that it be held at a later time." N.C. Gen. Stat. § 7B-1109(a) (2005). The petition to terminate respondent's parental rights was filed on 21 July 2004. The matter was set for hearing on 11 October 2004, which was within the ninety-day time requirement. On that date, respondent appeared and requested appointment of counsel. The trial court granted respondent's request and continued the matter until 29 November 2004 so that her counsel would have time to prepare.

Although the hearing was held outside of the initial ninety-day time requirement, the trial court did not lose its jurisdiction over the matter. N.C. Gen. Stat. § 7B-1109(b) provides that where a parent desires that counsel be appointed, the trial court "*shall* grant the parents such an extension of time as is reasonable to permit their appointed counsel to prepare their defense to the termination petition or motion." (emphasis added). This is precisely what the trial court did in this case. This argument is without merit.

[2] In respondent's second argument, she contends that because the TPR order was not reduced to writing, signed, and filed within thirty days following the completion of the TPR hearing, the TPR order must be vacated. We disagree.

N.C. Gen. Stat. § 7B-1109(e) provides that following the trial court's adjudication of a TPR petition, "the adjudicatory order shall be reduced to writing, signed, and entered no later than 30 days fol-

lowing the completion of the termination of parental rights hearing." In the instant case, the TPR hearing was concluded on 2 December 2004. The trial court did not enter the written order until eighty-three days later, on 23 February 2005. Respondent argues that non-compliance with the thirty-day time requirement in the statute constitutes prejudice *per se*, requiring a new hearing. While the trial court's delay clearly violated the 30-day provision of N.C. Gen. Stat. § 7B-1109(e), this Court has held that a trial court's violation of statutory time limits in a juvenile case is not reversible error *per se*. *In re C.J.B.*, 171 N.C. App. 132, 133, 614 S.E.2d 368, 369 (2005); *In re L.E.B.*, 169 N.C. App. 375, 378-79, 610 S.E.2d 424, 426 (2005); *In re B.M.*, 168 N.C. App. 350, 354, 607 S.E.2d 698, 701 (2005); *In re J.L.K.*, 165 N.C. App. 311, 315-16, 598 S.E.2d 387, 390-91, *disc. review denied*, 359 N.C. 68, 604 S.E.2d 314 (2004). Rather, we have held that the complaining party must appropriately articulate the prejudice arising from the delay in order to justify reversal. *In re As.L.G.*, 173 N.C. App. 551, 556-57, 619 S.E.2d 561, 565 (2005). *See C.J.B.*, 171 N.C. App. at 134-35, 614 S.E.2d at 369 (finding respondent adequately articulated the prejudice arising from the delay in the entry of the order where records and transcripts were missing and irretrievable and the respondent's appellate counsel was unable to reconstruct the trial court proceedings).

In the instant case, respondent asserts that prejudice is shown by the fact there was a "multiple-month delay," which, in actuality, was a delay of approximately two and a half months. The passage of time alone is not enough to show prejudice, although this Court has recently noted that the "longer the delay in entry of the order beyond the thirty-day deadline, the more likely prejudice will be readily apparent." *C.J.B.*, 171 N.C. App. at 134-35, 614 S.E.2d at 370. *Compare L.E.B.*, 169 N.C. App. at 379, 610 S.E.2d at 426 (holding six month delay was "highly prejudicial"), *and In re T.L.T.*, 170 N.C. App. 430, 432, 612 S.E.2d 436, 438 (2005) (holding respondent prejudiced by a seven month delay), *with J.L.K.*, 165 N.C. App. at 315, 598 S.E.2d at 390-91 (2004) (holding that absent a showing of prejudice, a delay of eighty-nine days alone was not reversible error), *and In re A.D.L.*, 169 N.C. App. 701, 705-06, 612 S.E.2d 639, 642 (finding no prejudice where order was entered forty-five days after hearing), *disc. review denied*, 359 N.C. 852, 619 S.E.2d 402 (2005).

Respondent has failed to articulate any prejudice that she suffered by the delay. In light of this Court's prior decisions on this issue, we are not persuaded that such prejudice occurred that would warrant finding reversible error. This argument is without merit.

[3] In respondent's third argument, she contends the trial court committed reversible error by failing to appoint a guardian *ad litem* where DSS sought to terminate her parental rights based on allegations of mental health defects and substance abuse. We disagree.

N.C. Gen. Stat. § 7B-1101 provides that a guardian *ad litem* shall be appointed in accordance with the provisions of Rule 17 of the Rules of Civil Procedure

> to represent a parent . . . (1) [w]here it is alleged that a parent's rights should be terminated pursuant to G.S. 7B-1111[a](6), and the incapability to provide proper care and supervision pursuant to that provision is the result of substance abuse, mental retardation, mental illness, organic brain syndrome, or another similar cause or condition.

N.C. Gen. Stat. 7B-1101 (2005)[1]. N.C. Gen. Stat. 7B-1111(a)(6) is one basis upon which the trial court may terminate parental rights when the parent is incapable of providing for the proper care and supervision of the juvenile such that the juvenile is a dependent.

In the instant case, the petitions for termination of respondent's parental rights did not contain any allegations of dependency or that respondent was incapable of properly providing care for her children. Rather, the grounds alleged were neglect and abuse, willfully leaving the juveniles in foster care for more than twelve months, willfully failing to pay child support for the previous six months, and willfully abandoning the children for six consecutive months immediately preceding the filing of the TPR petition. Although the petition does contain references to respondent's drug abuse and alleged mental illness, "the trial court is not required to appoint a guardian *ad litem* 'in every case where substance abuse or some other cognitive limitation is alleged.' " *J.A.A.*, 175 N.C. App. at 71, 623 S.E.2d at 48 (citations omitted). Thus, the trial court was not required to appoint a guardian *ad litem* based on the provisions of N.C. Gen. Stat. § 7B-1101.

Nevertheless, we must still consider whether the trial court should have conducted a hearing on whether to appoint a guardian *ad litem* pursuant to Rule 17 of the Rules of Civil Procedure. *J.A.A.*, 175 N.C. App. at 71, 623 S.E.2d at 48. Generally, the trial judge only has a duty to inquire into the competency of a litigant in a civil proceed-

1. We note that this statute has since been amended. See 2005 N.C. Sess. Laws ch. 398, § 14. The amendment became effective 1 October 2005 and is applicable to petitions filed on or after that date. We must apply the previous version of this statute since the TPR petition was filed 21 July 2004, before the effective date of the amendment.

ing where "circumstances are brought to [his] attention, which raise a substantial question as to whether the litigant is *non compos mentis*." *Id.* at 72, 623 S.E.2d at 49.

After careful review of the record and the transcript of the proceedings, we are unable to say there were any circumstances of the type that, if brought to the judge's attention, would have raised a substantial question regarding respondent's competency. Thus, the trial court did not err in failing to appoint a guardian *ad litem*. This argument is without merit.

[4] In respondent's fourth argument, she contends the trial court erred by taking judicial notice of prior orders and exhibits entered or admitted under what she asserts were lower evidentiary standards. We disagree.

In *In re J.B.*, this Court expressly held that the trial court did not err in taking judicial notice of prior disposition orders in a juvenile case, even where those orders were entered under a lower evidentiary standard, especially where "the trial court in a bench trial 'is presumed to have disregarded any incompetent evidence.' " 172 N.C. App. 1, 16, 616 S.E.2d 264, 273 (2005). In addition, respondent's counsel stipulated to the introduction into evidence from the children's underlying juvenile files. Thus, respondent has waived the right to object on appeal. *Curry v. Baker*, 130 N.C. App. 182, 188, 502 S.E.2d 667, 672 (1998); N.C. R. App. P. 10(b)(1). This argument is without merit.

[5] In respondent's fifth and final argument, she contends the trial court erred by delegating its fact finding duty to the attorney for the petitioner by directing that petitioner draft the proposed orders terminating her parental rights. We disagree.

This issue was also raised and rejected in *J.B.*, where this Court stated: "[n]othing in the statute or common practice precludes the trial court from directing the prevailing party to draft an order on its behalf. Instead, 'similar procedures are routine in civil cases[.]' " *Id.* at 25-26, 616 S.E.2d at 279 (quoting *Farris v. Burke County Bd. of Educ.*, 355 N.C. 225, 242, 559 S.E.2d 774, 784 (2002)). In the instant case, the trial judge clearly stated that he "[found] by clear and convincing evidence that the four grounds enumerated in the petition justify termination of parental rights of [respondent] to these two children[.]" The trial judge then directed counsel for petitioner to draft an order terminating respondent's parental rights and

enumerated specific findings of fact to be included in the order. Thus, the trial court did not err in directing petitioner's counsel to draft the termination order.

To the extent that respondent argues the findings of fact were mere recitations of testimony and documents entered into evidence, this issue is not properly before this Court on appeal. "[T]he scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal . . . ." N.C. R. App. P. 10(a). Respondent did not assign as error any of the trial court's findings of fact or conclusions of law in the record on appeal. Therefore, those findings and conclusions are binding on this Court and this issue is not properly before us. *J.A.A.*, 175 N.C. App. at 75-76, 623 S.E.2d at 46.

AFFIRMED.

Judges LEVINSON and JACKSON concur.

THE NORTH CAROLINA STATE BAR, PLAINTIFF v. K.E. KRISPEN CULBERTSON, ATTORNEY, DEFENDANT

No. COA05-1076

(Filed 4 April 2006)

1. Attorneys— disciplinary hearing—inherently misleading communications—letterhead and website

The whole record test revealed that the Disciplinary Hearing Committee of the North Carolina State Bar (DHC) did not err by concluding that defendant attorney's statements on his letterhead and website that he was "published in Federal Law Reports, 3d series" were false and misleading communications under the North Carolina Revised Rules of Conduct, Rules 7.1 and 7.5, because: (1) contrary to defendant's assertion, where the possibility of public deception is self-evidence, DHC is not required to survey the public to determine whether the communication has a tendency to mislead; (2) while defendant's name and his appearance as counsel for a party is "published" in the official court's reports, nowhere in the opinions is he credited or cited by the court, and defendant did not author any of the opinions contained in the volumes; (3) defendant's statements are inherently mis-

leading since a member of the general public could easily be led to believe from defendant's assertions on his firm letterhead and website that he authored the opinion contained in the federal reporter; (4) defendant's statements that he is a member of an elite percentage of attorneys who have been published in the federal reporter are inherently misleading since admission to practice before the United States Court of Appeals does not depend upon a licensed attorney's ability; and (5) defendant's statement on his website that the federal reporters are the large law books that contain the controlling case law of the United States is inherently misleading when the United States Supreme Court routinely reviews and decides cases reaching conflicting interpretations on the law from the United States Court of Appeals.

2. Attorneys— disciplinary hearing—admonition—inherently misleading communications on letterhead and website

The Disciplinary Hearing Committee of the North Carolina State Bar (DHC) did not abuse its discretion by ordering the issuance of an admonition as opposed to a less serious sanction for defendant attorney who used false or misleading communications on his letterhead and website, because: (1) contrary to defendant's contention, no showing of actual public harm is required; (2) DHC's disciplinary action and sanction was issued within the statutory limits of N.C.G.S. § 82-28; and (3) the Court of Appeals has stated that so long as the punishment imposed is within the limits allowed by the statute, it does not have authority to modify or change it.

Appeal by defendant from order entered 11 March 2005 and admonition entered 8 April 2005 by Hearing Committee Chair Elisabeth Bunting for the Disciplinary Hearing Commission of the North Carolina State Bar. Heard in the Court of Appeals 9 March 2006.

David R. Johnson, for plaintiff-appellee.

K.E. Krispen Culbertson, defendant-appellant, pro se.

TYSON, Judge.

K.E. Krispen Culbertson, Attorney ("defendant") appeals from order and admonition of the Disciplinary Hearing Committee of the North Carolina State Bar ("DHC") admonishing him for using false or misleading communications in violation of the North Carolina Revised Rules of Professional Conduct. We affirm.

I. Background

Defendant is a duly licensed and practicing attorney in Greensboro and was admitted to practice as a member of the North Carolina State Bar ("State Bar") in 1991. In November 2004, the State Bar filed a complaint against defendant alleging he violated the North Carolina Revised Rules of Professional Conduct. The complaint alleged defendant's law office letterhead contained an asterisk beside his name. Below defendant's name is printed another asterisk and the phrase, "Published in Federal Reports, 3d Series" surrounded by parentheses. The complaint also alleged defendant is described on the firm's website as "also one of the elite percentage of attorneys to be published in Federal Law Reports—the large law books that contain the controlling caselaw [sic] of the United States."

This matter was heard before the DHC on 27 January 2005. The DHC concluded as follows:

> 2. Culbertson's conduct, as set out above, constitutes grounds for discipline pursuant to N.C. Gen. Stat. § 84-28(a) & (b)(2) as follows:
>
> (a) By using letterhead stationery that indicates that he is published in Federal Reports, 3d Series when only opinions issued by the Court are published in the Federal Reports, Culbertson used letterhead that made a false or misleading communication about the lawyer in violation of Revised Rules 7.1 and 7.5.
>
> (b) By maintaining a website that states that "[he] is also **one of the elite percentage of attorneys to be published in Federal Law Reports**—the large law books that contain the controlling caselaw [sic] of the United States" when only opinions of the Court are published in the Federal Reports, Culbertson maintained a website that made a false or misleading communication about the lawyer in violation of Revised Rules 7.1.

The DHC concluded and ordered, "Culbertson's conduct warrants discipline because Culbertson's choice of the misleading language on his letterhead and website was intentional. However, because Culbertson's violation of the rules was a minor violation, it warrants only an admonition." Defendant appeals.

II. Issues

Defendant argues the DHC erred by: (1) concluding his statements that he was "published in Federal Law Reports, 3d Series" were false or misleading; and (2) issuing an admonition rather than a less serious sanction.

III. Standard of Review

N.C. Gen. Stat. § 84-28(h) (2005) provides, "There shall be an appeal of right by either party from any final order of the Disciplinary Hearing Commission to the North Carolina Court of Appeals." The standard for judicial review of attorney discipline cases is the "whole record" test. *N.C. State Bar v. DuMont*, 304 N.C. 627, 643, 286 S.E.2d 89, 98 (1982). This test requires the reviewing court to:

> consider the evidence which in and of itself justifies or supports the administrative findings and . . . also [to] take into account the contradictory evidence or evidence from which conflicting inferences can be drawn. . . . Under the whole record test there must be substantial evidence to support the findings, conclusions and result. . . . The evidence is substantial if, when considered as a whole, it is such that a reasonable person might accept as adequate to support a conclusion.

Id. at 643, 286 S.E.2d at 98-99 (citations omitted). "Under the 'whole record' test, [this Court] cannot substitute our judgment for the Committee's in choosing between two reasonably conflicting views of the evidence." *N.C. State Bar v. Frazier*, 62 N.C. App. 172, 178, 302 S.E.2d 648, 652 (1983) (citing *Boehm v. Board of Podiatry Examiners*, 41 N.C. App. 567, 255 S.E.2d 328, *cert. denied*, 298 N.C. 294, 259 S.E.2d 298 (1979)). 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).

IV. Revised Rules of Professional Conduct

An attorney's violation of the Rules of Professional Conduct constitutes misconduct and is grounds for discipline. N.C. Gen. Stat. § 84-28(b)(2) (2005). Rule 7.1 of the North Carolina State Bar Revised Rules of Professional Conduct (2005) provides, "A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services." Under this rule, a communication is false or misleading if it "contains a material misrepresentation of fact or law." Rule 7.5(a) the North Carolina State Bar Revised Rules of

Professional Conduct (2005) states, "A lawyer shall not use a firm name, letterhead, or other professional designation that violates Rule 7.1."

V. "False or Misleading" Communication

[1] Defendant argues the DHC erred by concluding his statements on his firm letterhead and website that he was "Published in Federal Law Reports, 3d Series" were false or misleading. He asserts the evidence shows the statements were not false or misleading and are constitutionally protected speech. We disagree.

A. First Amendment

In *Bates v. State Bar of Arizona*, 433 U.S. 350, 365, 53 L. Ed. 2d 810, 824-25 (1977), the United States Supreme Court held advertising by lawyers is a form of commercial speech entitled to protection by the First Amendment. Five years later, the Supreme Court stated:

> Truthful advertising related to lawful activities is entitled to the protections of the First Amendment. But when the particular content or method of the advertising suggests that it is inherently misleading or when experience has proved that in fact such advertising is subject to abuse, the States may impose appropriate restrictions. Misleading advertising may be prohibited entirely.

In re R.M.J., 455 U.S. 191, 203, 71 L. Ed. 2d 64, 74 (1982).

B. Extrinsic Evidence

At the DHC hearing, defendant introduced evidence of a detailed survey conducted by a Wake Forest University political science professor that asked members of the general public whether the phrase, "Published in Federal Reports, 3d" on an attorney's letterhead was misleading. Defendant also introduced a study performed by a Duke University English and anthropology professor which analyzed how the general public would interpret the word, "publish." Defendant argues the DHC failed to consider this evidence of whether the public would actually be misled by the language and erred in relying on its judgment to determine whether this language was false or misleading.

Where the possibility of public deception is self-evident, the DHC is not required to survey the public to determine whether the communication has a tendency to mislead. *Zauderer v. Office of Dis-*

ciplinary Counsel of The Supreme Court of Ohio, 471 U.S. 626, 652-53, 85 L. Ed. 2d 652, 673 (1985); *Accountant's Soc. of Virginia v. Bowman*, 860 F.2d 602, 606 (4th Cir. 1988); s*ee also Farrin v. Thigpen*, 173 F. Supp. 2d 427, 437 (M.D.N.C. 2001) (Evidence that actual consumers were harmed by the communication "is only required where the ad at issue contains a truthful statement that is nonetheless misleading and is not required where the ad is inherently misleading."). We must determine whether the DHC correctly concluded defendant's statements are "inherently misleading." *Farrin*, 173 F. Supp. 2d at 437.

C. Inherently Misleading

In *Joe Conte Toyota, Inc. v. Louisiana Motor Vehicle Comm'n*, 24 F.3d 754, 756 (5th Cir. 1994), the United States Court of Appeals for the Fifth Circuit discussed the meaning of "inherently misleading."

> The Court in *In re R.M.J.* suggested that "inherently" misleading advertising may be banned outright, but "potentially" misleading advertising may not. In attempting to understand the distinction, we derive additional guidance from a later commercial speech case, *Peel v. Attorney Disciplinary Commission*, 496 U.S. 91, 110 S. Ct. 2281, 110 L. Ed. 2d 83 (1990).
>
> . . . .
>
> A statement is "inherently" misleading when, notwithstanding a lack of evidence of actual deception in the record, "the particular method by which the information is imparted to consumers is inherently conducive to deception and coercion." *Id.* (Marshall, J. and Brennan, J., concurring). Included is "commercial speech that is devoid of intrinsic meaning." *Id.* (Marshall, J. and Brennan, J., concurring). In her dissent, Justice O'Connor added that "inherently misleading" means "inherently likely to deceive the public." *Id.* at 121, 110 S. Ct. at 1702 (O'Connor, J., Rehnquist, C.J. and Scalia, J., dissenting). Citing *In re R.M.J.*, Justice Marshall noted that states may prohibit actually or inherently misleading commercial speech entirely. *Id.* at 111, 110 S. Ct. at 1697 (Marshall, J. and Brennan, J., concurring).

Id. The court held, "From all of this we conclude that a statement is actually or inherently misleading when it deceives *or is inherently likely to deceive*." *Id.* (emphasis supplied).

D. "Published"

The Federal Reports are the official publications of the United States Courts of Appeal. The published opinions and other official documents of the Courts of Appeal are printed in hardcover book form. The set of books consists of serial volumes. As additional decisions and other written documents are selected for publication, volumes are bound. The parties and names of the attorneys representing before the Court are identified as such. Opinions contained within the Federal Reporters are also published by legal search engines on the internet. *See* **www.lexis.com; www.westlaw.com.**

With the exception of *per curiam* opinions, one of the judges of the Court is identified as the author of the opinion. Other judges on the panel who heard and ruled upon the case are also noted. These judges may author concurring or dissenting opinions which follow the majority's opinion. Those judges who write separate opinions are also identified as authors.

Defendant argues he was "published" in the Federal Reporter because he submitted two briefs to the United States Court of Appeals for the Fourth Circuit and language and arguments from his briefs were paraphrased and summarized in the Court's opinions. *See Ficker v. Curran*, 119 F.3d 1150 (4th Cir. 1997); *S.E.C. v. Dunlap*, 253 F.3d 768 (4th Cir. 2001).

Webster's Dictionary defines "publish" as "to make generally known," "to make public announcement of," "to place before the public," "to produce or release for publication," "to issue the work (of an author)," "to put out an edition," or "to have one's work accepted for publication." Webster's New Collegiate Dictionary 952 (9th ed. 1991). Defendant's name and his appearance as counsel for a party is "published" in the court's official reporter. While defendant may believe this fact allows him to assert he is "published" in the official court's reports, nowhere in either opinion is he credited or cited by the court. Defendant is not a judge on any of the United States Courts of Appeal and did not author any of the opinions contained in those volumes.

Defendant's statements are also inherently misleading because they are likely to deceive the general public. *Joe Conte Toyota*, 24 F.3d at 756. A member of the general public could easily be led to believe from defendant's assertions on his firm letterhead and website that he authored the opinion contained in the Federal Reporter.

Defendant's statements on his website are inherently misleading in other respects. First, defendant's statement professes he is a member of an "elite percentage" of attorneys who have been "published" in the Federal Reporter. Admission to practice before the United States Courts of Appeal does not depend upon a licensed attorney's ability. Any licensed attorney who is in good standing may move to be admitted upon application to appear before these courts. Fed. R. App. P. 46(a) (2005) ("An attorney is eligible for admission to the bar of a court of appeals if that attorney is of good moral and professional character and is admitted to practice before the Supreme Court of the United States, the highest court of a state, another United States court of appeals, or a United States district court[.]").

Second, defendant's statement on his website states that the Federal Reporters are "the large law books that contain the controlling caselaw [sic] of the United States." The opinions of a federal Court of Appeals are controlling precedent on the cases before it and on the cases heard within the Circuit in which the Court sits, but are not the "controlling caselaw [sic] of the United States." The Supreme Court of the United States routinely reviews and decides cases reaching conflicting interpretations of the law from the United States Courts of Appeal. *See*, *e.g.*, *Dooley v. Korean Air Lines Co.*, 524 U.S. 116, 121, 141 L. Ed. 2d 102, 108 (1998) ("We granted certiorari . . . to resolve a Circuit split concerning the availability of a general maritime survival action in cases of death on the high seas.").

In *Bates*, the Supreme Court recognized that advertising by professionals poses special risks of deception "because the public lacks sophistication concerning legal services, misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising." 433 U.S. at 383, 53 L. Ed. 2d at 835. The Supreme Court in *In re R.M.J.* later stated, "[t]he public's comparative lack of knowledge, the limited ability of the professions to police themselves, and the absence of any standardization in the 'product' renders advertising for professional services especially susceptible to abuses that the States have a legitimate interest in controlling." 455 U.S. at 202, 71 L. Ed. 2d at 73.

Because defendant's statements are inherently misleading, the DHC was not required to consider extrinsic evidence of whether the public was actually misled. *Zauderer*, 471 U.S. at 652-53, 85 L. Ed. 2d at 673. Substantial evidence in the record supports DHC's conclusion that defendant's statements published on his letterhead and website asserting he is "Published in the Federal Law Reports" are false or

misleading. *DuMont*, 304 N.C. at 643, 286 S.E.2d at 98-99. Defendant's statutory and First Amendment rights were not violated by the DHC's disciplining him for using misleading advertising. *In re R.M.J.*, 455 U.S. at 203, 71 L. Ed. 2d at 74. This assignment of error is overruled.

VI. Discipline

[2] Defendant argues the DHC erred by ordering the issuance of an admonition as opposed to a less serious sanction. We disagree.

The DHC's choice of discipline is reviewed under an abuse of discretion standard. *North Carolina State Bar v. Nelson*, 107 N.C. App. 543, 552, 421 S.E.2d 163, 167 (1992), *aff'd*, 333 N.C. 756, 429 S.E.2d 716 (1993). As noted in the DHC's order, "An admonition is a written form of discipline imposed in cases in which an attorney has committed a minor violation of the Rules of Professional Conduct." N.C. Gen. Stat. § 84-28(c)(5) (2005). An admonition is a lesser form of discipline the DHC may impose for a violation of the Rules of Professional Conduct. N.C. Gen. Stat. § 84-28(c) (Misconduct by an attorney shall be grounds for disbarment, suspension up to five years, censure, reprimand or admonition.).

Defendant contends an admonition was improper because there was no showing of actual public harm. Such a showing is not required. The DHC's disciplinary action and sanction issued were within the statutory limits of N.C. Gen. Stat. § 82-28. "This Court [has] stated that 'so long as the punishment imposed is within the limits allowed by the statute this Court does not have the authority to modify or change it.' " *Nelson*, 107 N.C. App. at 552, 421 S.E.2d at 167 (quoting *N.C. State Bar v. Whitted*, 82 N.C. App. 531, 539-40, 347 S.E.2d 60, 65 (1986), *aff'd*, 319 N.C. 398, 354 S.E.2d 501 (1987)). Defendant failed to show the DHC abused its discretion in admonishing him for his conduct. This assignment of error is overruled.

VII. Conclusion

The DHC did not err in concluding defendant's statements on his letterhead and website were false and misleading communications under the North Carolina Revised Rules of Professional Conduct, Rules 7.1 and 7.5. No showing is made that the DHC abused its discretion in admonishing defendant for his violations of these Rules. The DHC's order is affirmed.

Affirmed.

Judges McCULLOUGH and ELMORE concur.

STATE OF NORTH CAROLINA v. LEON JEROME DAVIS

No. COA05-650

(Filed 4 April 2006)

1. Criminal Law— self-defense—omitted from final mandate—reversed

The failure to include not guilty by reason of self-defense in the final mandate was prejudicial error requiring a new trial in a prosecution for discharging a firearm into occupied property.

2. Homicide— self-defense—no duty to retreat—not included in instruction

The failure to instruct the jury that defendant had no duty to retreat when met with deadly force was plain error in a prosecution resulting in a second-degree murder conviction where there was evidence that defendant was not the initial aggressor. In the absence of the instruction, the jury may have believed that defendant acted with malice.

3. Evidence— victim impact—guilt/innocence phase

In a case remanded on other grounds, it was noted that victim impact evidence is generally inadmissible during the guilt-innocence phase of a trial.

Appeal by defendant from judgment entered 3 September 2004 by Judge Jesse B. Caldwell, III in Gaston County Superior Court. Heard in the Court of Appeals 6 March 2006.

Roy A. Cooper, III, Attorney General, by Diane A. Reeves, Special Deputy Attorney General, for the State.

Staples S. Hughes, Appellate Defender, by Kelly D. Miller, Assistant Appellate Defender, for defendant-appellant.

MARTIN, Chief Judge.

Defendant was charged with first degree murder and discharging a firearm into occupied property. A jury convicted him of second degree murder and discharging a firearm into occupied property. He appeals from a judgment entered upon the verdicts sentencing him to an active term of imprisonment of a minimum of 189 months and a maximum of 236 months.

The State presented evidence at trial which tended to show that on 28 September 2002, Donnie Moose (Moose), Jeremy Stowe (Stowe), Chris Bumgardner (Bumgardner) and Johnny Lowery (Lowery) were riding together in Moose's car. The four men decided they wanted to purchase some marijuana and drove to Cleveland Avenue in Gastonia, North Carolina. While the others remained in the car, Lowery approached two black men and purchased a bag of "grass." As they were driving away, Lowery looked into the bag and discovered the contents consisted of lawn grass instead of marijuana. The men returned to Cleveland Avenue where Lowery confronted Kareem Craig, the smaller of the men who had sold them the counterfeit marijuana. According to Moose, he heard a shot and saw Lowery holding a gun. Lowery got back into the car, telling Moose to go. They drove up Cleveland Avenue to make a U-turn at the end of a cul-de-sac and, as they were returning down the street, they saw Lou Brice, the other man who had sold them the counterfeit marijuana, coming out of the woods. Lowery told Moose to stop the car and got out and confronted Brice. The two men conversed and then Lowery "jumped into the car and said go." Moose testified that he heard shots and drove away.

Moose further testified that as they were driving away, Lowery had his arm out the passenger-side door, and Moose was "pretty sure" and "believed" that Lowery had "fired back." They drove to the apartments where Lowery resided, where they discovered that Stowe had been shot and appeared dead. After the police were notified, Lowery was transported to the hospital where he was treated for a gunshot wound to the hand. A pathologist testified that Stowe died as a result of a gunshot wound which severed his spinal cord and damaged his brain and that the wounds were consistent with someone crouching in the backseat of a vehicle when a bullet entered through the trunk. There were bullet holes on the trunk, spoiler, passenger side door, and rear passenger seat of Moose's vehicle.

Eyewitnesses Kendra Powell and Timothy Byrd also testified. Powell recounted how she watched Brice arguing with another man on the street in front of her house. She saw a third man walk by and go towards the apartments behind her house. He returned "shooting" but prior to his return, at least two shots were fired. The person from the apartments fired back at the ground, and "before the car took off, one more shot was fired from the car." Powell testified that she had never seen defendant before, and while she knew Kareem Craig, she did not recall seeing him on the night of the shooting. Timothy Byrd

testified that he witnessed the argument as well, that he did not know either man, and that the man from the car shot first, and the other man "fired back."

Brice testified that he was defendant's uncle, that he sold Lowery the lawn grass on the night of 28 September, and then left Cleveland Avenue. When he was returning to Cleveland Avenue, he heard Lowery talking to his cousin, Kareem Craig, and also heard "a couple of gunshots." As Brice stayed behind a house, Lowery got back into the car, and the men began to pull away. However, they apparently saw him and stopped. Lowery again got out of the car and demanded his money, waving his gun around. Brice heard some more shots, saw Lowery jumping into the car, and Brice ran away. At some point, Brice saw defendant and asked him for his gun, but defendant told him that "Johnny [Lowery] ain't going to do nothing." However, Brice testified that Lowery had "his hand out the window" shooting and then defendant shot back.

Neal Morin, special agent with the State Bureau of Investigation, testified that there were strong characteristics between the gun defendant provided to police and the bullet removed from Stowe, but "there was insufficient detail to make a conclusive determination."

Defendant testified in his own behalf that on the night of the shooting, he was sitting in his automobile when he heard a gunshot and saw the white car. He explained that he kept a gun with him because his neighborhood was violent and people frequently are mistaken for others. He spoke with his cousin, Kareem Craig, who told him that Lowery had just shot at him. Defendant watched the white car begin to leave, but it stopped as he saw Brice, his uncle, come from behind a house. Lowery jumped out of the white car and appeared to be waving his gun and arguing with his uncle.

Defendant testified that when Brice asked him for his gun, "I told him hell, no, he couldn't have my gun. Johnny wasn't going to do that." As defendant and Brice walked off, "[Lowery] jumped in[to the white car] and fired a shot back. I fell over, shot back at him." Defendant stated that he was approximately 15 to 20 feet to the rear of the car when Lowery shot at him. He explained that he believed Lowery "was trying to shoot me. That's why the gun was pointed at me. I was the only person walking there."

Defendant further testified that he did not intend to kill Lowery and did not even know there were other passengers in the car, but

that once he did, he fired at the ground in order to avoid hitting them. Defendant stated that he shot at Lowery because he was afraid that Lowery was going to shoot him, and he had never been shot at before. He explained that the first he heard of Stowe's death was when he learned about the arrest warrant, and he voluntarily turned himself in and made a statement to police because he "had nothing to hide."

On appeal, defendant argues that the trial court erred by 1) failing to include in its final mandate to the jury on the charge of discharging a firearm into occupied property the possible verdict of not guilty by reason of self-defense, 2) failing to instruct the jury that defendant did not have a duty to retreat, 3) permitting victim impact testimony in the guilt or innocence phase of the trial, and 4) admitting certain extra-judicial statements of two State witnesses which defendant contends were hearsay. After careful review, we conclude defendant is entitled to a new trial by reason of error in the trial court's instructions to the jury. In view of our award of a new trial on these grounds, we will not discuss defendant's remaining assignments of error as they may not recur at his new trial.

I.

[1] Defendant argues that the trial court erred in failing to instruct the jury that it could find defendant not guilty by reason of self-defense in its final mandate upon the charge of discharging a firearm into occupied property. It is prejudicial error to fail to include "[a] possible verdict of not guilty by reason of self-defense . . . in the final mandate to the jury." *State v. Williams*, 154 N.C. App. 496, 499, 571 S.E.2d 886, 888 (2002). This error warrants a new trial. *State v. Ledford*, 171 N.C. App. 144, 146, 613 S.E.2d 726, 727 (2005).

In this case, the trial court properly instructed the jury on first degree murder under the felony murder rule, with the relevant underlying felony being discharging a firearm into occupied property. The trial court included not guilty by reason of self-defense in this instruction, and in the instruction on the lesser included offense of second degree murder. In its final mandate on the murder charge, the trial court included as a possible verdict that defendant could be found not guilty by self-defense. Subsequently, the trial court instructed the jury with respect to the elements of the crime of discharging a firearm into occupied property, explaining self-defense as a justification or excuse for the act in the body of the instruction. However, when giving the final mandate with respect to the charge of discharging a firearm into occupied property, the trial court did not instruct the jury

that it could return a verdict of not guilty as to that charge if it found defendant had acted in self-defense. The trial court continued with its general jury instructions and, as it was late in the day, excused the jurors for the evening recess. When the court reconvened the next morning, the trial court re-instructed the jury on second degree murder, voluntary and involuntary manslaughter, including the instruction that it could find defendant not guilty by reason of self-defense, but gave no additional instructions on the charge of discharging a firearm into occupied property nor any final mandate on that charge which permitted the jury to find the defendant not guilty of the charge by reason of self-defense. The failure to include not guilty by reason of self-defense in the final mandate is prejudicial error, *State v. Williams*, *supra.*, and we must therefore grant defendant a new trial on the charge of discharging a firearm into occupied property.

II.

[2] Defendant also argues the trial court committed plain error in failing to instruct that defendant had no duty to retreat. Since defendant neither requested the instruction nor objected to the court's failure to give the instruction, we review the assignment of error under the plain error standard. *See State v. Davis*, 349 N.C. 1, 28, 506 S.E.2d 455, 470 (1998) (although defendant did not preserve the error for review at trial, the plain error rule permits review of alleged errors affecting substantial rights), *cert. denied*, 526 U.S. 1161, 144 L. Ed. 2d 219 (1999).

> The plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a "*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done"[. . .] or where it can be fairly said "the instructional mistake had a probable impact on the jury's finding that the defendant was guilty."

State v. Lemons, 352 N.C. 87, 96-97, 530 S.E.2d 542, 548 (2000) (emphasis in original, citations omitted), *cert. denied*, 531 U.S. 1091, 148 L. Ed. 2d 698 (2001).

A comprehensive self-defense instruction requires instructions that a defendant is under no duty to retreat if the facts warrant it, and it is error for the trial court not to give this instruction if it is requested. *State v. Everett*, 163 N.C. App. 95, 100, 592 S.E.2d 582, 586 (2004). Moreover, "[i]f an instruction is required, it must be compre-

hensive." *Id.* (*quoting State v. Brown*, 117 N.C. App. 239, 241, 450 S.E.2d 538, 540 (1994), *cert. denied*, 340 N.C. 115, 456 S.E.2d 320 (1995)). "There is *no* duty to retreat when . . . confronted with an assault that threatens death or great bodily harm." *Everett*, 163 N.C. App. at 100, 592 S.E.2d at 586 (emphasis in original, citations omitted). Where a defendant's right to stand his ground and shoot an assailant in self-defense is a "substantial feature" of a defense, it is error for the trial court to fail to give the instruction, "even in the absence of a special request therefor." *State v. Ward*, 26 N.C. App. 159, 162, 215 S.E.2d 394, 396 (1975); *see also State v. Hudgins*, 167 N.C. App. 705, 708, 606 S.E.2d 443, 446 (2005) (awarding new trial where trial court failed to instruct on necessity defense despite defendant's presentation on all the elements of the defense).

In the present case, there was testimony from the State's own witnesses that defendant returned fire only after Lowery shot at him after arguing with Brice and Craig. According to such evidence, defendant was not the initial aggressor and his right to stand his ground was at least a "substantial feature" of his defense of self-defense. The jury found the defendant guilty of second degree murder: that defendant wounded the victim with a deadly weapon, acting intentionally and with malice, which was defined in pertinent part as arising "from an act which is inherently dangerous to human life" and "is intentionally done so recklessly and wantonly as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief." Without an instruction that defendant had the right to stand his ground when met with deadly force, the jury may have believed that defendant acted with malice, requiring it to return a verdict of guilty of second degree murder. Since this instructional error had a probable impact on the jury's finding of guilt, this error was prejudicial. Therefore, we hold the trial court's failure to give the instruction was plain error entitling defendant to a new trial as to both the murder charge and the charge of discharging a firearm into occupied property.

III.

[3] In light of our award of a new trial, we need not discuss defendant's remaining assignments of error, as they are unlikely to occur at defendant's retrial. We note, however, that while a trial court's rulings on relevancy are given great deference on appeal, even though they "technically are not discretionary and therefore are not reviewed under the abuse of discretion standard[,]" *State v. Wallace*, 104 N.C. App. 498, 502, 410 S.E.2d 226, 228 (1991), *cert. denied*, 506 U.S. 915,

121 L. Ed. 2d 241 (1992), victim-impact evidence is generally inadmissible during the guilt/innocence phase of a trial. *State v. Maske*, 358 N.C. 40, 50, 591 S.E.2d 521, 528 (2004). Thus, we urge caution against admission of such victim-impact testimony during the State's guilt/innocence case on retrial.

New Trial.

Judges WYNN and STEPHENS concur.

STATE OF NORTH CAROLINA v. MONICA D. BRANCH

No. COA03-350-2

(Filed 4 April 2006)

1. **Search and Seizure— lawful detention—use of drug-sniffing dog around exterior of vehicle**

   Once the lawfulness of a person's detention is established, including to verify driving privileges at a license checkpoint or a stop for a traffic violation, officers need no additional assessment under the Fourth Amendment before walking a drug-sniffing dog around the exterior of that individual's vehicle.

2. **Criminal Law; Search and Seizure— motion to suppress—drugs—null and void order entered out of county, out of term, and out of session**

   The trial court erred in a drug case by denying defendant's motion to suppress, and the case is remanded for a new suppression hearing, because the order denying her motion to suppress was null and void since it was entered out of county, out of term, and out of session. Defendant's agreement to the trial court's request to take the motion under advisement is not the same as consenting to the order being entered out of term, and defendant's failure to object does not affect the nullity of an order entered out of term and out of session.

Appeal by defendant from order entered 29 August 2002 by Judge Anthony M. Brannon in Rockingham County Superior Court. Originally heard in the Court of Appeals 3 December 2003. Now on remand from the United States Supreme Court by order issued 11 October 2005, vacating this Court's 17 February 2004 opinion.

Attorney General Roy Cooper, by Special Deputy Attorney General J. Allen Jernigan, for the State.

Barbara S. Blackman for defendant-appellant.

ELMORE, Judge.

On 11 October 2005 the United States Supreme Court vacated this Court's 17 February 2004 opinion in *State v. Branch*, 162 N.C. App. 707, 591 S.E.2d 923 (2004), and remanded the matter to this Court for further consideration in light of the decision in *Illinois v. Caballes*, 543 U.S. 405, 160 L. Ed. 2d 842 (2005). *See North Carolina v. Branch*, 126 S. Ct. 411, 163 L. Ed. 2d 314 (2005). At the direction of the Supreme Court, we now undertake that review.

The facts of this case have been laid out in our prior opinion, but we will restate those applicable to this review. On 4 November 2000 officers of the Rockingham County Sheriff's Department conducted a drivers license checkpoint near the intersection of Bethlehem Church Road and Harrington Highway. The officers were stopping all cars approaching the intersection and quickly assessing whether the driver's registration and license were valid. During the time the officers were performing this duty, officers with the K-9 unit were available for assistance. Determining the validity of the driver's information presented typically took approximately forty seconds.

At approximately 11:00 p.m. defendant approached the checkpoint and was stopped by Deputy Marshall. Deputy Marshall recognized defendant as someone he had previously arrested for drug possession and whose drivers license might be revoked. Defendant presented a duplicate license and a car registration bearing her sister's name. Deputy Marshall testified at the motion to suppress that duplicate licenses can often be used by drivers whose originally issued license was taken by the Department of Motor Vehicles during a period of suspension or revocation.

Deputy Howell with the K-9 unit testified at the hearing on the motion that seeing defendant driving through the checkpoint stood out in his mind as well. He recalled that upon previously issuing defendant a citation for a moving violation she had failed to appear in court, an act that would normally result in a suspension or revocation of her driving privileges.

After conferring with one another, Deputy Marshall directed defendant to the side of the road and he attempted to verify over the

radio whether defendant had any outstanding warrants or was otherwise legally able to drive. While he was verifying this information, Deputy Howell took his dog "Toon," a well-trained K-9 officer, around the exterior of defendant's car. Toon alerted Deputy Howell to the presence of contraband by scratching on the passenger's side door. Deputy Howell and Toon's walk around the car occurred during Deputy Marshall's investigation, and the alert came before Deputy Marshall was finished verifying defendant's status. The entire incident resulted in an overall stop of less than five minutes.

Based on Toon's alert to contraband, Deputy Howell asked defendant and her passenger to step out of the car while he searched it. He found small amounts of marijuana in the ash tray. He further inquired about the contents of a purse that was taken out of the car by defendant. She denied ownership of it, but upon Deputy Howell's search confessed that the purse was hers. The purse contained more marijuana. Defendant was placed under arrest.

Just after the search of the car, Deputy Marshall notified Deputy Howell there were no warrants for defendant's arrest and her drivers license was valid. Since defendant was under arrest at this point, a female officer was asked to conduct a personal search of defendant. This search revealed a small amount of cocaine in defendant's bra.

After defendant's motion to suppress was denied by the trial court, she pled guilty, but pursuant to N.C. Gen. Stat. § 15A-979(b) sought review of that denial before this Court. Defendant failed to except to any of the trial court's findings and thus, we reviewed the trial court's conclusions of law. *See Branch*, 162 N.C. App. at 709, 591 S.E.2d at 924; *see also* N.C.R. App. P. 10(c)(1).

Based on that limited review, we held that the license checkpoint was proper and defendant's detention beyond the initial review of her license and registration was for the valid and checkpoint related purpose of verifying the status of her driving privileges. *Id.* at 712-13, 591 S.E.2d at 926. We stressed, however, that the detention was not just based on presentation of a duplicate license, or the sole fact that the officers' recollection was defendant might have failed to appear in court; it was the interaction of these two facts that supported detaining defendant for further investigation. *Id.* ("Prior knowledge of the defendant alone would not constitute such a reasonable suspicion. Neither would the presentation of a duplicate license, standing alone. Both together, however, may form reasonable suspicion to justify investigation of the validity of the license."). We next held

that the facts did not support the conclusion that a reasonable articulable suspicion existed to use the K-9 unit to search the exterior of the car, and failure to meet that standard required suppression. *Id.* at 714, 591 S.E.2d at 927 ("We therefore determine that the initial stop was justified, as found by the trial court. The trial court erred, however, in finding that no reasonable suspicion was necessary to conduct the dog sniff and subsequent searches. Because this conclusion is contrary to our caselaw, we must reverse the ruling of the trial court."). As such, we reversed the trial court's denial of the motion to suppress.

[1] Following the issuance of our opinion, the State first sought discretionary review before our Supreme Court. That review was initially granted, *see State v. Branch*, 358 N.C. 236, 595 S.E.2d 438 (2004), but then deemed improvidently allowed, *see State v. Branch*, 359 N.C. 406, 610 S.E.2d 198 (2005). The State next sought review before the United States Supreme Court, which granted certiorari for the limited purpose of vacating the opinion and remanding the case to this Court for further consideration in light of *Illinois v. Caballes*, 543 U.S. 405, 160 L. Ed. 2d 842 (2005), a case that was decided while *Branch* was pending review before the North Carolina Supreme Court. *See North Carolina v. Branch*, 126 S. Ct. 411, 163 L. Ed. 2d 314 (2005).

In *Caballes*, the Supreme Court held that the Fourth Amendment does not give rise to a legitimate expectation of privacy in possessing contraband or illegal drugs, and as such, a well-trained dog that alerts solely to the presence of contraband during a walk around a car at a routine traffic stop "does not rise to the level of a constitutionally cognizable infringement." *Id.* at 409, 160 L. Ed. 2d at 847. There, the defendant had been stopped for speeding by an Illinois State Trooper. While the trooper was issuing a citation, another trooper arrived on scene and, without prolonging the traffic stop,[1] walked his well-trained K-9 officer around the car. The dog alerted to the presence of contraband in the trunk. *Id.* at 406, 160 L. Ed. 2d at 845-46.

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1. In *Caballes*, the Supreme Court prefaced its analysis of whether the dog sniff infringed on defendant's Fourth Amendment rights by plainly stating, "[a] seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission." *Id.* at 407, 160 L. Ed. 2d at 846. The Court did not address that issue, concluding that the Illinois Supreme Court had already determined the traffic stop was not prolonged. *Id.* at 407-08, 160 L. Ed. 2d at 846. We also need not address that concern today since the trial court conclusively found that the dog sniff was completed within the time necessary to investigate defendant's driving privileges.

The defendant argued unsuccessfully to the trial court that the drugs should have been suppressed. The Illinois Supreme Court concluded, however, that "because the canine sniff was performed without any 'specific and articulable facts' to suggest drug activity, the use of the dog 'unjustifiably enlarg[ed] the scope of a routine traffic stop into a drug investigation.' " *Id.* at 407, 160 L. Ed. 2d 846 (quoting *People v. Caballes*, 802 N.E.2d 202, 205 (Ill. 2003)). The United States Supreme Court granted certiorari to determine "[w]hether the Fourth Amendment requires reasonable, articulable suspicion to justify using a drug-detection dog to sniff a vehicle during a legitimate traffic stop." *Id.* The Court answered the question in the negative.

> [T]he use of a well-trained narcotics-detection dog—one that "does not expose noncontraband items that otherwise would remain hidden from public view," *Place*, 462 U.S., at 707, 77 L. Ed. 2d 110, 103 S. Ct. 2637—during a lawful traffic stop, generally does not implicate legitimate privacy interests. In this case, the dog sniff was performed on the exterior of respondent's car while he was lawfully seized for a traffic violation. Any intrusion on respondent's privacy expectations does not rise to the level of a constitutionally cognizable infringement.

Id. at 409, 160 L. Ed. 2d at 847.

Although *Branch* arises from a different set of factual circumstances than *Caballes*—one involves a detention at a license checkpoint and the other a stop for a traffic violation—the Supreme Court's analysis is no less applicable. In *Branch*, we determined that the officers' detention of defendant to verify whether her driving privileges were valid was reasonable under the circumstances. *See Branch*, 162 N.C. App. at 712-13, 591 S.E.2d at 926. And once the lawfulness of a person's detention is established, *Caballes* instructs us that officers need no additional assessment under the Fourth Amendment before walking a drug-sniffing dog around the exterior of that individual's vehicle. This is directly contrary to what we held in *Branch*. Thus, based on *Caballes*, once Ms. Branch was detained to verify her driving privileges, Deputies Howell and Marshall needed no heightened suspicion of criminal activity before walking Toon around her car. Yet, this does not end our inquiry; upon remand we must address the second issue related to the suppression order that we did not need to address previously.

[2] Defendant asserts that she is entitled to a new suppression hearing because the order denying her motion to suppress was null and

void since it was entered out of county, out of term, and out of session. We agree.

On 8 August 2001 defendant filed her motion to suppress in Rockingham County Superior Court and that motion was heard before Judge Anthony M. Brannon, serving as an emergency recalled judge, on 5 October 2001. No ruling was issued at that time; instead, with the counsel's consent, the trial judge said he would take the matter under advisement and issue a ruling and order shortly. Yet, it was not until 29 August 2002 that the trial court's order was entered, nearly a year after the hearing on the motion. The order signed in Durham County was quite thorough, containing forty-seven findings of fact and sixteen conclusions of law.

Our Supreme Court has held that:

> 'an order of the superior court, in a criminal case, must be entered during the term, during the session, in the county and in the judicial district where the hearing was held.' *State v. Boone*, 310 N.C. 284, 287, 311 S.E.2d 552, 555 (1984). Absent consent of the parties, an order entered in violation of these requirements is null and void and without legal effect. *Id.*

State v. Trent, 359 N.C. 583, 585, 614 S.E.2d 498, 499 (2005). The State does not dispute this rule, nor the fact that this order was entered out of term, but argues that defendant consented to entering the order out of term. Defendant did consent to the trial court's request to take the motion under advisement and issue a later order, but did not explicitly consent to the order's entry out of term.

When presented with a strikingly similar scenario in *Trent*, our Supreme Court rejected the notion that an agreement to have the court take an issue under advisement was the same as consenting to the order being entered out of term. *See id.* at 586, 614 S.E.2d at 500. In fact, the Court stated "the decisions of our appellate courts adequately demonstrate that defendant's failure to object does not affect the nullity of an order entered out of term and out of session." *Id.* (citing *State v. Saults*, 299 N.C. 319, 261 S.E.2d 839 (1980); *Bynum v. Powe*, 97 N.C. 374, 2 S.E. 170 (1887); *State v. Reid*, 76 N.C. App. 668, 334 S.E.2d 235 (1985)). Further, even though the prejudice to defendant in this circumstance is marginal—she pled guilty to the charges on 15 October 2005—since the order is null and void, any prejudicial analysis is misplaced. *See id.* 587, 614 S.E.2d 500 (quoting *State v. Boone*, 310 N.C. 284, 289, 311 S.E.2d 552, 556 (1984)).

Accordingly, we vacate the trial court's order denying defendant's motion to suppress and remand the matter for a new suppression hearing. Any hearing that occurs pursuant to this opinion will not be bound by our previous opinion in this case nor the prior suppression order, and should necessarily address whether the officers' investigative detention of defendant at a license checkpoint while verifying her driving privileges was constitutional.

Vacated and Remanded.

Judges BRYANT and CALABRIA concur.

IN THE MATTER OF: K.H. AND P.D.D., MINOR CHILDREN

No. COA05-655

(Filed 4 April 2006)

1. **Appeal and Error— appealability—permanency planning order**

   A permanency planning order that changed the permanent plan from reunification to adoption was a final order from which appeal could be taken.

2. **Termination of Parental Rights— permanency planning order—appointment of guardian ad litem for parent**

   A permanency planning order was remanded for a hearing as to whether respondent-parent was entitled to the appointment of a guardian ad litem where the evidence raised genuine issues about the interplay between respondent's mental health, the neglect of his children, and his entitlement to a guardian ad litem. N.C.G.S. § 7B-602(b)(1).

   Judge JACKSON dissenting.

Appeal by respondent father from orders entered 28 September 2004 by Judge Patricia Kaufmann Young in Buncombe County District Court. Heard in the Court of Appeals 7 February 2006.

Sybil G. Mann and Lisa Morrison for petitioner-appellee Buncombe County Department of Social Services.

Michael N. Tousey for Guardian ad Litem, Jan Wilkins.

Susan J. Hall for respondent-appellee mother.

Katharine Chester for respondent-appellant father.

HUNTER, Judge.

Respondent-father ("respondent") appeals from two permanency planning and review orders entered by the trial court relieving the Buncombe County Department of Social Services ("DSS") of further efforts to reunify respondent with his minor child, P.D.D., and his stepdaughter, K.H. Respondent contends the trial court erred in failing to appoint a guardian ad litem to represent him where the record contained substantial evidence of his mental illness and substance abuse. We agree that the trial court erred in failing to hold a hearing as to whether respondent was entitled to appointment of a guardian ad litem, and we therefore reverse the permanency planning orders of the trial court.

On 18 September 2003, DSS filed a juvenile petition in Buncombe County District Court alleging that one-month-old P.D.D. was a neglected juvenile in that he lived in an environment injurious to his welfare. The petition alleged, *inter alia*, that respondent regularly used crack cocaine, was verbally and physically abusive towards his wife (P.D.D.'s mother) and other members of the household, and had threatened to kill an investigative social worker. A nonsecure custody order was subsequently issued. On 17 March 2004, P.D.D. was adjudicated neglected. The central concerns with respondent's parental abilities, as found by the trial court in its order of adjudication and disposition, were (1) his substance abuse; (2) domestic violence perpetrated by respondent; and (3) issues of anger management. The trial court also found that respondent had been diagnosed "with depression, Bipolar Disorder, that he has been viewed as suicidal and homicidal, that he has been addicted to crack cocaine and started using approximately 20 to 25 years ago." Respondent had also been diagnosed with "Personality Disorder NOS" and "appears to have some borderline tendencies including 'splitting' the world into extremes."

On 20 August 2004, the trial court held a permanency planning and review hearing pursuant to N.C. Gen. Stat. § 7B-907(a) regarding both P.D.D. and respondent's stepdaughter, K.H., who had earlier been adjudicated neglected in a separate proceeding. In its subsequent order, the trial court noted that respondent had attempted to commit suicide in June of 2004 by slitting his throat, and found that

respondent's "suicidal incident in June raises ongoing concern about his mental health[.]" The trial court found respondent had not addressed the issues of domestic violence and substance abuse that led to the children's removal from the home. After reviewing the evidence, the trial court found and concluded that the best plan to achieve a safe, permanent home for P.D.D. and K.H. would be to change the plan from reunification to adoption with a concurrent plan of guardianship with a relative. The trial court therefore relieved DSS of further reunification efforts with respondent. Respondent appeals. Respondent-mother does not appeal.

[1] Initially, it should be noted that the district court's order is a final order and, as such, is appealable. *See* N.C. Gen. Stat. § 7B-1001 (2003) (orders of disposition after an adjudication of abuse, neglect, or dependency are appealable final orders); *In re Weiler*, 158 N.C. App. 473, 477, 581 S.E.2d 134, 136-37 (2003) (an order that ceases reunification and allows termination of rights is a dispositional order that is appealable). Because the permanency planning order changed the permanent plan from reunification to that of adoption, it is a final order from which appeal may be taken. *See In re C.L.S.*, 175 N.C. App. 240, 241-42, 623 S.E.2d 61, 62-63 (2005).

[2] Respondent argues the trial court erred in failing to appoint a guardian ad litem pursuant to section 7B-602 of the North Carolina General Statutes, which provides in pertinent part that:

> (b) In addition to the right to appointed counsel . . . a guardian ad litem shall be appointed in accordance with the provisions of G.S. 1A-1, Rule 17, to represent a parent in the following cases:
>
> (1) Where it is alleged that the juvenile is a dependent juvenile within the meaning of G.S. 7B-101 in that the parent is incapable as the result of substance abuse, mental retardation, mental illness, organic brain syndrome, or any other similar cause or condition of providing for the proper care and supervision of the juvenile[.]

N.C. Gen. Stat. § 7B-602(b) (2003).[1] Section 7B-602(b)(1) requires appointment of a guardian ad litem where "(1) the petition specifi-

1. We note that N.C. Gen. Stat. § 7B-602 has since been amended to provide for appointment of a guardian ad litem for a non-minor parent upon motion "if the court determines that there is a reasonable basis to believe that the parent is incompetent or has diminished capacity and cannot adequately act in his or her own interest." 2005

cally alleges dependency; and (2) the majority of the dependency allegations tend to show that a parent or guardian is incapable as the result of some debilitating condition listed in the statute of providing for the proper care and supervision of his or her child." *In re H.W.*, 163 N.C. App. 438, 447, 594 S.E.2d 211, 216, *disc. review denied*, 358 N.C. 543, 599 S.E.2d 46 (2004).

In the present case, there is no express allegation of dependency, and no allegations of incapability on the part of respondent. Nevertheless, this Court will reverse an order for appointment of guardian ad litem where the evidence tends to show "that respondent's mental health issues and the child's neglect [are] so intertwined at times as to make separation of the two virtually, if not, impossible." *In re J.D.*, 164 N.C. App. 176, 182 605 S.E.2d 643, 646 (2004); *In re C.B.*, 171 N.C. App. 341, 346, 614 S.E.2d 579, 581-82 (2005).

In the present case, it is unclear the extent to which respondent's mental health issues are inextricably linked to the issues of domestic violence, substance abuse, and anger management that support the finding of continued neglect of K.H. and P.D.D. The evidence indicating respondent suffers from depression, Bipolar Disorder, Personality Disorder NOS, as well as his suicide attempt, raises genuine questions regarding the interplay between respondent's mental health, the neglect of his children, and his entitlement to a guardian ad litem. As such, we conclude the trial court erred in failing to hold a hearing as to respondent's need for a guardian ad litem, and we reverse the orders of the trial court and remand for a hearing as to whether respondent is entitled to appointment of a guardian ad litem. *See In re L.M.C.*, 170 N.C. App. 676, 678-79, 613 S.E.2d 256, 258 (2005) (vacating a permanency planning order for failure to appoint a guardian ad litem).

Reversed and remanded.

Judge WYNN concurs.

Judge JACKSON dissents in a separate opinion.

N.C. Sess. Laws ch. 398, § 2. The amendment applies to cases arising after 1 October 2005. As the juvenile petition in the present case was filed 18 September 2003, the current amendment is inapplicable.

JACKSON, Judge dissents.

For the reasons stated below, I must respectfully dissent from the majority's opinion reversing the permanency planning orders, and holding the trial court erred in failing to conduct a hearing as to whether respondent was entitled to the appointment of a guardian *ad litem*.

While the majority relies on *In re J.D.* and *In re C.B.* for the conclusion that respondent's mental health issues were so intertwined with P.D.D. and K.H.'s neglect, such that separating the two was virtually impossible, the instant case is distinguishable from *J.D.* and *C.B.* In both of those cases, the petitions actually alleged that the children were dependent on the respondents in those cases, and that the respondents' mental illnesses significantly contributed to the children being dependent. *See In re C.B.*, 171 N.C. App. 341, 346, 614 S.E.2d 579, 582 (2005); *In re J.D.*, 164 N.C. App. 176, 182, 605 S.E.2d 643, 646 (2004). This is not so in the instant case. Here there has been no allegation of dependency or of respondent's incapability to parent, and his mental illness has not been alleged as a significant factor in the neglect of P.D.D. or K.H.

The case of *In re L.M.C.*, also relied on by the majority, also may be distinguished from the instant case. In *L.M.C.*, when dependency was alleged in the juvenile petition, this Court held the trial court erred in failing to appoint a guardian *ad litem* for the respondent mother, after the court had been presented with evidence sufficient to support a finding that the juvenile's mother had various mental health disorders, and that these disorders resulted in L.M.C. being dependent on her mother. *In re L.M.C.*, 170 N.C. App. 676, 679, 613 S.E.2d 256, 258 (2005). In the instant case, although respondent was diagnosed as having Bipolar Disorder and other personality issues which might interfere with his being able to be an effective, nurturing, and safe parent, there was not a finding by any mental health professional or an allegation that respondent's mental health issues resulted in P.D.D. and K.H. being neglected or dependent, or that he was incapable of parenting the children.

Based on the record before this Court, there is no dispute that respondent suffers from various mental health issues and that he has failed to comply with the prior court orders, however there is not sufficient evidence that his mental health issues resulted in respondent's being incapable to parent or care for P.D.D. and K.H. This Court has held that even though a juvenile petition may not specifically refer-

ence dependency or allegations of incapability on the part of respondent, when the trial court allows evidence to be presented regarding the parent's mental illness and substance abuse, and the adverse effect on the parent's ability to care for their children, the parent may be entitled to have a guardian *ad litem* appointed. *In re T.W.*, 173 N.C. App. 153, 157-58, 617 S.E.2d 702, 706 (2005); *In re B.M.*, 168 N.C. App. 350, 358-59, 607 S.E.2d 698, 704 (2005). Although the trial court in the instant case may have taken respondent's mental health issues into consideration when ruling on respondent's permanency planning order, there is no indication that the trial court's ruling was based solely on respondent's mental health issues and their effect on his ability to parent P.D.D. and K.H. Also, at no point during the permanency planning review hearings did respondent request the appointment of a guardian *ad litem* based on his mental illness. *Cf. In re T.W.*, 173 N.C. App. at 158-59, 617 S.E.2d at 706 (respondent specifically petitioned the trial court for appointment of guardian *ad litem* based upon her mental illness, and the trial court erred in not appointing one when it considered her mental illness as a factor in deciding to terminate her parental rights).

While dependency or respondent's incapability may not have been alleged in the juvenile petition, we still must determine whether respondent was entitled to the appointment of a guardian *ad litem* per Rule 17 of our Rules of Civil Procedure. *In re J.A.A.*, 175 N.C. App. 66, 71, 623 S.E.2d 45, 49 (2005). Rule 17 provides that

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

N.C. Gen. Stat. § 1A-1, Rule 17(b)(2) (2005). Thus, a trial court need only inquire into the competency of a litigant in a case such as respondent's when "circumstances are brought to [the trial court's] attention, which raise a substantial question as to whether the litigant is *non compos mentis*." *J.A.A.*, 175 N.C. App. at 72, 623 S.E.2d at 49 (citing *Rutledge v. Rutledge*, 10 N.C. App. 427, 432, 179 S.E.2d 163, 166 (1971)). After reviewing the record in the instant case, I believe the

evidence was insufficient to raise a substantial question regarding respondent's competency. Thus, I believe respondent was not entitled to the appointment of a guardian *ad litem* per Rule 17.

Although the juvenile petition in the instant case does contain references to respondent's drug abuse, and the subsequent permanency planning orders reference respondent's mental health issues, "the trial court is not required to appoint a guardian *ad litem* 'in every case where substance abuse or some other cognitive limitation is alleged.' " *J.A.A.*, 175 N.C. App. at 70-71, 623 S.E.2d at 48 (citations omitted). As there were no allegations of dependency or respondent's incapability to parent P.D.D. and K.H. properly, I would affirm the trial court's permanency planning orders, and hold the trial court was not required to conduct a hearing on the issue of appointing a guardian *ad litem* for respondent.

RICHARD HARRISON AND KATHY HARRISON, PLAINTIFFS v. CITY OF SANFORD, A MUNICIPAL CORPORATION, DEFENDANT

No. COA05-1001

(Filed 4 April 2006)

1. Statutes of Limitation and Repose— sewage back-up—negligence—unique injury

Summary judgment should not have been granted on the basis of the statute of limitations in a negligence action against a city arising from a sewage back-up in plaintiffs' basement. Although there had been other incidents, the injury here was unique, regulatory action indicated that each discharge was a separate violation, and this was not a case of a continuing injury. The statute of limitations did not begin to run until the date of this injury.

2. Negligence— sewage back-up—duty of reasonable care admitted—summary judgment motion

There was evidence sufficient to establish a triable issue of fact in a negligence case against a city arising from a sewage back-up where the city admitted that it had a duty of reasonable care and the evidence was sufficient to withstand the motion for summary judgment on causation and damage.

3. Immunity— governmental—sewage back-up—proprietary function

A city was not entitled to the shield of governmental immunity in an action arising from a sewage back-up where the city admitted setting rates and charging fees. The doctrine of governmental immunity will not act as a shield to a municipality when the activity is proprietary; the operation and maintenance of a sewer system is a proprietary function where the municipality sets rates and charges fees.

Appeal by plaintiffs from judgment entered 4 April 2005 by Judge Gregory A. Weeks in Lee County Superior Court. Heard in the Court of Appeals 23 February 2006.

Van Camp, Meacham & Newman, PLLC, by Thomas M. Van Camp, for plaintiff appellants.

Cranfill Sumner & Hartzog, LLP, by Norwood P. Blanchard, III, for defendant appellee.

McCULLOUGH, Judge.

Plaintiffs appeal from the granting of a motion for summary judgment where there was no genuine issue of material fact and defendant was entitled to judgment as a matter of law.

Richard and Kathy Harrison ("the Harrisons") own a residence located at 528 Summit Drive in Sanford, North Carolina, which is serviced by a main sewer line and manhole maintained and operated by the City of Sanford ("the City"). The Harrisons allege that on 8 August 2003 a large rain storm occurred in which the manhole located on the Harrisons' property and operated and maintained by the City, begin emitting untreated sewage from the City's sewage system causing the untreated sewage to flow onto the Harrison's property. The Harrisons further allege that the City was informed of the sewage overflow; however, the City took no action. The overflow of sewage from the manhole caused 39 inches of untreated sewage to enter the Harrisons' basement causing damage to personal property located in the basement totaling approximately $49,000.00 and further property damage totaling approximately $20,000.

Prior to 8 August 2003, sewage from the City's sewer lines and manhole had entered the Harrisons' yard and a small concrete area of their basement beginning sometime around 1992. Beginning in 1996,

the Harrisons contacted the City on numerous occasions regarding problems with sewage discharge onto their property. The North Carolina Department of Environment and Natural Resources ("NCDENR") issued a notice of violations in February 2002 stating that it is illegal under our statutes to "discharge wastewater without a permit" which could result in assessment of monetary penalties "per day per violation." The City failed to correct the problems causing the sewer system and manhole to continue to discharge untreated sewage.

In January 2004, the Harrisons filed a complaint against the City alleging negligence, private nuisance, and trespass. The City filed a motion for summary judgment on 18 February 2005 for failure to state a claim upon which relief may be granted, failure to file the claim within the applicable statutory periods, and claims barred by immunity. On 4 April 2005 the trial court entered an order granting the City's motion for summary judgment.

Plaintiff appeals.

[1] We now address the Harrisons' argument on appeal that the trial court erred in granting summary judgment. We agree.

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) (2005). On a motion for summary judgment, "[t]he evidence is to be viewed in the light most favorable to the nonmoving party." *Moore v. Coachmen Industries, Inc.*, 129 N.C. App. 389, 394, 499 S.E.2d 772, 775 (1998). When determining whether the trial court properly ruled on a motion for summary judgment, this Court conducts a *de novo* review. *Va. Electric and Power Co. v. Tillett*, 80 N.C. App. 383, 385, 343 S.E.2d 188, 191, *cert. denied*, 317 N.C. 715, 347 S.E.2d 457 (1986).

There is no genuine issue of material fact where a party demonstrates that the claimant cannot prove the existence of an essential element of his claim or cannot surmount an affirmative defense which would bar the claim. *Vares v. Vares*, 154 N.C. App. 83, 86, 571 S.E.2d 612, 615 (2002), *disc. review denied*, 357 N.C. 67, 579 S.E.2d 576 (2003). In regard to the accrual of a cause of action, our statutes state, "for personal injury or physical damage to claimant's property, the cause of action, . . . shall not accrue until bodily harm to the

claimant or physical damage to his property becomes apparent or ought reasonably to have become apparent to the claimant." N.C. Gen. Stat. § 1-52(16) (2005). Appellee's argument relies on the interpretation of N.C. Gen. Stat. § 1-52(16) in *Robertson v. City of High Point*, 129 N.C. App. 88, 497 S.E.2d 300, *disc. review denied*, 348 N.C. 500, 510 S.E.2d 654 (1998), and *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 329 S.E.2d 350 (1985). However, the instant case is easily distinguished from each of these cases, and therefore the application of the statute must also differ.

In *Pembee*, the defendant constructed a roof for plaintiff which was later determined to be defective. The plaintiff discovered the defect in the roof when it began to leak two months after occupying the building in 1977; however, in 1980, an engineer discovered blistering throughout the entire roof which was determined to be caused by the entrapment of moisture in the roof. Our Supreme Court rejected plaintiff's contention that the blistering of the roof was a separate injury from the original leaks. The Court held that as soon as an injury becomes apparent, a cause of action accrues and that further damage caused because of the injury does not give rise to a new cause of action, but is rather a mere aggravation of the original injury. *Pembee*, 313 N.C. at 493-94, 329 S.E.2d at 354.

In *Robertson*, the plaintiffs filed a suit alleging negligence, nuisance, trespass and infringement of constitutional rights based on damage caused by the operation of a landfill in the dumping of solid waste. The City of High Point began dumping solid waste onto property adjacent to plaintiffs' property in October 1993 and suit was not filed until December 1996. This Court held that plaintiffs knew or reasonably should have known of the injury to their property in October 1993, and the fact that further injury was caused was insufficient to give rise to a new cause of action. *Robertson*, 129 N.C. App. at 91, 497 S.E.2d at 302.

It was clear in *Pembee* that there was one single injury, leaks in the roof, which was only further exacerbated by entrapment of the moisture from the leaks in the roof. Moreover, in *Robertson* the injury caused by the landfill recurred each and every day from October 1993 until December 1996 without interruption. In stark contrast to both of these cases, the injury in the instant case of which the Harrisons complain was not a continuing injury but rather one of a separate and distinct nature. Before 8 August 2003, when sewage was discharged and entered into the Harrisons' home, the damage consisted of broken pipes and concrete. However, on 8 August 2003, the injury caused by

sewage discharge into the home caused a loss of personal property totaling $49,000.00 and further property damage of $20,000.00. The unique nature of the injury in this case is further evidenced by the language of NCDENR's violation notice to the City. The notice stated that further illegal discharge would result in an assessment of penalties **per violation** indicating that each separate instance of sewage discharge was a separate violation. This is not a case of a continuing injury nor is it one involving an exacerbated injury. Instead, this Court must focus on the date the injury at issue occurred which is 8 August 2003.

We also note that in applying this statute, this Court must look to the plain and ordinary meaning where the words chosen by the legislature to comprise the law are clear and unambiguous. *See Hyler v. GTE Products Co.*, 333 N.C. 258, 262, 425 S.E.2d 698, 701 (1993). It is clear from the words of the statute that the litmus test used in determining the date of the accrual of an action is the date on which the **injury** becomes apparent or reasonably should have been apparent. The legislative purpose behind this statute and the interpretations of the Courts are twofold: (1) deterring litigants from bringing suit each and every time they sustain a harm, and (2) deterring litigants from acting in a dilatory manner about substantive damage. The case at hand is an intersection of these two purposes, and for that reason this Court must balance those interests. The Harrisons gave repeated notice to the City regarding the overflow of sewage from the manhole. Further, if the Harrisons brought suit in any of the instances involving sewage discharge before 8 August 2003, their damages would have been nominal at best. To require a plaintiff to go into court and predict an occurrence, such as is present in the instant case, would be requiring a plaintiff to litigate over speculative injury. This Court does not hold today differently than we have before; instead, we note the separate and distinct injury caused on 8 August 2003 and determine that this is the date on which the cause of action accrued.

[2] Further, taking the evidence in the light most favorable to the Harrisons, it is evident from the affidavits that a triable issue of fact exists as to whether or not the City engaged in actionable negligence. In a negligence claim, summary judgment is proper where the plaintiff's forecast of evidence is insufficient to support an essential element of negligence. *See Patterson v. Pierce*, 115 N.C. App. 142, 143, 443 S.E.2d 770, 771, *disc. review denied*, 337 N.C. 803, 449 S.E.2d 749 (1994). A plaintiff must show that: "(1) the defendant owed the plain-

tiff a duty of care; (2) the defendant's conduct breached that duty; (3) the breach was the actual and proximate cause of the plaintiff's injury; and (4) damages resulted from the injury." *Bostic Packaging, Inc. v. City of Monroe*, 149 N.C. App. 825, 830, 562 S.E.2d 75, 79, *disc. review denied*, 355 N.C. 747, 565 S.E.2d 192 (2002). Summary judgment is a drastic measure, and it should be used with caution, especially in a negligence case in which a jury ordinarily applies the reasonable person standard to the facts of each case. *See Williams v. Power & Light Co.*, 296 N.C. 400, 402, 250 S.E.2d 255, 257 (1979).

In the instant case, the record reveals that the City admitted that it had a duty of reasonable care in regard to the main sewer lines and manhole located on the Harrisons' property. Further, the affidavits in the record evince sufficient evidence to withstand the City's summary judgment of a breach of duty by the City, causation and damage.

[3] Moreover, the doctrine of governmental immunity will not act as a shield to a municipality from liability for torts committed by its agencies and organizations when the activity of the municipality is " 'proprietary' " in nature. *Bostic*, 149 N.C. App. at 826-27, 562 S.E.2d at 77. The law is clear in holding that the operation and maintenance of a sewer system is a proprietary function where the municipality sets rates and charges fees for the maintenance of sewer lines. *Bostic*, 149 N.C. App. at 829, 562 S.E.2d at 78; *Pulliam v. City of Greensboro*, 103 N.C. App. 748, 754, 407 S.E.2d 567, 570, *disc. review denied*, 330 N.C. 197, 412 S.E.2d 59 (1991). In the instant case, the City admitted that it sets sewer rates and charges fees in respect to the sewer system. Therefore, this assignment of error is overruled.

Accordingly, the trial court erred in granting summary judgment in favor of the City where the statute of limitations did not begin to run until the separate and distinct act of sewage discharge caused injury on 8 August 2003. Further, the affidavits and pleadings, taken in the light most favorable to the Harrisons evinces that there was a genuine issue of material fact and that the City was not entitled to the shield of governmental immunity.

Reversed.

Judges TYSON and LEVINSON concur.

STATE OF NORTH CAROLINA v. TONY JOHNSON

No. COA05-758

(Filed 4 April 2006)

Search and Seizure— vehicle—motion to suppress—drugs—objective reasonableness test

The trial court erred in a trafficking in cocaine, conspiracy, possession with intent to sell and deliver cocaine, and possession of drug paraphernalia case by denying defendant's motion to suppress evidence seized pursuant to a search of his vehicle where a plastic wall panel was removed by a law enforcement officer from the interior of defendant's van, thereby facilitating discovery of cocaine, because: (1) applying the test of objective reasonableness, neither the officer nor defendant could reasonably have interpreted defendant's general statement of consent to include the intentional infliction of damage to the vehicle; (2) although an individual consenting to a vehicle search should expect that search to be thorough, he need not anticipate that the search will involve the destruction of his vehicle, its parts or contents; (3) unless an individual specifically consents to police conduct that exceeds the reasonable bounds of a general statement of consent, that portion of the search is impermissible; (4) the trial court's findings do not address, nor does the testimony of the officer reveal, the presence of probable cause necessary to extend the scope of the instant search beyond the limitation of reasonableness; (5) save for the search itself, no evidence nor any finding of fact suggested the officer suspected the van contained contraband or that defendant was involved in any criminal conduct; (6) taking the presence of inappropriate or out of place glue as the totality of the circumstances, that solitary factor standing alone was wholly inadequate and insufficient to establish probable cause justifying search beyond the reasonable scope of defendant's consent; and (7) the alterations to the vehicle must be such that an officer may reasonably believe a crime is being committed, and the officer must go beyond the inarticulable hunch that all customized vehicles contain hidden compartments and point to specific factors which justify the objectively reasonable conclusion that particular alterations indicate a hidden compartment which may contain contraband.

Appeal by defendant from order entered 26 October 2004, *nunc pro tunc* 11 October 2004, by Judge Robert F. Floyd, Jr., in Robeson County Superior Court. Heard in the Court of Appeals 25 January 2006.

Attorney General Roy Cooper, by Assistant Attorney General Martin T. McCracken, for the State.

Stubbs, Cole, Breedlove, Prentis & Biggs, PLLC, by C. Scott Holmes, for defendant-appellant.

JOHN, Judge.

Defendant appeals the trial court's denial of his motion to suppress evidence seized pursuant to a search of his motor vehicle. Defendant argues, *inter alia*, the search was unconstitutional because it exceeded the reasonable scope of any valid consent and therefore constituted a warrantless search without probable cause. We agree.

On 13 August 2003, Detective Steven Ray Lovin (Lovin) of the Robeson County Sheriff's Department stopped defendant's Plymouth Voyager van because the license plate was partially obscured. Detaining defendant in his patrol vehicle, Lovin wrote a warning ticket, returned defendant's license and registration, and indicated defendant was free to leave. Notwithstanding, Lovin then inquired if he could ask defendant "a few questions," whereupon defendant resumed his seat in the patrol vehicle. Lovin described "a lot of problems on Interstate 95, people transporting illegal guns and drugs, large sums of money exceeding $10,000, drugs like cocaine, marijuana, things like that." Lovin then asked defendant if he had "anything like that in his vehicle." Defendant replied "no" several times. At that point Lovin asked if it was "alright with [defendant] if we search the van"? Lovin testified defendant responded "yeah." Lovin and Deputy Sheriff James Hunt (Hunt) then proceeded to search the vehicle. The officers discovered approximately ten kilograms of cocaine as a result of the search.

In his testimony, Lovin acknowledged the cocaine was "not in plain view," and described the process of locating it as follows:

> On the inside wall on the passenger's side where the door slides open, when that door slides open, there is a wheel well, the hump, and there is the whole entire wall. There is a piece of rubber that comes down that wall. It's glued there. It shouldn't be. If

> you pull that glue off, or if you pull that piece of rubber off, there is a piece of plastic for the inside wall. If you pull that piece of plastic back, you can look down inside there and see into the wall, the actual outer wall and the inner wall of the vehicle. There's two. If you're sitting in the back seat and look, and here is the wall, the plastic gray that you would normally see. Okay? Between this wall and the outer wall, which is the metal part of the vehicle, is where the kilos were at on that one side, as well as the passenger's side.

Lovin further indicated he was unable to say whether Hunt used a tool or whether he "was able to pull things apart with his hands to see inside the door."

Prior to trial, defendant moved to suppress the evidence. Following a hearing, the motion was denied. Defendant subsequently pled guilty pursuant to a plea agreement to two counts of trafficking in cocaine, one count of conspiracy, one count of possession with intent to sell and deliver cocaine, and one count of possession of drug paraphernalia. The convictions were consolidated for judgment and defendant was sentenced to a 175 to 219 months active term of imprisonment. Pursuant to N.C.G.S. § 15A-919(b) (1979), defendant expressly reserved his right to appeal the denial of his motion to suppress.

"The scope of review on appeal of the denial of a defendant's motion to suppress is strictly limited to determining whether the trial court's findings of fact are supported by competent evidence, in which case they are binding on appeal, and in turn, whether those findings support the trial court's conclusions of law." *State v. Corpening*, 109 N.C. App. 586, 587-88, 427 S.E.2d 892, 893 (1993) (citations omitted). "Generally, the Fourth Amendment and article I, § 20 of the North Carolina Constitution require issuance of a warrant based on probable cause for searches. However, our courts recognize an exception to this rule when the search is based on the consent of the detainee." *State v. Jones*, 96 N.C. App. 389, 397, 386 S.E.2d 217, 222 (1989) (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 36 L. Ed. 2d 854, 858 (1973), *appeal dismissed and disc. review denied*, 326 N.C. 366, 389 S.E.2d 809 (1990); *State v. Belk*, 268 N.C. 320, 322, 150 S.E.2d 481, 483 (1966)). "The scope of the search can be no broader than the scope of the consent." *Id.* (citing *United States v. Ross*, 456 U.S. 798, 821, 72 L. Ed. 2d 572, 591 (1982)). In the case *sub judice*, the trial court concluded the search of defendant's vehicle

was consensual, but made no determination as to whether that consent was limited. Assuming without deciding that the trial court's characterization of the search as consensual was proper, we first discuss defendant's contention that the search at issue exceeded the reasonable scope of defendant's consent.

"When an individual gives a general statement of consent without express limitations, the scope of a permissible search is not limitless. Rather it is constrained by the bounds of reasonableness . . . ." *United States v. Strickland*, 902 F.2d 937, 941 (11th Cir. 1990). "The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?" *Florida v. Jimeno*, 500 U.S. 248, 251, 114 L. Ed. 2d 297, 302 (1991) (citations omitted); *see also United States v. Urbina*, 431 F.3d 305, 310 (8th Cir. 2005) ("We measure the scope of consent under the Fourth Amendment using a standard of objective reasonableness, considering what an objectively reasonable person would have understood the consent to include.") (citing *United States v. Fleck*, 413 F.3d 883, 892 (8th Cir. 2005)).

In the instant case, a plastic wall panel was removed by a law enforcement officer from the interior of defendant's van, thereby facilitating discovery of the cocaine. Applying the test of "objective reasonableness," *Florida v. Jimeno*, 500 U.S. at 251, 114 L. Ed. 2d at 302, to this circumstance, we hold neither Lovin nor defendant could reasonably have interpreted defendant's general statement of consent "to include the intentional infliction of damage to the vehicle. . . ." *Strickland*, 902 F.2d at 941-42.

"Although an individual consenting to a vehicle search should expect that search to be thorough, he need not anticipate that the search will involve the destruction of his vehicle, its parts or contents." *Id.* at 942; *see also United States v. Garcia*, 897 F.2d 1413, 1419-20 (7th Cir. 1990) (opening of door panels during search "is inherently invasive" and extends beyond scope of general consent to search); *United States v. Gastellum*, 927 F.Supp. 1386, 1390 (D. Colo. 1996) (searching panels of trunk, removing interior panels that had been fastened with screws, pulling up carpet, and removing seats exceeded permissible scope of consent); *United States v. Orrego-Fernandez*, 78 F.3d 1497, 1505-06 (10th Cir. 1996) (search did not exceed scope of consent where police searched no hidden compartments); *State v. Swanson*, 172 Ariz. 579, 583, 838 P.2d 1340, 1344

(1992), *cert. denied*, 507 U.S. 1006, 123 L. Ed. 2d 270 (1993) (even "unqualified consent to search a vehicle does not give law enforcement officer's [sic] license, absent some further basis, to start ripping or tearing a car apart. This would, in the Court's mind, apply to removing door panels."). Moreover, "[u]nless an individual specifically consents to police conduct that exceeds the reasonable bounds of a general statement of consent, that portion of the search is impermissible." *Strickland*, 902 F.2d at 942 (reasonable person would not understand general consent to search automobile as authorizing slashing of spare tire and investigating its contents).

Notwithstanding,

> [i]t is well settled that a vehicle may be searched without either permission or a warrant if there is probable cause to believe that it contains contraband or other evidence which is subject to seizure under law and exigent circumstances necessitate the search or seizure. A vehicle search conducted pursuant to probable cause may include any item and compartment in the car that might contain the object of the search. Moreover, such a search may include some injury to the vehicle or the items within the vehicle, if the damage is reasonably necessary to gain access to a specific location where the officers have probable cause to believe that the object of their search is located.

Id. (citations omitted); *see also State v. Poczontek*, 90 N.C. App. 455, 457, 368 S.E.2d 659, 660-61 (1988) ("[a]n officer may search an automobile without a warrant if he has probable cause to believe the vehicle contains contraband, and he has probable cause if based upon the totality of the circumstances known to him 'he believes there is a "fair probability that contraband or evidence of a crime will be found" therein.' ") (citations omitted).

Here, however, the trial court's findings do not address, nor does the testimony of Lovin reveal, the presence of probable cause necessary to extend the scope of the instant search beyond the limitation of reasonableness. The trial court simply found that, "upon inspection of the van, glue was found on one side of the panels which the officer determined was inappropriate or out of place." Lovin's testimony indicated defendant was cooperative and that his appearance seemed normal. Save for the search itself, no evidence nor any finding of fact suggested Lovin suspected the van contained contraband or that defendant was involved in any criminal conduct. Taking the presence of "inappropriate" or "out of place" glue as the "totality of

the circumstances," *see Poczontek*, 90 N.C. App. at 457, 368 S.E.2d at 661, presented herein, we believe that solitary factor, standing alone, to be wholly inadequate and insufficient to establish probable cause justifying search beyond the reasonable scope of defendant's consent. *See Orrego-Fernandez*, 78 F.3d at 1504-05 ("Alterations to vehicles do not automatically create reasonable suspicion. The alterations to the vehicle must be such that a trooper may reasonably believe a crime is being committed. The trooper must go beyond the inarticulable hunch that all customized vehicles contain hidden compartments and point to specific factors which justify the objectively reasonable conclusion that particular alterations indicate a hidden compartment which may contain contraband."). Accordingly, defendant's motion to suppress should have been granted.

Because we conclude on the basis of the foregoing discussion that the trial court erred in denying the motion to suppress, we do not address defendant's remaining assignments of error. The trial court's denial of defendant's motion to suppress is reversed, and this matter is remanded to the trial court for such further proceedings as may be consistent with our opinion herein.

Reversed and remanded.

Judges BRYANT and CALABRIA concur.

STATE OF NORTH CAROLINA v. JEREMY SCOTT STEELMON

No. COA05-847

(Filed 4 April 2006)

Witnesses— expert—officer—lividity of body and approximate time of death

The trial court did not abuse its discretion in a first-degree murder case by admitting expert testimony from an officer as to the lividity of the body and approximate time of death even though he was not a medical expert, because: (1) the evidence shows that the officer has a degree in criminal justice and training in the areas of crime scene investigation and homicide, along with his many years of experience as an officer; (2) the trial court determined that the officer's expertise in death scene investiga-

tions puts him in a better position to give an opinion on the subjects of lividity and approximate time of death than the trier of fact; and (3) the standard for admission of expert testimony does not require an expert to be licensed or a specialist in the field in which he testifies.

Appeal by defendant from judgments entered 1 March 2004 by Judge David S. Cayer in Catawba County Superior Court. Heard in the Court of Appeals 22 February 2006.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General David Roy Blackwell, for the State.

Leslie C. Rawls for defendant-appellant.

HUNTER, Judge.

Jeremy Scott Steelmon ("defendant") appeals from judgments entered 1 March 2004 consistent with a jury verdict of first degree murder, second degree burglary, and entering a vehicle with intent to steal.

The sole issue in this case is whether the trial court erred in permitting expert testimony from Police Officer Norris Yoder ("Officer Yoder") concerning the lividity and approximate time of death of the victim. For the reasons stated herein, we find no error.

Christopher Ledford ("Ledford"), an acquaintance of defendant, testified that in the early morning hours of 20 July 2001 defendant called him twice. In the first conversation, Ledford testified that defendant said he had broken into an elderly woman's house. In the second conversation, defendant told Ledford that he had killed the elderly woman by slitting her wrists.

Defendant testified that he first entered Jean Wolff's ("Wolff") home sometime between 8:30 p.m. and 9:00 p.m. on 19 July 2001. He then fell asleep and was awakened when Wolff returned home. Defendant testified that when he woke up, Wolff was coming at him with a knife. Defendant stated that he was trying to get the knife away from Wolff when it flew out of her hand and cut her wrist. Defendant then pushed Wolff away and ran past her to leave through the back door. Defendant stated that he heard a thud as though Wolff had hit her head. Defendant stopped, came back, and checked for a pulse but did not find one.

On 20 July 2001, Officer Brett Porter ("Officer Porter") was dispatched to the home of Wolff. Upon arrival, he found Wolff's body on the kitchen floor. Later, Officer Yoder was called to Wolff's home to investigate her death. When Officer Yoder entered the home, he observed Wolff's body lying on her left side in the center area of the kitchen floor. Officer Yoder testified that Wolff's left wrist appeared to have been cut, resulting in a small amount of blood pooled under the wrist. In Officer Yoder's opinion, the laceration was made while Wolff was lying on the kitchen floor. Officer Yoder testified that Wolff appeared to have suffered some trauma to the left side of her head. The only blood Officer Yoder observed in the entire house lay directly below Wolff's left wrist, below her head on her clothing, and one small dried spot directly in front of the body.

The trial court allowed Officer Yoder to testify as an expert in death scene investigation. The State offered Officer Yoder's education, experience, and training as foundations to qualify him as an expert. Officer Yoder testified that he held a bachelor's degree from the University of North Carolina-Charlotte in criminal justice, and he had received training from Western Piedmont Community College and the North Carolina Justice Academy in crime scene search and investigation. He also received training in the area of homicide and death investigation. Officer Yoder stated that he was a member of the North Carolina Homicide Investigators Association and had attended at least five conferences where he received in-depth training on various aspects of homicide investigation. Officer Yoder also testified to his experience with twenty-eight years in law enforcement, responding to over two hundred death scenes, including fifteen to twenty homicides.

Over defendant's objections, Officer Yoder was allowed by the trial court to testify as an expert. Officer Yoder explained that lividity occurs when there is pooling of the blood after someone dies, i.e. the blood will sink to the lowest level. Significant lividity indicates that the body was in that position for some time. Officer Yoder opined that Wolff's body had significant lividity, and he concluded that her body had been in that position for several hours. Officer Yoder stated that the amount of lividity could give an approximate, but not exact time of death, and thus, he was unable to pinpoint the exact time of Wolff's demise. Dr. Mark Russell Atkins ("Dr. Atkins"), the Catawba County Medical Examiner, conducted Wolff's autopsy and concluded that Wolff died of a concussive injury.

Defendant was found guilty and convicted of first degree murder, second degree burglary, and entering a vehicle with intent to steal. Defendant's second degree burglary conviction was arrested as the felony underlying the first degree murder conviction. Defendant was sentenced to life in prison. Defendant appeals.

Defendant contends the trial court erred in allowing Officer Yoder to testify as an expert in lividity and approximate time of death. We disagree.

When reviewing whether the trial court erred in permitting a witness to qualify as an expert, the appellate court looks for an abuse of discretion. This Court has consistently given much deference to the trial court when determining the admissibility of expert testimony. *State v. Alderson*, 173 N.C. App. 344, 350, 618 S.E.2d 844, 848 (2005); *see also State v. White*, 154 N.C. App. 598, 604, 572 S.E.2d 825, 830 (2002). Thus, the trial court's decision will only be reversed if the appellate court finds an abuse of discretion. *State v. Holland*, 150 N.C. App. 457, 461-62, 566 S.E.2d 90, 93 (2002).

Rule 702(a) of the North Carolina Rules of Evidence states, "[i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion." N.C. Gen. Stat. § 8C-1 Rule 702(a) (2005). However, when trial courts make determinations concerning a witness's ability to testify as an expert, they are not bound by the Rules of Evidence. *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 458, 597 S.E.2d 674, 686 (2004). The Supreme Court of North Carolina in *State v. Goode*, 341 N.C. 513, 461 S.E.2d 631 (1995), set out a three-part analysis for determining whether to permit expert testimony. The first step evaluates whether the expert's method of proof is sufficiently reliable as an area for expert testimony. *Id.* at 527, 461 S.E.2d at 639. The second step determines whether the witness testifying at trial is qualified as an expert in that area of testimony. *Id.* at 529, 461 S.E.2d at 640. Finally, the court must ask whether the expert's testimony is relevant. *Id.* at 529, 461 S.E.2d at 641. The second step of the analysis is at issue in the present appeal.

The standard for evaluating a witness's qualification as an expert is whether his expertise places him in a better position to have an opinion on the subject than the trier of fact. *Goode*, 341 N.C. at 529, 461 S.E.2d at 640. Under *Howerton*, it is not necessary that an expert

be experienced with the identical subject matter at issue, or be a specialist, licensed, or even engaged in a specific profession. *Howerton*, 358 N.C. at 461, 597 S.E.2d at 688. Whether a witness is qualified as an expert is largely a question of fact answered by the trial court. *Id.* at 461-62, 597 S.E.2d at 688. Thus, trial courts are given wide discretion when determining whether expert testimony is allowed at trial. *Id.* at 458, 597 S.E.2d at 686.

Defendant argues the trial court erred in allowing the jury to hear the expert testimony of Officer Yoder, contending Officer Yoder testified outside of his area of expertise concerning lividity of the body and approximate time of death. Defendant argues that only a medical expert may make determinations concerning lividity and time of death.

Here, the evidence shows that Officer Yoder has a degree in criminal justice and training in the areas of crime scene investigation and homicide, along with his many years of experience as an officer. The trial court determined that Officer Yoder's expertise in death scene investigations puts him in a better position to give an opinion on the subjects of lividity and approximate time of death than the trier of fact.

Under the abuse of discretion standard, the trial court is given much deference to determine whether a witness is qualified as an expert. The trial court in this case did not abuse its discretion when allowing Officer Yoder to testify as a witness. The State offered ample evidence to support the trial court's finding that Officer Yoder, because of his expertise, was better qualified to give his opinion on the subject than the trier of fact. Therefore, Officer Yoder was qualified to give an expert opinion on lividity of the body and approximate time of death, even though he was not a medical expert, as our standard does not require an expert to be licensed or a specialist in the field in which he testifies.

Thus, the trial court properly permitted expert testimony from Officer Yoder as to lividity of the body and approximate time of death.

No error.

Judges HUDSON and BRYANT concur.

HAYDEN HILL, A MINOR, BY AND THROUGH HIS GUARDIAN AD LITEM, HARVEY GENE HILL, JR. AND REGINA HILL, INDIVIDUALLY AND AS PARENT AND NATURAL GUARDIAN OF THE MINOR, HAYDEN HILL, PLAINTIFFS v. TERESA HENSON WEST, C.F. WEST, INC., CHARLES F. WEST, SR., ANNETTE WEST, CHARLES F. WEST, JR. AND RICHARD LESTER, DEFENDANTS

No. COA05-815

(Filed 4 April 2006)

1. Appeal and Error— preservation of issues—no assignment of error—no argument in brief

A matter to which error was not assigned and about which there was no argument in the brief was deemed abandoned.

2. Appeal and Error— Appellate Rules violations—Rule 2 not invoked

Appellate Rule 2 was not invoked where plaintiffs' brief had no statement of the grounds for appellate review and there were no exceptional circumstances, significant issues, or manifest injustices to warrant invocation of Appellate Rule 2.

3. Appeal and Error— appealability—partial summary judgment—dismissal without prejudice of remaining claim—appeal not allowed

An appeal was dismissed as interlocutory where plaintiffs consented to dismissal of the remaining defendant in an automobile accident case without prejudice and then attempted to appeal a summary judgment which had been granted for the other defendants. The consent order was not a final judgment because plaintiffs have the opportunity to refile; counsel was attempting to manipulate the Rules of Civil Procedure to do indirectly what could not be done directly and achieve a result never intended by the General Assembly.

Appeal by plaintiffs from orders entered 28 October 2003 and 19 April 2005 by Judge Knox V. Jenkins, Jr. in Johnston County Superior Court. Heard in the Court of Appeals 11 January 2006.

Lucas, Bryant, Denning & Ellerbe, P.A., by Sarah Ellerbe, for plaintiff-appellants.

Bailey & Dixon, L.L.P., by Patricia P. Kerner and Kenyann Brown Stanford, for defendant-appellees.

SMITH, Judge.

Harvey Gene Hill, Jr., Regina Hill and Hayden Hill (collectively plaintiffs) appeal from orders entered 28 October 2003 and 19 April 2005. The 28 October 2003 order dismissed with prejudice the actions against C.F. West, Inc., Charles F. West, Sr. and Annette West. The 19 April 2005 order is a consent order which dismissed without prejudice the action against Teresa Henson West.

This litigation arose as a result of a traffic accident occurring when defendant Teresa Henson West, who was intoxicated, crossed over a highway median while driving a van owned by defendant C.F. West, Inc. A detailed summary of the facts from our unpublished opinion can be found at *Hill v. West*, 2005 N.C. App. LEXIS 327 (unpublished) (February 15, 2005) (First Appeal-*Hill I*).

Plaintiffs instituted this action on 16 October 2002, seeking damages for personal injuries arising from the motor vehicular accident 21 January 2001 involving Teresa Henson West. Plaintiffs' original complaint included causes of action for negligence against defendant Teresa Henson West for negligent operation of a van owned by defendant C.F. West, Inc. and causes of action against C.F. West, Inc., Charles F. West, Sr., Annette West, and Charles F. West, Jr. for negligent entrustment of the van to Teresa Henson West.

On 18 December 2002, plaintiffs amended their complaint to include Richard Lester, an employee of C.F. West, Inc., who left keys to the van in the unlocked vehicle parked at the home of Charles F. West, Sr. and Annette West. On 19 December 2002, defendants denied the allegations of negligence and filed a motion to dismiss the amended complaint pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6) for failure to state a claim upon which relief might be granted. On 17 February 2003, defendants' 12(b)(6) motion to dismiss was granted as to Charles F. West, Jr. and Richard Lester, but denied as to all remaining defendants. On 28 October 2003, the Honorable Knox V. Jenkins entered summary judgment for defendants C.F. West, Inc., Charles F. West, Sr. and Annette West. On 15 February 2005, this Court filed its unpublished opinion that the First Appeal was interlocutory and that no substantial right would be lost by plaintiffs in the absence of an immediate appeal. *Hill I*. This Court also stated in *Hill I* that "[p]laintiffs' brief in violation of Rule 28(b)(4), fail[ed] to include a statement of grounds for appellate review[.]" *Id.* On 19 April 2005, Judge Jenkins signed and entered a consent order dismissing the remaining claims against defendant Teresa Henson West

without prejudice, "thereby resolving all claims against all remaining defendants."

[1] Plaintiffs appeal the order entered 28 October 2003 which dismissed with prejudice the action against C.F. West, Inc., Charles F. West, Sr. and Annette West. Plaintiffs' notice of appeal indicates they also appeal from the consent order dated 19 April 2005. Because plaintiffs fail to assign error to the April 2005 consent order, or argue this issue in their brief on appeal, we deem this matter abandoned as it is not entitled to appellate review. N.C.R. App. P. 28(b)(6) ("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.").

[2] Once again, plaintiffs' brief has no statement of the grounds for appellate review in violation of Rule 28(b)(4) of the North Carolina Rules of Appellate Procedure. N.C.R. App. P. 28(b)(4). This Court may vary the requirements of the Rules of Appellate Procedure to "prevent manifest injustice." N.C.R. App. P. 2. Our Supreme Court has stated that "Rule 2 relates to the residual power of our appellate courts to consider, in exceptional circumstances, significant issues of importance in the public interest, or to prevent injustice which appears manifest to the Court and only in such instances." *Steingress v. Steingress*, 350 N.C. 64, 66, 511 S.E.2d 298, 299-300 (1999) (citing *Blumenthal v. Lynch*, 315 N.C. 571, 578, 340 S.E.2d 358, 362 (1986)). This Court has repeatedly held that " 'there is no basis under Appellate Rule 2 upon which we should waive [] violations of Appellate Rules . . . .' " *Holland v. Heavner*, 164 N.C. App. 218, 222, 595 S.E.2d 224, 227 (2004) (quoting *Sessoms v. Sessoms*, 76 N.C. App. 338, 340, 332 S.E.2d 511, 513 (1985)).

This Court in *Hill I*, admonished plaintiffs for failing to include a statement of the grounds for appellate review, and dismissed that appeal as interlocutory. Our review in the present case fails to establish any "exceptional circumstances," "significant issues," or "manifest injustice" to warrant suspension of the Appellate Rules and we decline to reach the merits of the case under Rule 2. Our Supreme Court has recently stated "[i]t is not the role of the appellate courts . . . to create an appeal for an appellant. . . . [T]he Rules of Appellate Procedure must be consistently applied; otherwise, the Rules become meaningless[.]" *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005) (citing *Bradshaw v. Stansberry*, 164 N.C. 356, 79 S.E. 302 (1913)).

[3] In addition, we believe that by entering into the consent order as to Teresa Henson West, counsel are manipulating the Rules of Civil Procedure in an attempt to appeal the 2003 summary judgment that otherwise would not be appealable.

Rule 54(a) of the North Carolina Rules of Civil Procedure provides that "[a] judgment is either interlocutory or the final determination of the rights of the parties." N.C. Gen. Stat. § 1A-1, Rule 54(a) (2005). Subsection (b) allows appeal if the specific action of the trial court from which appeal is taken is final. N.C. Gen. Stat. § 1A-1, Rule 54(b) (2005). The Rules of Civil Procedure permit a plaintiff to take one voluntary dismissal on an action "by filing a notice of dismissal at any time before the plaintiff rests his case, or [] by filing a stipulation of dismissal signed by all parties[.]" N.C. Gen. Stat. § 1A-1, Rule 41(a)(1) (2005).

When plaintiffs originally appealed from the order granting summary judgment to defendants C.F. West, Inc., Charles F. West, Sr., and Annette West, we dismissed the appeal as interlocutory because the underlying lawsuit was still pending with respect to Teresa Henson West. (*Hill I*). After this Court dismissed the interlocutory appeal, the trial court signed and entered the consent order in which the parties agreed to the voluntary dismissal without prejudice of all claims against Teresa Henson West pursuant to N.C.R. Civ. P. 41(a)(1). Two weeks after the voluntary dismissal, plaintiffs noticed appeal, again seeking this Court's review of the 2003 summary judgment.

In our view, the consent order of 19 April 2005 is not a "final" judgment as contemplated by Rule 54, as it is not a "final determination of the rights of the parties" because plaintiffs' rights as to Teresa Henson West have not been determined. Rather, plaintiffs' rights as to Teresa Henson West are "in limbo" as plaintiffs still have the opportunity to refile their action against her. This is apparently an attempt to obtain appellate review of the 2003 summary judgment by taking a dismissal without prejudice as to Teresa Henson West. The only perceived purpose of the consent order is to appeal an order that is in fact, not final.

The consent order filed herein provides, in part:

> 9. This Court specifically orders, with the consent of all parties, that if this case is remanded for trial, all claims against Teresa Henson West may be reinstated as the Plaintiffs deem necessary and that the prior dismissals without prejudice will not be pled as a bar to said claims.

This language reveals the order is not a "final" order as to Teresa Henson West within the meaning of N.C. Gen. Stat. § 1A-1, Rule 54. If we assume that N.C. Gen. Stat. § 1A-1, Rule 54 is not violative of N.C. Const. Art. IV, sec. 13(2), which we doubt, *see State v. Elam*, 302 N.C. 157, 273 S.E.2d 661 (1981); *State v. O'Neal*, 77 N.C. App. 600, 335 S.E.2d 920 (1985), it is our belief that in enacting N.C. Gen. Stat. § 1A-1, Rule 54, the General Assembly never contemplated or intended that parties would be allowed an appeal under the circumstances in the case *sub judice*. If we were to entertain an appeal under these circumstances, an appeal would be possible from every interlocutory ruling which disposes of one or more claims as to one or more parties by taking a dismissal without prejudice as to the other parties and claims and later refiling the action. This was never intended by the General Assembly and will not be permitted.

Counsel in the case at bar are violating the spirit of our Rules and are attempting to do indirectly what they cannot do directly. This appeal is dismissed for violation of N.C.R. App. P. 28(b)(4) and for the reason that no *final* determination of the plaintiffs' rights as to Teresa Henson West has been made in the trial court pursuant to N.C. Gen. Stat. § 1A-1, Rule 54.

Appeal dismissed.

Judges BRYANT and CALABRIA concur.

IN THE MATTER OF: D.S., S.S., F.S., M.M., M.S.

No. COA05-977

(Filed 4 April 2006)

Termination of Parental Rights— timeliness of order—prejudicial error

The trial court erred by failing to reduce its order terminating respondent's parental rights to writing, sign, and enter it within the statutorily prescribed time period under N.C.G.S. § 7B-1111(a), and the trial court's order is reversed and remanded because the delay of over six months to enter the adjudication and disposition order prejudiced all parties.

IN RE D.S., S.S., F.S., M.M., M.S.

[177 N.C. App. 136 (2006)]

Appeal by respondent mother from order entered 22 September 2004 by Judge J.H. Corpening, II, in New Hanover County District Court. Heard in the Court of Appeals 15 March 2006.

No brief filed for petitioner-appellee New Hanover County Department of Social Services.

Womble Carlyle Sandridge & Rice, PLLC, by Murray C. Greason, III, for petitioner-appellee Guardian ad Litem.

Lisa Skinner Lefler, for respondent-appellant.

TYSON, Judge.

S.S. ("respondent") appeals from order entered terminating her parental rights to her minor children, D.S., S.S., F.S., M.M., and M.S. We reverse and remand.

I. Background

On 5 October 2001, a non-secure custody order was entered for legal custody of respondent's five minor children. Respondent's three oldest children were placed in foster care.

Respondent appeared *pro se* at the 8 October 2001 hearing on the need for continued non-secure custody of the three oldest children. Respondent denied allegations of neglect and asserted it was in her children's best interests to reside in her home or in the home of her children's great grandparents. Respondent requested assistance of counsel. The court ordered the three oldest children remain in non-secure custody of the New Hanover County Department of Social Services ("DSS").

On 13 December 2001, the adjudication hearing was held. Respondent was represented by counsel. The court concluded respondent's five children were neglected and dependent.

A review hearing was held on 7 March 2002. The court permitted the return of respondent's two youngest children to her home. Respondent's three oldest children remained in non-secure custody.

On 23 May 2002, the court convened a hearing for review of the prior order. To reunify her family, respondent was ordered to: (1) complete her GED; (2) satisfy the requirements of the Work First Program; (3) obtain a psychological evaluation; and (4) cooperate with DSS to assure her children's mental health needs were met. The court concluded the legal custody of her five children remain

with DSS for continued placement of her three oldest children. The court ordered the children not to be in the presence of their maternal great-grandfather.

On 15 August 2002, the court: (1) determined respondent failed to satisfy the obligations contained in the prior order; (2) granted physical custody of the two youngest children to DSS; and (3) retained the cause for a permanency planning hearing.

On 21 November 2002, the court convened a permanency planning hearing. The court concluded, "the permanent plan for the above-named children shall be adoption."

On 30 September 2003, DSS petitioned to terminate respondent's parental rights. The termination hearing was held 16 and 17 February 2004 and the court terminated respondent's parental rights. The trial court reduced its order to writing and signed it on 22 September 2004. Respondent appeals.

II. Issues

Respondent argues the trial court erred by: (1) failing to reduce its order to writing within the statutorily prescribed time limit; (2) terminating her parental rights in the absence of clear, cogent, and convincing evidence; and (3) terminating her parental rights when it was not in the best interests of the minor children.

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).

The trial court's "conclusions of law are reviewable *de novo* on appeal." *Starco, Inc. v. AMG Bonding and Ins. Servs.*, 124 N.C. App. 332, 336, 477 S.E.2d 211, 215 (1996).

IV. Order in Writing

Respondent argues the trial court erred when it failed to reduce its order to writing, sign, and enter it within the statutorily prescribed time period. We agree.

N.C. Gen. Stat. § 7B-1111(a) (2005) provides, "[a]ny 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*, 359 N.C. 68, 604 S.E.2d 314 (2004).

In re L.E.B., *K.T.B.*, 169 N.C. App. 375, 378-79, 610 S.E.2d 424, 426, *disc. rev. denied*, 359 N.C. 632, 616 S.E.2d 538 (2005).

This Court has held a delay of the entry of order of six months was "prejudicial to respondent-mother, the minors, and the foster parent." *Id.* at 380, 610 S.E.2d at 427.

> Respondent-mother, the minors, and the foster parent did not receive an immediate, final decision in a life altering situation for all parties. Respondent-mother could not appeal until "entry of the order." If adoption becomes the ordered permanent plan for the minors, the foster parent must wait even longer to commence the adoption proceedings. The minors are prevented from settling into a permanent family environment until the order is entered and the time for any appeals has expired.

Id. at 379, 610 S.E.2d at 426.

Here, the termination of parental rights hearing was held on 16 and 17 February 2004. Respondent's trial counsel entered a purported notice of appeal on 8 June 2004 and formally requested the trial court reduce its order to writing, sign, and enter it. The trial court reduced its order to writing in September 2004. Although the file-stamp on the termination order is illegible on the copy in the record on appeal and on the original in the office of the New Hanover County Clerk of Superior Court, the trial court's signature line is preceded by a date line. The trial court marked the date line as "22 September 2004." The order could not have been entered prior to that date. *Id.* The trial court failed to reduce its order to writing until approximately seven months after the termination hearing.

Respondent argues the delay prejudiced all members of the family involved, as well as the foster and adoptive parents. By failing to reduce its order to writing within the statutorily prescribed time period, "the parent and child have lost time together, the foster parents are in a state of flux, and the adoptive parents are not able to complete their family plan." "The delay of over six months to enter the adjudication and disposition order terminating respondent-

mother's parental rights prejudiced all parties, not just respondent-mother." *Id.* at 380, 610 S.E.2d at 427.

"This late entry is a clear and egregious violation of both N.C. Gen. Stat. § 7B-1109(e), N.C. Gen. Stat. § 1110(a), and this Court's well-established interpretation of the General Assembly's use of the word 'shall.' " *Id.* at 378, 610 S.E.2d at 426.

V. Conclusion

The trial court erred when it failed to reduce its order terminating respondent's parental rights to writing and enter it within the statutorily prescribed time limit. *See In re T.L.T.*, 170 N.C. App. 430, 432, 612 S.E.2d 436, 448 (2005) ("[T]he trial court entered its order approximately seven months after the conclusion of the termination hearing. . . . Therefore, as we recognized in *In re L.E.B.*, the trial court's failure to enter its termination order in a timely manner affected not only respondent, but also Thomas, his foster parents, and his potential adoptive parents."). This trial court's order is reversed, and this case is remanded. In light of our decision, we do not address respondent's remaining assignments of error.

Reversed and remanded.

Judges McCULLOUGH and LEVINSON concur.

STATE OF NORTH CAROLINA v. WILLIAM S. LUTZ

No. COA05-1187

(Filed 4 April 2006)

Probation and Parole— revocation—credit for time served—substance abuse program

Defendant was confined and in custody while in a substance abuse program and the trial court erred by denying his motion for credit for that time when his probation was revoked.

Appeal by defendant from judgment entered 8 April 2005 by Judge Jerry Braswell in Wayne County Superior Court. Heard in the Court of Appeals 9 March 2006.

Attorney General Roy Cooper, by Assistant Attorney General Christopher W. Brooks, for the State.

N.C. Prisoner Legal Services, Inc., by Mary E. McNeill, for defendant-appellant.

TYSON, Judge.

William S. Lutz ("defendant") appeals from judgment entered denying his motion for credit against his active sentence. We reverse and remand for resentencing.

I. Background

On 24 March 2004, defendant pled guilty to four counts of forgery and one count of embezzlement. Defendant was sentenced to a term of a minimum of eight months and a maximum of ten months imprisonment, consistent with the plea agreement. The trial court suspended defendant's sentence and placed him on thirty-six months supervised probation. Defendant was ordered to attend a substance abuse program ("DART-Cherry") for ninety days as a special condition of his probation.

The trial court ordered defendant to be incarcerated until space became available at DART-Cherry. On 28 April 2004, defendant entered the program. Defendant spent ninety-one days at DART-Cherry and successfully completed the program on 28 July 2004.

On 18 November 2004, a probation violation report was filed against defendant alleging positive drug tests, failure to pay the supervision fee, and failure to report to his probation officer. The trial court found defendant had wilfully violated the terms and conditions of his probation. The trial court revoked defendant's probation and activated his suspended sentence of eight to ten months imprisonment. The trial court credited defendant for time served in the Wayne County jail awaiting entry into DART-Cherry.

Defendant filed a motion for credit against his active sentence for his time spent at DART-Cherry on 11 March 2005, pursuant to N.C. Gen. Stat. § 15-196.1. On 8 April 2005, an evidentiary hearing was held and the trial court denied defendant's motion for credit against his sentence. Defendant appeals.

II. Issue

Defendant argues he is entitled to credit against his active sentence for the days he was in the control and custody of the State at DART-Cherry.

III. Standard of Review

Our standard of review for a motion for appropriate relief is well established. "When a trial court's findings on a motion for appropriate relief are reviewed, these findings are binding if they are supported by competent evidence and may be disturbed only upon a showing of manifest abuse of discretion. However, the trial court's conclusions are fully reviewable on appeal." *State v. Wilkins*, 131 N.C. App. 220, 223, 506 S.E.2d 274, 276 (1998) (internal citations omitted).

IV. Credit Against Sentence

Defendant argues his sentence should be credited for the days he spent at DART-Cherry pursuant to *State v. Hearst*, 356 N.C. 132, 567 S.E.2d 124 (2002). We agree.

N.C. Gen. Stat. § 15-196.1 (2005) provides:

> The minimum and maximum term of a sentence shall be credited with and diminished by the total amount of time a defendant has spent, committed to or in confinement in any state or local correctional, mental or other institution as a result of the charge that culminated in the sentence. The credit provided shall be calculated from the date custody under the charge commenced and shall include credit for all time spent in custody pending trial, trial de novo, appeal, retrial, or pending parole, probation, or post-release supervision revocation hearing: Provided, however, the credit available herein shall not include any time that is credited on the term of a previously imposed sentence to which a defendant is subject.

Our Supreme Court has stated, "[t]he langauge of section 15-196.1 manifests the legislature's intention that a defendant be credited with all time defendant was in custody and not at liberty as the result of the charge." *State v. Farris*, 336 N.C. 552, 556, 444 S.E.2d 182, 185 (1994).

In *State v. Hearst*, our Supreme Court also considered the conditions of confinement at a State ordered rehabilitation program

("IMPACT") and held that where the defendant was ordered to attend the program as a condition of his probation and had to relinquish his freedom to the IMPACT staff, the defendant was confined. 356 N.C. 138, 140, 567 S.E.2d 129, 130 (2002). The Court also held that the environment at IMPACT presented a custodial situation wherein the defendant was denied his liberty even though the facility was not locked or fenced, and the defendant could have left at anytime. *Id.* at 139, 567 S.E.2d at 129. The defendant was ordered to attend treatment at IMPACT, or he would have been in violation of the special conditions of probation and subject to having his sentence activated. *Id.* The Court noted that "[w]hile trainees may be 'free to leave' IMPACT, those who fail or withdraw from the program face the probability of returning to prison." *Id.* at 140, 567 S.E.2d at 130.

A. Confinement and Custody

Our Supreme Court defined, " 'confinement' . . . as 'the act of imprisoning or restraining someone; the state of being imprisoned or restrained,' while 'custody' is defined as 'the care and control of a thing or person for inspection, preservation, or security.' " *Id.* (citing *Black's Law Dictionary* (7th ed. 1999)). The Court also stated, "*Black's Law Dictionary* also specifically defines types of custody such as 'penal custody' and 'physical custody.' " *Id.* "Penal custody is defined as 'custody intended to punish a criminal offender' and physical custody is defined as 'custody of a person . . . whose freedom is directly controlled and limited.' " *Id.*

B. Analysis

While at DART-Cherry, defendant's "freedom [was] directly controlled and limited." *Id.* During the evidentiary hearing on defendant's motion for credit against his sentence, the State conceded defendant was "confined" at DART-Cherry. The State now asserts defendant was not "confined" while being treated at DART-Cherry and argues conditions at DART-Cherry are dissimilar to the conditions at IMPACT because here defendant was: (1) allowed several breaks and free time; (2) not required to do any physical labor; (3) required to be up at 5:30 a.m. instead of 4:30 a.m.; and (4) required to be in bed by 10:30 p.m. instead of 8:30 p.m.

Defendant contends he was ordered to attend DART-Cherry as a special condition of his probation, as was the defendant in *Hearst*. If defendant failed to attend the program or withdrew from the program, his sentence could have been activated. Defendant was not

allowed to speak with other DART-Cherry participants while in hallways. If he violated that rule, the staff could require him to write a paper or perform extra hours of cleaning or clearing land. Although no guards were stationed on the premises, he was told that if he left the facility "he would be charged with escape." If charged, defendant testified he was told that "six more months" would be added to his sentence in addition to facing a probation violation report.

Defendant was confined and in custody pursuant to the plain meaning of those words and our Supreme Court's analysis in *Hearst*. Defendant's freedom and liberty were limited by the programs and daily schedule. Although defendant could leave or withdraw from the program at anytime, he was told if he did so he would be charged with additional crimes and have his suspended sentence activated.

V. Conclusion

Defendant was in confinement and not at liberty at DART-Cherry. *Farris*, 336 N.C. at 556, 444 S.E.2d at 185. Pursuant to N.C. Gen. Stat. § 15-196.1, defendant is entitled to be credited for the ninety-one days spent at DART-Cherry. The trial court erred in denying defendant's motion for credit against his sentence. We reverse and remand for resentencing with appropriate credit consistent with this opinion.

Reversed and Remanded.

Judges McCULLOUGH and LEVINSON concur.

STATE OF NORTH CAROLINA v. TONY LAMONT FRINK

No. COA05-439

(Filed 4 April 2006)

Rape— indictment for statutory rape—attempted second-degree plea—fatally defective

A conviction for attempted second-degree rape was a nullity where the indictment was for statutory rape, did not charge essential elements of the offense of attempted second-degree rape, and did not provide subject matter jurisdiction.

STATE v. FRINK

[177 N.C. App. 144 (2006)]

Appeal by defendant from judgment entered 4 October 2004 by Judge Clarence E. Horton, Jr., in Harnett County Superior Court. Heard in the Court of Appeals 7 February 2006.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Brian C. Wilks, for the State.

Michelle FormyDuval Lynch, for defendant-appellant.

JACKSON, Judge.

Tony Lamont Frink ("defendant") pled guilty to attempted second degree rape pursuant to a plea agreement providing that he would receive an active prison sentence of ninety-four to 122 months. Upon defendant's concession that he had a Prior Record Level IV based on nine record points, the trial court accepted the plea and entered judgment consistent with the plea agreement. Defendant filed timely notice of appeal.

This is an *Anders* appeal in which defense counsel asks this Court to conduct its own review of the record for possible prejudicial error. *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493, *reh'g denied*, 388 U.S. 924, 87 S. Ct. 2094, 18 L. Ed. 2d 1377 (1967); *State v. Kinch*, 314 N.C. 99, 331 S.E.2d 665 (1985). Defense counsel has shown to the satisfaction of this Court that she has complied with the requirements of *Anders* and *Kinch* by advising defendant of his right to file written arguments with this Court and providing him with the documents necessary to do so. However, defendant has not filed any written arguments, and a reasonable time for him to have done so has passed.

Under our review pursuant to *Anders* and *Kinch*, "we must determine from a full examination of all the proceedings whether the appeal is wholly frivolous." *State v. Hamby*, 129 N.C. App. 366, 367-68, 499 S.E.2d 195, 195-96 (1998). In carrying out this duty, we will review the legal points appearing in the record, transcript, and briefs, not for the purpose of determining their merits (if any) but to determine whether they are wholly frivolous. *Kinch*, 314 N.C. at 102-03, 331 S.E.2d at 667.

Our Supreme Court has stated that an indictment is fatally defective when the indictment fails on the face of the record to charge an essential element of the offense. *State v. McGee*, 175 N.C. App. 586, 623 S.E.2d 782, 784 (2006), citing *State v. Bartley*, 156 N.C. App. 490,

499, 577 S.E.2d 319, 324 (2003). Here, defendant was indicted for statutory rape of a person 13, 14, or 15 years of age. The indictment stated that defendant "unlawfully, willfully and feloniously did engage in vaginal intercourse with [the victim], a person of the age of 13 years[.]" However, defendant pled guilty to attempted second degree rape. The essential elements of attempted rape required the "intent to commit the rape and an overt act done for that purpose which goes beyond mere preparation but falls short of the completed offense." *State v. Freeman*, 307 N.C. 445, 449, 298 S.E.2d 376, 379 (1983). In addition, the essential elements of second degree rape under N.C. Gen. Stat. § 14-27.3 (2005) required:

> (a) the person [to engage] in vaginal intercourse with another person: (1) By force and against the will of the other person; or (2) Who is mentally disabled, mentally incapacitated, or physically helpless, and the person performing the act knows or should reasonably know the other person is mentally disabled, mentally incapacitated, or physically helpless.

In the present case, upon a full examination of all the proceedings, the indictment for statutory rape is insufficient to support a judgment on the offense of attempted second degree rape because although the indictment did allege that defendant engaged in vaginal intercourse, it did not allege that the intercourse was "with another person: (1) By force and against the will of the other person; or (2) Who is mentally disabled, mentally incapacitated, or physically helpless, and the person performing the act knows or should reasonably know the other person is mentally disabled, mentally incapacitated, or physically helpless." N.C. Gen. Stat. § 14-27.3 (2005). The indictment fails on the face of the record because the indictment for statutory rape fails to charge essential elements of the offense of attempted second degree rape. Therefore, the indictment is fatally defective. We conclude that defendant's appeal is not wholly frivolous, and we must address this error.

Our Supreme Court held in *State v. Partlow*, 272 N.C. 60, 63, 157 S.E.2d 688, 691 (1967), that notwithstanding the "proper methods to raise the question of the sufficiency of a bill of indictment . . . if the offense is not sufficiently charged in the indictment, this Court, *ex mero motu*, will arrest the judgment." When an indictment is fatally defective, the trial court acquires no subject matter jurisdiction, and "if it assumes jurisdiction a trial and conviction are a nullity." *State v. Neville*, 108 N.C. App. 330, 332, 423 S.E.2d 496, 497 (1992) (citation

omitted). The issue of subject matter jurisdiction may be raised at any time, and may be raised for the first time on appeal. *In re S.D.A.*, 170 N.C. App. 354, 357-58, 612 S.E.2d 362, 364 (2005); *see State v. Felmet*, 302 N.C. 173, 176, 273 S.E.2d 708, 711 (1981).

As previously stated, the indictment for statutory rape included in the record on appeal is insufficient to support a judgment on the offense of attempted second-degree rape. This Court may arrest defendant's judgment of attempted second-degree rape because the offense is not sufficiently charged in the indictment. The trial court did not have subject matter jurisdiction to enter the judgment against defendant because the indictment was fatally defective. Therefore, the resultant conviction was a nullity.

Vacate.

Judges WYNN and HUNTER concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

Filed 4 April 2006

CHESTNUT BRANCH, L.L.C. v. PUBLIC INTEREST PROJECTS, INC. No. 04-1406	Buncombe (02CVS1645)	Affirmed
EMPIRE HOMES, INC. v. KEELING No. 05-740	Alamance (04CVS615)	Dismissed
HEAD v. STATE No. 05-1034	Rutherford (04CVS1533)	Dismissed
IN RE J.A. No. 05-762	Anson (99J27)	Affirmed
IN RE J.W. No. 05-704	Mecklenburg (04J235)	Affirmed
IN RE S.R.B., C.A.B. No. 05-1055	Pender (04J49) (04J50)	Affirmed
IN RE S.W., T.W., C.W. No. 05-638	Mecklenburg (01J372) (01J373) (03J213)	Affirmed
IN RE Y.Q.M. No. 05-989	Sampson (00J29)	Affirmed
JONES v. NEW HANOVER CTY. SCHOOLS No. 05-687	Ind. Comm. (I.C. #187952)	Affirmed in part, reversed in part, and remanded
LABRIE v. MCGLONE No. 05-209	Iredell (03CVD2282)	Affirmed
NORTH COUNTRY DEV. OF JEFFERSON CTY., INC. v. AUBIN No. 05-1301	Davidson (01CVS2238)	Vacated
ROTHMAN v. TOWN OF ELON No. 05-1151	Alamance (05CVS122)	Appeal dismissed
SPEARS v. BETSY JOHNSON MEM'L HOSP. No. 05-718	Ind. Comm. (I.C. #013245)	Affirmed
STATE v. ANDERSON No. 05-259	Union (02CRS55109) (02CRS55110) (02CRS55111) (02CRS55235) (03CRS2101)	No error

STATE v. AUMAN No. 05-836	Forsyth (03CRS55827) (03CRS37601)	No error
STATE v. BLACKWELL No. 05-660	Durham (04CRS16686) (02CRS52609)	Affirmed
STATE v. FULLER No. 04-1022	Robeson (99CRS6455) (99CRS6456) (99CRS16563)	No error
STATE v. GLOVER No. 05-588	Cumberland (04CRS55044)	No error
STATE v. GREENE No. 05-782	Pitt (05CRS113)	Affirmed
STATE v. HIATT No. 05-1158	Surry (02CRS53545) (02CRS53546)	No error
STATE v. HULCEY No. 05-1148	Gaston (04CRS51646) (04CRS51656) (04CRS51653) (04CRS51650)	No error
STATE v. JETER No. 05-1292	Forsyth (04CRS61976)	Affirmed
STATE v. MERENOPERDOMO No. 05-1101	Mecklenburg (04CRS220866)	No error
STATE v. MOFFITT No. 05-545	Guilford (03CRS78964) (03CRS78967) (03CRS78968) (03CRS78969) (03CRS78970)	No error; remanded in part for resentencing
STATE v. MOORE No. 05-911	Buncombe (00CRS9120) (00CRS9121) (00CRS53714) (00CRS53715)	Judgment arrested
STATE v. NELSON No. 05-1242	Buncombe (03CRS64517) (03CRS64520) (03CRS64521) (03CRS64522) (03CRS64523) (03CRS64524)	Remanded for resentencing

	(03CRS64525) (03CRS64526)	
STATE v. PENDERGRAPH No. 05-799	Cumberland (04CRS54381)	Appeal dismissed
STATE v. PUGH No. 05-354	Mecklenburg (03CRS216887) (03CRS216888)	No error
STATE v. RAGLAND No. 05-121	Mecklenburg (02CRS202974) (02CRS202975) (02CRS202978)	No error
STATE v. REGAN No. 05-984	Person (03CRS52355)	No error
STATE v. SANDERS No. 05-608	Forsyth (04CRS52469)	No error
STATE v. SIMPSON No. 05-534	Gaston (01CRS15210) (01CRS58516) (01CRS58517) (01CRS59758)	Affirmed
STATE v. SOUTHERN No. 05-535	Alamance (03CRS60744) (03CRS60745)	No error
STATE v. TAYLOR No. 05-1229	Durham (04CRS43059)	No error
STATE v. WOODARD No. 05-597	Cabarrus (02CRS53583)	No error; remanded with instructions
STATE v. WOODBERRY No. 05-459	Forsyth (01CRS9100)	No error
SUSI v. AUBIN No. 05-1300	Davidson (01CVS2234)	Vacated
WIDENHOUSE v. CRUMPLER No. 05-805	Wake (96CVD6933)	Reversed and remanded
WOOD v. OWEN No. 05-742	Haywood (01CVD833)	Affirmed
YOUNG v. JORDAN No. 05-695	New Hanover (99CVD1780)	Affirmed

IN RE J.S.L.

[177 N.C. App. 151 (2006)]

IN RE: J.S.L., A MINOR CHILD

IN RE: G.T.L., A MINOR CHILD

IN RE: T.L.L., A MINOR CHILD

No. COA05-768

(Filed 18 April 2006)

1. Termination of Parental Rights— notice—objection waived by appearance

Respondent's appearance with counsel at her termination of parental rights hearing waived any objection to improper notice.

2. Evidence— termination of parental rights—parent's mental health records

The admission of respondent's mental health records at her termination of parental rights hearing was not error where the court ordered production of the records at a permanency planning review hearing, respondent did not file a motion in limine or request an in camera review, and she entered only a general objection when the records were tendered into evidence.

3. Termination of Parental Rights— guardian ad litem for parent—no allegation of dependency—not required at adjudicatory hearing

Appointment of a guardian ad litem was not required by N.C.G.S. § 7B-1101 (amendment not yet applicable) for a mother facing termination of her parental rights where the motion to terminate did not allege that the children were dependent. The argument that a guardian ad litem was required for the adjudication proceeding has been rejected.

4. Termination of Parental Rights— wilfully leaving children in foster care—findings not sufficient

In the termination of a father's parental rights, the findings were not adequate to support the conclusion that the father had wilfully left the children in foster care for more than 12 months without reasonable progress.

Appeals by respondent mother and respondent father from judgments entered 30 December 2004 by Judge Laura J. Bridges in Rutherford County District Court. Heard in the Court of Appeals 12 January 2006.

No brief filed for petitioner-appellee Rutherford County Department of Social Services.

Hunton & Williams LLP, by Ray A. Starling, for petitioner-appellee Guardian ad Litem.

Carol Ann Bauer, for respondent mother-appellant.

Mercedes O. Chut, for respondent father-appellant.

TYSON, Judge.

R.K.L. ("respondent mother") and R.L.L. ("respondent father") appeal from judgments entered terminating their parental rights to their children, J.S.L, G.T.L., and T.L.L. We affirm in part, reverse in part, and remand.

I. Motion to Dismiss and Motion to Amend the Record

Subsequent to the filing of respondent father's notice of appeal, the appellee guardian *ad litem* for the minor children filed a motion to dismiss respondent father's appeal pursuant to Rule 37 of the North Carolina Rules of Appellate Procedure.

The trial court's judgments were entered 30 December 2004 and served on the parties. The ten-day period for filing a notice of appeal expired on 13 January 2005. The attorney for appellee Rutherford County Department of Social Services ("DSS") served respondent father by placing a copy of the judgments in his attorney's mailbox maintained by the clerk of court at the courthouse. The attorney representing respondent father died on 7 February 2005. Respondent father filed his notice of appeal *pro se* on 9 February 2005.

Subsequent to the filing of the motion to dismiss, respondent father filed a petition for writ of *certiorari*. Respondent father's petition is granted. N.C. Gen. Stat. § 7A-31 (2005); N.C.R. App. P. 21 (2006). Appellee guardian *ad litem's* motion to dismiss is denied.

Respondent father moved to amend his notice of appeal to include the following additional assignment of error: "[t]he trial court committed reversible error in delaying entry of each order of adjudication in this case beyond the statutory requirement of thirty days." We allow respondent father's motion to amend to add this additional assignment of error.

II. Background

Respondents have three children, J.S.L., age thirteen, G.T.L., age nine, and T.L.L., age eight.

On 1 November 2002, both respondents admitted to allegations of neglect concerning all three children and stipulated the children's best interests would be served for DSS to have custody of the children and for DSS to make a lawful placement of the children.

DSS developed a case plan to address the issue of neglect of the children. Respondent father signed the case plan. Respondent mother declined to sign the plan.

The case plan established several objectives, including: (1) respondent mother should overcome substance abuse and addiction; (2) respondents should establish a home free of domestic violence; (3) respondents should provide the children a sanitary environment in which to live; (4) respondents should provide financial child support for the children; and (5) respondent mother should gain stable mental health and good parenting abilities.

To work toward the first objective, DSS encouraged respondent mother to voluntarily go to an inpatient treatment program for her substance abuse problems. The trial court found respondent mother has "experienced substantial problems with abuse of prescription drugs and illegal controlled substances since 1996. She refuses to attend recommended mental health therapy sessions, instead going to any length to obtain prescribed pain medication from numerous sources." Respondent mother never voluntarily attended an inpatient program. Respondent mother was incarcerated from April 2003 until July 2003 for an attempted forgery conviction and was required to undergo mandatory treatment during that time. DSS also requested respondent mother consult only one doctor for legitimate illnesses and one pharmacy for obtaining prescription medications. Respondent mother has not complied with that request.

To work toward the second objective, DSS requested that respondent father attend anger management classes. Respondent father attended and completed the classes. After attending the anger management classes, respondent father pled guilty to assault on a female after he "spit" on respondent mother.

DSS established the third objective because respondents were without a home. Respondents had failed to pay rent and utility bills

and were forced to vacate their home. Following DSS's recommendation, respondents moved into a mobile home rent free and received assistance to pay utilities. Respondent father is gainfully employed. Respondent mother is in the process of filing for disability.

DSS established the fifth objective as a result of respondent mother's substance abuse and addiction. DSS encouraged respondent mother to obtain a mental health evaluation and follow all recommendations. Respondent mother never presented for a mental health examination, even though she called mental health services several times and threatened to commit suicide.

III. Issues

Respondent mother argues the trial court: (1) lacked jurisdiction to hear the motion in the cause to terminate her parental rights because she was not properly served with notice; (2) erred in receiving her mental health records into evidence; and (3) erred in not appointing a guardian *ad litem* to aid her.

Respondent father argues the trial court erred by: (1) making findings of fact that are not supported by clear, cogent, and convincing evidence; (2) concluding as a matter of law that grounds existed to terminate his parental rights to each child and failing to make proper conclusions of law; (3) terminating his rights to each child where the motions in the cause violated N.C. Gen. Stat. § 7B-1104(6); (4) terminating his rights to each child when he was not properly served with notice under N.C. Gen. Stat. §§ 7B-1106.1.26 and 7B-1106.1.27; and (5) delaying entry of the adjudicatory orders in this case beyond the statutory requirement of thirty days after hearing as required by N.C. Gen. Stat. § 7B-1110(a).

IV. 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).

The trial court's "conclusions of law are reviewable *de novo* on appeal." *Starco, Inc. v. AMG Bonding and Ins. Servs.*, 124 N.C. App. 332, 336, 477 S.E.2d 211, 215 (1996).

V. Respondent Mother

A. Jurisdiction

[1] Respondent mother argues the trial court lacked jurisdiction to hear DSS's motion in the cause to terminate her parental rights. She asserts DSS failed to properly serve her with notice of the termination proceedings.

N.C. Gen. Stat. § 7B-1106.19(a)(1) (2005) provides, "(a) Upon the filing of a motion pursuant to G.S. 7B-1102, the movant shall prepare a notice directed to each of the following persons or agency, not otherwise a movant: (1) The parents of the juvenile."

Respondent mother was present with counsel and participated in the termination hearing and entered no objection regarding improper notice at the proceeding. This Court stated in *In re B.M.*, "[w]here a movant fails to give the required notice, prejudicial error exists, and a new hearing is required. However, a party who is entitled to notice of a hearing waives that notice by attending the hearing of the motion and participating in it without objecting to the lack thereof." 168 N.C. App. 350, 355, 607 S.E.2d 698, 702 (2005) (internal quotations and citations omitted).

In *In re J.S.*, the respondents contended they did not receive proper notice of the permanency planning hearing in accordance with N.C. Gen. Stat. § 7B-907(a). 165 N.C. App. 509, 514, 598 S.E.2d 658, 662 (2004). The respondents and their attorneys were present and participated in the hearing and failed to object to the insufficiency of notice. *Id.* We held the respondents "waived any objection they might have had to improper notice." *Id.* Here, respondent mother appeared with counsel at the hearing and failed to object to any lack of notice. This assignment of error is overruled.

B. Medical Records

[2] Respondent mother argues the trial court erred by receiving her mental health medical records into evidence. We disagree.

At trial, respondent mother made a general objection to the admission of her mental health records on privacy grounds. Respondent mother argues that "any records relating to [her] mental or substance abuse issues are not admissible as hospital records." Respondent mother contends the mental health records were inadmissible based upon the requirements of N.C. Gen. Stat. § 122C-52(b).

The trial court made the following finding of fact:

> (6) Upon conclusion of all the evidence as to adjudication the Court recessed for the purpose of reviewing the substantial medical records of the mother offered into evidence by the Guardian ad Litem. Following review of the medical records of [respondent mother] and the other evidence presented the Court is convinced that [she] has experienced substantial problems with abuse of prescription drugs and illegal controlled substances since 1996.

N.C. Gen. Stat. § 8-44.1 (2005) provides:

> Copies or originals of hospital medical records shall not be held inadmissible in any court action or proceeding on the grounds that they lack certification, identification, or authentication, and shall be received as evidence if otherwise admissible, in any court or quasi-judicial proceeding, if they have been tendered to the presiding judge or designee by the custodian of the records, in accordance with G.S. 1A-1, Rule 45(c), or if they are certified, identified, and authenticated by the live testimony of the custodian of such records.
>
> Hospital medical records are defined for purposes of this section and G.S. 1A-1, Rule 45(c) as records made in connection with the diagnosis, care and treatment of any patient or the charges for such services except that records covered by G.S. 122-8.1, G.S. 90-109.1 and federal statutory or regulatory provisions regarding alcohol and drug abuse, are subject to the requirements of said statutes.

N.C. Gen. Stat. § 122C-52(b) (2005) provides, "[e]xcept as authorized by G.S. 122C-53 through G.S. 122C-56, no individual having access to confidential information may disclose this information." N.C. Gen. Stat. § 122C-3(9) (2005) defines confidential information as, "any information, whether recorded or not, relating to an individual served by a facility that was received in connection with the performance of any function of the facility." N.C. Gen. Stat. § 122C-54 (2005) provides exceptions to N.C. Gen. Stat. § 122C-52 and requires a medical facility to "disclose confidential information if a court of competent jurisdiction issues an order compelling disclosure."

This Court in *In re J.B.* held the trial court did not err when it admitted the respondent's mental health records into evidence. 172 N.C. 1, 18, 616 S.E.2d 264, 274 (2005). The trial court ordered the production of the respondent's mental health records prior to the termi-

nation hearing at a permanency planning review hearing. *Id.* "In light of these statutory provisions, we conclude that petitioner was not precluded from admitting respondent's mental health records into evidence." *Id.* at 18, 616 S.E.2d at 274. Respondent mother did not file a motion *in limine* or request an *in camera* review by the trial court and entered only a general objection when the records were tendered into evidence. This assignment of error is dismissed.

C. Guardian *ad Litem*

[3] Respondent mother argues the trial court erred by failing to appoint a guardian *ad litem* for her. We disagree.

N.C. Gen. Stat. § 7B-1101 governs the appointment of a guardian *ad litem* during termination of parental rights proceedings. Respondent does not argue the trial court erred in failing to appoint her a guardian *ad litem* under N.C. Gen. Stat. § 7B-1101. Respondent mother relies upon N.C. Gen. Stat. § 7B-601 and argues a guardian *ad litem* was statutorily required to have been appointed to her during the adjudication proceedings.

This Court has stated, "[t]he trial court is under a statutory duty to appoint a GAL when a petition 'alleges' a child is dependent and the parent can not offer proper care for their child based on mental illness or other conditions listed in N.C. Gen. Stat. § 7B-602(b)(1)." *In re D.D.Y.*, 171 N.C. App. 347, 353, 621 S.E.2d 15, 18 (2005).

In the judgments terminating respondents' parental rights, the court found that both respondents "willfully left the [children] in foster care 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 [children]." N.C. Gen. Stat. § 7B-1111(a)(2) (2005). The court did not find that the juveniles were dependent. N.C. Gen. Stat. § 7B-1111(a)(6) (2005). DSS argues because the motion in the cause to terminate respondent mother's parental rights failed to allege dependency, respondent mother was not entitled to a guardian *ad litem*.

In *In re O.C. and O.B.*, this Court held "the motion to terminate parental rights neither alleged respondent was incapable of caring for the minor children due to a debilitating condition, nor cited G.S. § 7B-1111(a)(6)." 171 N.C. App. 457, 462, 615 S.E.2d 391, 394, *disc. rev. denied*, 360 N.C. 64, 623 S.E.2d 587 (2005). The respondent *In re O.C. and O.B.* argued the termination order should be reversed

because the initial adjudication petition alleged the children were both neglected and dependant and a guardian *ad litem* had not been appointed to her. *Id.* We rejected this argument and stated:

> Only the order on termination of parental rights is before this Court; the order on adjudication is not. Even assuming, arguendo, that the trial court failed to appoint a GAL for respondent during the adjudication proceedings and that she was even entitled to such a GAL, we reject her argument that this bears a legal relationship with the validity of the later order on termination. First, there is no statutory authority for the proposition that the instant order is reversible because of a GAL appointment deficiency that may have occurred years earlier. Our legislature has adopted two separate juvenile GAL appointment provisions concerning the appointment of a GAL for a parent, one found in Article 6 of the Juvenile Code concerning petitions alleging the status of the child, G.S. § 7B-602(b), and a second, equally specific provision in Article 11 concerning the appointment of a GAL for a parent within the context of a motion or petition for termination of parental rights, G.S. § 7B-1101. Neither of these two provisions, nor anything in our Juvenile Code, evinces an intent on the part of the legislature that a failure to appoint a GAL during the earlier adjudication proceedings impacts a later order on termination of parental rights. Secondly, there is no common law authority to support such a proposition.

Id. at 462-63, 615 S.E.2d at 394-96 (emphasis in original).

Consistent with this Court's holding in *In re O.C. and O.B.* our General Assembly recently amended the law governing appointment for a guardian *ad litem* for a parent. N.C. Gen. Stat. § 7B-1101.1(c) (2005). The amendments are applicable only to proceedings filed on or after 1 October 2005 and are therefore not applicable here. The amendment reveals the legislature's intent to limit the appointment of a guardian *ad litem*. The amended statute provides:

> On motion of any party or on the court's own motion, the court may appoint a guardian ad litem for a parent if the court determines that there is a reasonable basis to believe that the parent is incompetent or has diminished capacity and cannot adequately act in his or her own interest. The parent's counsel shall not be appointed to serve as the guardian ad litem.

N.C. Gen. Stat. § 7B-1101.1(c).

The issue before this Court is whether respondent mother was, in light of the allegations in the motion in the cause, entitled to appointment of a guardian *ad litem* for the termination of parental rights proceedings. The motion to terminate respondent mother's parental rights did not allege dependency. The trial court was not required to appoint a guardian *ad litem* under N.C. Gen. Stat. § 7B-1101. *In re O.C. and O.B.*, 171 N.C. App. at 462, 615 S.E.2d at 394-96. This assignment of error is overruled.

VI. Respondent Father

[4] Respondent father argues the trial court erred when it concluded as a matter of law that grounds exist to terminate his parental rights to each child, and the trial court failed to make proper conclusions of law.

The trial court concluded respondent father "willfully left [his children] in foster care 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 [children]." N.C. Gen. Stat. § 7B-1111(a)(2). Respondent father stipulated for DSS to have custody and to make placement and cooperated with DSS by signing and working toward the goals of the case plan. The court found respondent father "completed anger management classes as required by his case plan." Respondent father's social worker testified he had maintained employment. Respondent father had obtained and provided adequate housing for his children at the time of trial.

This Court has stated:

> At the hearing on a petitioner's motion for termination of parental rights, *the burden of proof shall be upon the petitioner or movant to prove the facts justifying such termination by clear and convincing evidence.* N.C. Gen. Stat. § 7B-1111(b) (2001). Thus, in order to prevail in a termination of parental rights proceeding, the petitioner must: (1) allege and prove all facts and circumstances supporting the termination of the parent's rights; and (2) demonstrate that all proven facts and circumstances amount to clear, cogent, and convincing evidence that the termination of such rights is warranted.

In re Baker, 158 N.C. App. at 492-93, 581 S.E.2d at 145 (emphasis supplied).

> This Court also stated:
>
> [W]e 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.

Id. at 494, 581 S.E.2d at 146.

> Regarding wilfulness, this Court has stated:
>
> A finding of willfulness does not require a showing that the parent was at fault. Willfulness is established when the respondent had the ability to show reasonable progress, but was unwilling to make the effort.
>
> The trial court's order is devoid of any finding that respondent was unwilling to make the effort to make reasonable progress in remedying the situation that led to the adjudication of neglect. The evidence presented at the hearing is directly contrary.

In re C.C., 173 N.C. App. 375, 383, 618 S.E.2d 813, 819 (2005) (internal quotations and citations omitted).

In re Baker, this Court found the respondent father willfully left his child in foster care for more than twelve months without making reasonable progress towards correcting the circumstances that led to the child's removal. 155 N.C. App. at 494, 581 S.E.2d at 146. The respondent father's son had bruises on his body from "improper discipline" administered by the respondent father. *Id.* at 495, 581 S.E.2d at 147. The respondent father attended anger management classes, but the therapist who taught the classes testified the respondent father had a limited understanding of the concepts involved. *Id.* at 496, 581 S.E.2d at 148. He did not complete parenting classes. *Id.* The respondent father failed to complete the requirements of the case plan. *Id.* The respondent father also refused to sign a DSS family plan for reunification. *Id.*

> This Court stated:
>
> "Extremely limited progress is not reasonable progress." *In re Nolen*, 117 N.C. App. 693, 700, 453 S.E.2d 220, 224-225 [(1995)]; *see also In re Fletcher*, 148 N.C. App. 228, 235-236, 558 S.E.2d 498, 502 (2002) (upholding termination of parental rights order where "although the respondent mother made some efforts, the evi-

> dence supports the trial court's determination that she did not make sufficient progress in correcting conditions that led to the child's removal"); *In re Bishop*, 92 N.C. App. 662, 670, 375 S.E.2d 676, 681 [(1989)] (holding trial court's finding was supported by clear, cogent, and convincing evidence where "although respondent has made some progress in the areas of job and parenting skills, such progress has been extremely limited").

Id.

These facts are not present in the case before us. The trial court failed to make findings sufficient to establish either respondent father acted "wilfully" or lacked "reasonable progress."

In *In re Nolen*, the respondent mother failed to make reasonable progress. 117 N.C. App. at 699, 453 S.E.2d at 224. This Court found the "respondent's alcoholism and abusive living arrangement have continued," and the "respondent has not obtained positive results from her sporadic efforts to improve her situation." *Id.* at 699-700, 453 S.E.2d at 224-25.

In *In re Nesbitt*, this Court reversed the trial court's judgment terminating the respondent's parental rights and held the respondent "was cooperative with the social workers, completed all required parenting classes, mental health therapy, and visited with [the child] at every possible chance." 147 N.C. App. 349, 360, 555 S.E.2d 659, 666 (2001). The Court stated:

> While we do conclude that there is evidence in the record to support [the finding that respondent failed to make reasonable progress]; we hold that this evidence does not rise to the level of clear, cogent and convincing evidence of grounds for termination of parental rights.
>
> Clear, cogent and convincing describes an evidentiary standard stricter than a preponderance of the evidence, but less stringent than proof beyond a reasonable doubt.

Id. at 355, 555 S.E.2d at 664 (internal quotations and citations omitted).

Here, respondent father voluntarily agreed to and completed the requirements of his case plan. When asked at trial whether DSS had informed him of any obligations he needed to complete in order to have his children reunited with him, he replied, "I've done everything they've told me to do."

The trial court's findings state respondent father completed anger management classes. The findings also state respondents reside in a mobile home owned by the paternal grandfather, and they received help in paying their utilities. The findings do not explain how that fails to meet the requirement that respondents "obtain a residence suitable for their children without eviction or loss of utilities." The findings also state respondent father visited the children weekly.

With respect to child support, the trial court found respondent father did not comply with the requirement that he contact DSS to arrange for payment of support, but in finding respondent father failed to pay child support, the trial court made no findings respondent father was able to provide support more than he did. The trial court made no finding that respondent father's failure to pay was willful. Respondent father's social worker testified that given the economic circumstances in Rutherford County, respondent father "was laid off for brief periods of time," but the evidence showed he maintained employment when available in Rutherford County. His social worker also testified:

> [t]he parents have purchased gifts for the children at birthdays and Christmas. Since the first of this year, we have changed our visitation slightly where the family has a meal together. Typically at a place like McDonald's or Burger King or Bojangles, those sorts of places. So about once a week they are purchasing a meal for their children.

The trial court's judgments contain no further findings of fact regarding specific acts of domestic violence and only state generally that "[a]cts of domestic violence by [the father] against [the mother] have infiltrated the . . . household for years and continue to do so." While the guardian *ad litem* cites to various other evidence of domestic violence, the court made no findings of fact regarding that evidence and it cannot be considered. The only domestic violence incident found by the court is the spitting incident. Respondent father testified regarding this incident:

> Q [Y]ou've never had a drug problem?
>
> A No.
>
> . . . .
>
> Q You might have gotten mad or there's been some violence because of the—

A Yes. Of the drugs.

Q Is there anything else about raising children that's a problem for you?

A No.

Q Is there anything about raising children that you know is a problem for your mother?

A No.

Q You have had no criminal problems with any kind of violence other than these things with your wife; is that correct?

A In October—when that—when I got charged.

Q Other than with your wife. You haven't gone around swatting people and getting in fights and getting arrested?

A No.

Q No criminal assaultive behavior?

A No.

Q You want your kids back bad?

A Yes, I do.

Respondent father "obtained positive results" from his efforts to remain employed, provide housing for his children, and complete anger management classes.

Our standard of review is whether clear, cogent, and convincing evidence supports a finding and conclusion to terminate respondent father's parental rights. *In re Nesbitt*, 147 N.C. App. at 355, 555 S.E.2d at 664. The trial court failed to make findings of fact to support a conclusion that respondent father "willfully left the [children] in foster care 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 [children]." N.C. Gen. Stat. § 7B-1111(a)(2). A parent's failure to fully satisfy all elements of the case plan goals is not the equivalent of a lack of "reasonable progress." *Id.* The trial court's findings suggest substantial cooperation and progress by respondent father with DSS

to attend classes, find work, and to provide a safe home for his children, in the face of harsh economic conditions, while coping with respondent mother's threats of suicide and her being uncooperative both with him and DSS. The trial court failed to make any other findings to establish wilfulness or a lack of "reasonable progress" by respondent father to sustain its conclusion that statutory grounds for termination had been proven to the required standard. *Id.* Those portions of the judgments terminating respondent father's rights are reversed. In light of our decision, it is unnecessary to consider his remaining assignments of error.

VII. Conclusion

Presuming notice was deficient, respondent mother was present with counsel and participated without objection to notice in the termination hearings. Respondent mother waived any purported lack of personal jurisdiction by the trial court to hear the motion in the cause to terminate her parental rights. The trial court did not err in receiving respondent mother's mental health medical records into evidence. Under these facts, the trial court did not err when it failed to appoint a guardian *ad litem* for respondent mother at the termination hearings. The trial court's judgments terminating respondent mother's parental rights are affirmed.

The trial court failed to make adequate findings of fact to support its conclusion that respondent father "willfully left the [children] in foster care 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 [children]." N.C. Gen. Stat. § 7B-1111(a)(2). The trial court's judgments terminating respondent father's parental rights are reversed.

Affirmed in Part, Reversed in Part, and Remanded.

Judges HUDSON and GEER concur.

STATE v. BOYD

[177 N.C. App. 165 (2006)]

STATE OF NORTH CAROLINA v. DANNY BOYD, DEFENDANT

No. COA05-63

(Filed 18 April 2006)

1. Search and Seizure— warrant—false statements—sufficiency of unchallenged statements

The unchallenged statements in a search warrant were sufficient to support a conclusion of probable cause where defendant alleged that some statements in the affidavit were false.

2. Evidence— hearsay—excited utterance—seizure of defendant's girlfriend

A hearsay statement by a cocaine defendant's girlfriend that "we gots to be more careful" was properly admitted under the excited utterance exception. The statement occurred when she arrived home, was seized by police in her front yard, and led handcuffed into her own residence. She was upset and shaking before the statement and burst into tears immediately afterwards.

3. Evidence— shotgun—found in drug house—relevant

A shotgun found in a house in which drugs were found was properly admitted as relevant to charges of possession and trafficking cocaine and a jury could have found the shotgun consistent with the charge of maintaining the dwelling for keeping or selling cocaine. Defendant did not specifically demonstrate unfair prejudice.

4. Confessions and Incriminating Statements— booking question—defendant's address—maintaining a dwelling for drugs

A booking question about a cocaine defendant's address did not fall within a Miranda exception and defendant's answer was not admissible where the charges against defendant included maintaining a dwelling for the possession or sale of cocaine. There was prejudice because, in the absence of the booking question, there was insufficient evidence of the charge.

5. Drugs— possession of cocaine—sufficiency of evidence

There was sufficient evidence for constructive possession of cocaine where defendant admitted the drugs were his, there was sufficient evidence of non-exclusive possession of the premises, a large amount of individually wrapped cocaine was found in a

room adjacent to the room in which defendant was found swallowing similar plastic bags, defendant had a white residue around his mouth, and defendant possessed a scanner.

Appeal by defendant from judgment entered 15 January 2003 by Judge W. Russell Duke, Jr. in Pasquotank County Superior Court. Heard in the Court of Appeals 1 November 2005.

Attorney General Roy Cooper, by Special Deputy Attorney General Thomas J. Ziko, for the State.

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

GEER, Judge.

Defendant Danny Boyd appeals from his convictions for possession of cocaine with intent to manufacture, sell, or deliver; trafficking in cocaine; and maintaining a dwelling for the purpose of keeping or selling cocaine. We uphold his convictions for possession and trafficking. With respect to his conviction on the maintaining a dwelling charge, however, we hold that the trial court erred when it allowed a police officer to testify that, prior to being Mirandized, defendant had incriminated himself by giving his home address in response to a routine booking question. Defendant is, therefore, entitled to a new trial on that charge. In addition, as the State concedes, defendant is entitled to a new sentencing hearing on the conviction of possession of cocaine because the trial court erroneously found as an aggravating factor that defendant had joined with more than one other person in committing his crimes.

Factual and Procedural History

The State's evidence tended to show the following facts. In late 2001, the Pasquotank County Sheriff's Office launched an investigation into a residence located at 809 Wilson Street in Elizabeth City. During a two-month surveillance of the residence, police officers observed a steady stream of "individuals coming to the residence and staying only a few minutes then leaving. They were on foot and also coming up in vehicles." On 18 January 2002, the police, using a confidential informant, completed a controlled purchase of crack cocaine from defendant at the Wilson Street residence. That same day, based on (1) the evidence from the confidential informant, (2) the officers' surveillance of the residence, and (3) information and complaints

from citizens during the course of the investigation, police officers obtained a search warrant authorizing them to search both defendant and the Wilson Street residence.

As soon as they had obtained the warrant, several police officers knocked on the door of 809 Wilson Street and announced loudly that they were with the Sheriff's Department and they had a search warrant. When no one answered, they used a sledgehammer to break down the door. As officers entered the house, they found defendant lying on a sofa, stuffing plastic bags into his mouth. Defendant initially resisted arrest, but after he was subdued, officers observed a white chalky substance around his mouth consistent with wet cocaine.

Shortly thereafter, Lisa Robinson, defendant's girlfriend, appeared at the house. Officers intercepted her outside, detained her, handcuffed her, and brought her inside, where she was shown a copy of the search warrant. Witnesses described her as "extremely upset," "shaking," and "extremely excited." As soon as she saw defendant, she said, "[W]e gots to be more careful" and started to cry.

As police searched the residence, they found defendant's 12-year-old son in the kitchen and three young girls in one of the bedrooms. In a second bedroom, containing a single bed and children's and men's clothes, officers located 27 clear plastic bags containing various amounts of cocaine. The bags were concealed behind blinds in the space between an interior window and an exterior storm window. All told, the cocaine in the bags added up to approximately 280-300 grams, with a street value of approximately $28,000.00 to $30,000.00. In a third bedroom, containing a double bed, officers found an unloaded .12 gauge shotgun hidden in a closet behind female clothing. Officers also recovered a phone bill addressed to Lisa Robinson at the Wilson Street residence, as well as a box containing a handheld scanner and a receipt for the scanner from Advance Auto Parts. The receipt bore defendant's name and the Wilson Street address.

The police took defendant and Ms. Robinson to the police station, where they were each charged with (1) trafficking in cocaine; (2) possession of cocaine with intent to manufacture, sell, or deliver; and (3) maintaining a dwelling for the purpose of keeping or selling cocaine. Defendant was booked by Officer McKecuen, the same police officer who had arrested him. Prior to advising defendant of his *Miranda* rights, Officer McKecuen asked defendant a number of routine booking questions, including his name, age, date of birth, next of kin, and

home address. In response to the inquiry about his address, defendant responded that he lived at 809 Wilson Street.

Immediately after booking, defendant was read his *Miranda* rights, and he agreed to talk to the police without exercising his right to have an attorney present. When defendant was asked whether the cocaine found in the 809 Wilson Street residence belonged to him or Ms. Robinson, defendant responded: "It's mine." When he was asked to memorialize this admission in writing, defendant wrote "it's mine" on a piece of paper, but refused to sign the paper.

Defendant was later indicted for one count of trafficking in cocaine; one count of possession of cocaine with intent to manufacture, sell, or deliver; and one count of maintaining a dwelling for the purpose of keeping or selling cocaine. A jury convicted him of all three charges on 15 January 2003. At sentencing, the trial court imposed a presumptive range sentence of 70 to 84 months on the trafficking charge. With respect to the charges of possession of cocaine with intent to manufacture, sell, or deliver and maintaining a dwelling for the purpose of keeping or selling cocaine, the trial judge sentenced defendant in the aggravated range to consecutive terms of 10 to 12 months and 8 to 10 months respectively. As an aggravating factor for each offense, the judge found that defendant had "joined with more than one other person in committing the offense and was not charged with committing a conspiracy." Although defendant did not give timely notice of appeal, this case comes before us pursuant to our grant of certiorari on 5 November 2003.

Defendant's Motion to Suppress

[1] Defendant first assigns error to the trial court's denial of his motion to suppress the evidence seized from the Wilson Street residence, arguing that the search warrant was invalid because of false statements contained in the affidavit submitted in support of the request for a warrant. With respect to an affidavit supporting a search warrant, if a defendant shows that "(1) the affiant knowingly or with reckless disregard for the truth made false statements; and (2) the false statements are necessary to the finding of probable cause, then 'the warrant is rendered void, and evidence obtained thereby is inadmissible . . . .' " *State v. Rashidi*, 172 N.C. App. 628, 633, 617 S.E.2d 68, 72 (quoting *State v. Fernandez*, 346 N.C. 1, 13, 484 S.E.2d 350, 358 (1997)), *aff'd per curiam*, 360 N.C. 166, 622 S.E.2d 493 (2005).

Here, defendant argues that the affidavit falsely stated that (1) the police received complaints about criminal activity by defendant, when in fact the complaints pertained more generally to the Wilson Street residence; (2) defendant had been served with criminal papers at the Wilson Street address, when actually he had been served with civil papers; and (3) by means of a hidden transmitter, the affiants were able to overhear a conversation between defendant and the confidential informant at the time of the controlled buy, when in fact the transmitter did not pick up any voices except for the informant's. We need not decide whether defendant sufficiently established that these were knowing or reckless falsehoods because even if those assertions are omitted, the affidavit is still sufficient to support a finding of probable cause. *See Rashidi*, 172 N.C. App. at 634, 617 S.E.2d at 73 (holding that when the affidavit was considered without the allegedly false statements, it still indicated the presence of probable cause; therefore, it was unnecessary to reach the issue whether the false statements were made knowingly or recklessly).

North Carolina uses a "totality of the circumstances" test to assess whether probable cause exists for the issuance of a search warrant. *State v. Arrington*, 311 N.C. 633, 643, 319 S.E.2d 254, 260-61 (1984). Generally, an affidavit supporting a search warrant

> is sufficient [to establish probable cause] if it supplies reasonable cause to believe that the proposed search for evidence probably will reveal the presence upon the described premises of the items sought and that those items will aid in the apprehension or conviction of the offender. . . . The facts set forth in an affidavit for a search warrant must be such that a reasonably discreet and prudent person would rely upon them before they will be held to provide probable cause justifying the issuance of a search warrant.

Id. at 636, 319 S.E.2d at 256 (internal citations omitted).

In the present case, the unchallenged statements in the affidavit show that 20 different sources contacted police over a six-month period to complain about criminal activity occurring in the Wilson Street residence; two months' surveillance of the residence revealed substantial coming and going by individuals who stayed at the house only for very short periods of time; a confidential informant submitted to a full search by officers, made a controlled buy of cocaine at 809 Wilson Street, and returned with cocaine that he promptly gave to the police; and the confidential informant identified defendant as the individual who had sold him the cocaine. Taken as a whole, this infor-

mation, set forth in the challenged affidavit, is sufficient to support the conclusion that probable cause existed to search defendant and the Wilson Street residence.

While the unusual traffic at the residence was not sufficient, by itself, to constitute probable cause, the additional evidence regarding the controlled buy by an informant under surveillance of the officers was sufficient to support issuance of the search warrant. *See State v. Collins*, 56 N.C. App. 352, 355, 289 S.E.2d 37, 39 (1982) (probable cause to search existed when officer watched informant enter house and return several minutes later with LSD that he gave to officer); *State v. McLeod*, 36 N.C. App. 469, 472, 244 S.E.2d 716, 719 (probable cause to search existed when officer watched informant enter building and return with marijuana that he gave to officer), *cert. denied*, 295 N.C. 555, 248 S.E.2d 733 (1978). Contrary to defendant's argument, it was unnecessary, under these facts, for the State to make any showing addressing the credibility and reliability of the informant. *Collins*, 56 N.C. App. at 355-56, 289 S.E.2d at 40 (holding that the affidavit describing a controlled buy was not required to contain facts establishing that the informant was credible or his information reliable). Defendant's first assignment of error is, therefore, overruled.[1]

Hearsay

[2] Defendant next argues that the trial court improperly admitted, over his objection, Ms. Robinson's statement to defendant: "[W]e gots to be more careful." Defendant contends that Ms. Robinson's statement was hearsay and, therefore, inadmissible under N.C.R. Evid. 802. We hold that the statement was properly admitted under N.C.R. Evid. 803(2), the excited utterance exception to the hearsay rule.

Rule 803 states: "The following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . . (2) Excited Utterance.—A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." The reason for allowing the excited utterance exception is that "circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces spontaneous and sincere utterances." *State*

1. Defendant also argues, in a general manner, that the findings of fact in the trial court's order denying his motion to suppress are unsupported by competent evidence. Because defendant did not specifically assign error to any of the findings in the trial court's order, he has not preserved this issue for appellate review. N.C.R. App. P. 10(a) (providing that "the scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal").

v. Reid, 335 N.C. 647, 662, 440 S.E.2d 776, 784 (1994) (internal quotation marks omitted).

Ms. Robinson's statement, given the circumstances under which it was made, fits within the excited utterance exception. She made her exclamation in reaction to the startling event of arriving home late in the evening, being seized in the front yard, and being led handcuffed into her own residence. An eyewitness testified that when she made the statement, she was upset and shaking, and immediately after making it, she burst into tears. These circumstances qualify the statement for admission as an excited utterance. *See State v. Beaver*, 317 N.C. 643, 650, 346 S.E.2d 476, 480-81 (1986) (admitting as an excited utterance a statement by defendant's mother—as the police brought defendant into his mother's house and told her he had been arrested for manufacturing marijuana—that "I told you you'd get caught. I told you not to mess with that stuff."); *State v. Guice*, 141 N.C. App. 177, 201, 541 S.E.2d 474, 489 (2000) (victim's statements properly considered to be excited utterances because they were made shortly after police found her, when she was crying and terrified), *appeal dismissed, disc. review denied in part, and disc. review allowed in part on other grounds*, 353 N.C. 731, 551 S.E.2d 112-13 (2001), *modified upon remand on other grounds*, 151 N.C. App. 293, 564 S.E.2d 925 (2002). Defendant's second assignment of error is, therefore, overruled.

Admissibility of Shotgun

[3] Defendant next argues that the trial court should have excluded from evidence as irrelevant the shotgun found in the closet of the third bedroom. " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.R. Evid. 401.

In this case, the presence of a gun was relevant to the possession and trafficking charges. *See State v. Smith*, 99 N.C. App. 67, 72, 392 S.E.2d 642, 645 (1990) (holding that trial court could properly determine that evidence of a gun was relevant to the charge of possession with intent to sell or deliver cocaine because "[a]s a practical matter, firearms are frequently involved for protection in the illegal drug trade"), *cert. denied*, 328 N.C. 96, 402 S.E.2d 824 (1991); *see also State v. Willis*, 125 N.C. App. 537, 543, 481 S.E.2d 407, 411 (1997) (relying upon the "common-sense association of drugs and guns"). Further, a jury could conclude that the shotgun was consistent with maintaining

a dwelling for the purpose of keeping or selling cocaine, especially given the street value of the drugs found. While defendant argues that the evidence suggested the gun belonged to Ms. Robinson, the State also offered evidence suggesting that defendant was residing at the house with his son and was a full participant in the trafficking and possession of the cocaine.

As to defendant's argument that the gun was erroneously admitted because it was overly prejudicial in relation to its probative value under N.C.R. Evid. 403, "the determination of whether relevant evidence should be excluded [under Rule 403] is a matter left to the sound discretion of the trial court, and the trial court can be reversed only upon a showing of abuse of discretion." *State v. Wallace*, 351 N.C. 481, 523, 528 S.E.2d 326, 352-53, *cert. denied*, 531 U.S. 1018, 148 L. Ed. 2d 498, 121 S. Ct. 581 (2000). Since defendant has failed to specifically demonstrate how he was unfairly prejudiced beyond the inferences the jury was properly entitled to draw from the presence of the gun in the closet, we hold that the trial court did not abuse its discretion in holding that the gun's probative value was not unfairly outweighed by its prejudicial effect.

Routine Booking Question

[4] Defendant next argues that the trial court erred by allowing, over defendant's objections, testimony that defendant, in response to a pre-*Miranda* routine booking question at the police station, told officers that 809 Wilson Street was his home address. Although courts across the United States have adopted various approaches in addressing routine booking questions in light of *Miranda*, *see* Meghan S. Skelton & James G. Connell, III, *The Routine Booking Question Exception to* Miranda, 34 U. Balt. L. Rev. 55, 78-94 (2004), the issue has been decided in this State by our Supreme Court's opinion in *State v. Golphin*, 352 N.C. 364, 409-10, 533 S.E.2d 168, 201 (2000), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305, 121 S. Ct. 1379 (2001). In *Golphin*, the Court wrote:

> [T]here is a limited exception to *Miranda* for routine questions asked during the booking process. . . . In an effort not to infringe upon an accused's constitutional rights, however, the exception is limited to *routine informational* questions necessary to complete the booking process that are *not* reasonably likely to elicit an incriminating response from the accused.

Id. at 406-07, 533 S.E.2d at 199-200 (internal citations and quotation marks omitted).

Golphin establishes that the key inquiry regarding the admissibility of a defendant's answer to a routine booking question is whether the question was " 'reasonably likely to elicit an incriminating response from the accused.' " *Id.* at 407, 533 S.E.2d at 200 (quoting *State v. Ladd*, 308 N.C. 272, 287, 302 S.E.2d 164, 173 (1983)). In this case, the State has conceded on appeal that "there is no doubt on the facts in this case that defendant's admission that he lived at 809 Wilson Street was the product of an [sic] custodial interrogation which Officer McKecuen fully expected to produce an incriminating response." Pointing to Officer McKecuen's affidavit in support of the request for a search warrant, the State further acknowledges that "the evidence proves that Office McKecuen fully expected that in response to that [booking] question defendant would make the incriminating statement that he lived at 809 Wilson Street." Indeed, the State does not dispute that the question was reasonably likely to elicit an incriminating response. Instead, the State asks that we adopt a different rule than the one set forth in *Golphin*. We are bound by *Golphin* and, given *Golphin* and the undisputed record, we are compelled to hold that the question posed to defendant in this case does not fall within the routine booking question exception to *Miranda*. Because the answer was obtained in violation of *Miranda*, it was not admissible. *See Miranda v. Arizona*, 384 U.S. 436, 494, 16 L. Ed. 2d 694, 735, 86 S. Ct. 1602, 1638 (1966) (holding that fruits of custodial interrogation conducted without proper warnings were inadmissible).

"A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless." N.C. Gen. Stat. § 15A-1443(b) (2005). We hold that the State has not met this burden. If we consider the State's evidence pertaining to the Wilson Street residence, omitting defendant's incriminating response to the booking question, it is apparent that this evidence is insufficient to support a conviction for maintaining a dwelling for the purpose of keeping or selling cocaine.

N.C. Gen. Stat. § 90-108(a)(7) (2005) prohibits any person from:

> knowingly keep[ing] or maintain[ing] any store, shop, warehouse, dwelling house, building, vehicle, boat, aircraft, or any place whatever, which is resorted to by persons using controlled substances in violation of this Article for the purpose of using such

> substances, or which is used for the keeping or selling of the same in violation of this Article.

A pivotal factor is whether there is evidence that defendant owned, leased, maintained, or was otherwise responsible for the premises. *See State v. Harris*, 157 N.C. App. 647, 652, 580 S.E.2d 63, 67 (2003) (evidence insufficient to support maintaining a dwelling charge when defendant was seen at the house several times over a period of two months, an officer had spoken to defendant there twice during that time, and personal property of defendant was found in bedroom, but there was "no evidence that defendant owned the property, bore any expense of renting or maintaining the property, or took any other responsibility for the property"); *State v. Hamilton*, 145 N.C. App. 152, 154, 549 S.E.2d 233, 234-35 (2001) (evidence insufficient to support maintaining a dwelling charge when sole evidence tying defendant to address was a traffic citation with defendant's name on it, listing his address as the address in question); *State v. Bowens*, 140 N.C. App. 217, 221-22, 535 S.E.2d 870, 873 (2000) (evidence that defendant had been seen frequenting a residence and that a closet in the residence contained men's clothing was insufficient to support charge of maintaining a dwelling when no evidence indicated that defendant's name was on lease or utility bills, or that he was in any way responsible for dwelling's upkeep), *disc. review denied*, 353 N.C. 383, 547 S.E.2d 417 (2001).

Here, there was no evidence that defendant had any responsibility for the premises. While a jury could find that he lived there, the State offered no evidence that he participated in the leasing of the house, the payment of the rent, or the maintenance and upkeep of the premises. The only utility bill in evidence was in Ms. Robinson's name. In sum, the only valid pieces of evidence that tied defendant to the 809 Wilson Street residence were (1) the receipt from Advance Auto Parts, (2) the civil summons served upon defendant at that address, (3) the presence of male clothing, and (4) the fact that defendant sold drugs to the informant and remained at the residence until police executed the search warrant soon after the controlled buy. This evidence is materially indistinguishable from the evidence found insufficient in *Harris*, *Hamilton*, and *Bowens*.

Since in the absence of the answer to the booking question, the evidence is insufficient to convict defendant of the charge of maintaining a dwelling for the purpose of keeping or selling cocaine, we must reverse that conviction and order a new trial on that charge. Defendant's response to the booking question was not, however, nec-

essary to support his convictions on the remaining charges. Even when the challenged statement is omitted, substantial evidence of defendant's guilt on those two charges remains.

Defendant's Motion to Dismiss

[5] Defendant next argues that his motion to dismiss his three charges for insufficiency of the evidence should have been granted. Because we have ordered a new trial on the maintaining a dwelling conviction, we address the motion to dismiss only insofar as it relates to the possession and trafficking charges. Defendant's sole argument on appeal as to these charges is that the State did not present sufficient evidence that defendant had possession of any cocaine.

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 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).

Possession of a controlled substance may be actual or constructive. *State v. McLaurin*, 320 N.C. 143, 146, 357 S.E.2d 636, 638 (1987). "A person has actual possession of a substance if it is on his person, he is aware of its presence, and either by himself or together with others he has the power and intent to control its disposition or use." *State v. Reid*, 151 N.C. App. 420, 428-29, 566 S.E.2d 186, 192 (2002). Constructive possession, on the other hand, exists when the defendant, " 'while not having actual possession, . . . has the intent and capability to maintain control and dominion over' the narcotics." *Matias*, 354 N.C. at 552, 556 S.E.2d at 270 (quoting *Beaver*, 317 N.C. at 648, 346 S.E.2d at 480). When the defendant does not have exclusive possession of the location where the drugs were found, the State must make a showing of "other incriminating circumstances" in order to establish constructive possession. *Id.*, 556 S.E.2d at 271.

In this case, the State's evidence indicated that defendant admitted the drugs were his. There was also evidence of defendant's constructive possession of the drugs. A large amount of individually packaged cocaine was found in a room adjacent to the room where defendant was apprehended. The State offered evidence that would permit a reasonable juror to find that defendant lived at that house, which was rented by his girlfriend, including defendant's receipt of a civil summons at that address, the presence of his 12-year-old son and adult male clothing at the house, and a receipt listing his name and the Wilson Street address. This evidence is sufficient to support a finding of non-exclusive possession of the premises by defendant, even though the evidence does not establish that defendant was maintaining the dwelling. Further, the State offered evidence of incriminating circumstances, including testimony that defendant did not respond to the police's knock at the door, he was caught swallowing small plastic bags similar to the ones found to contain cocaine, he had a white substance around his mouth as he was being arrested, and defendant possessed a handheld "Uniden Bear Cat 20 channel, 10 band scanner." Finally, we have Ms. Robinson's statement that the two of them needed to be more careful.

This evidence, when viewed in the light most favorable to the State, constitutes substantial evidence of constructive possession by defendant of the cocaine. *See State v. Battle*, 167 N.C. App. 730, 733, 606 S.E.2d 418, 420 (2005) (holding evidence was sufficient to show defendant was in constructive possession of cocaine found in motel room, where defendant was in motel room registered to another when police officers conducted search, room contained a number of defendant's personal effects, including personal papers, and defendant's vehicle was parked in motel lot); *State v. Autry*, 101 N.C. App. 245, 252, 399 S.E.2d 357, 362 (1991) (evidence sufficient to show constructive possession when defendant was standing next to kitchen table whose contents included cocaine, cash, jacket, and pistol, and defendant admitted to ownership of jacket and cash). Defendant's arguments as to his motion to dismiss are, therefore, without merit, and this assignment of error is overruled.

Sentencing

Defendant's final argument addresses the trial court's imposition of an aggravated range sentence with respect to the possession charge and maintaining a dwelling charge. The trial court found as an aggravating factor that the defendant "joined with more than one other person in committing the offense and was not charged with

committing a conspiracy." The State concedes on appeal that the trial court erred with respect to the two aggravated sentences since the record contains no evidence that any third person joined with defendant and Ms. Robinson in committing the crimes.

In addition to a new trial on the maintaining a dwelling charge, defendant is, therefore, also entitled to a new sentencing hearing with respect to his conviction for possession of cocaine with intent to manufacture, sell, or deliver. *See State v. Morston*, 336 N.C. 381, 411, 445 S.E.2d 1, 18 (1994) (remanding for re-sentencing when the State conceded an error in defendant's initial sentence); *State v. Scercy*, 159 N.C. App. 344, 354, 583 S.E.2d 339, 345 (same), *appeal dismissed and disc. review denied*, 357 N.C. 581, 589 S.E.2d 363 (2003).[2] Defendant's sentence with respect to his trafficking charge was in the presumptive range, and accordingly we leave that sentence undisturbed.

No error in part, new trial in part, and remanded for re-sentencing in part.

Judges WYNN and McGEE concur.

STATE OF NORTH CAROLINA v. HENRY WILLIS BROWN, JR. AND ALBERT GADSON

No. COA05-542

(Filed 18 April 2006)

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

Defendants' assignments of error not argued on appeal are deemed abandoned under N.C. R. App. P. 28(b)(6).

2. Witnesses— denial of motion to sequester—failure to show abuse of discretion

The trial court did not abuse its discretion in a common law robbery and assault inflicting serious bodily injury case by denying defendants' motions to sequester the State's witnesses, because: (1) the trial court's ruling showed adequate deliberation

2. Because of the State's concession in this matter, we need not reach defendant's argument that the sentence was improper under *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403, 124 S. Ct. 2531 (2004).

and weighing of the merits of the motion; and (2) where defendants failed to point to any instance in the record where a witness conformed his testimony to that of another witness, defendants failed to show an abuse of discretion.

3. Discovery— voluntary witness list—failure to disclose witness prior to trial—voir dire—good faith

The trial court did not err in a common law robbery and assault inflicting serious bodily injury case by allowing the victim's father to testify at trial when his name did not appear on the witness list disclosed by the State prior to trial, because: (1) the record does not disclose that either defendant made a motion requesting the trial court to order the State to provide a list of witnesses, and thus, the State was not required under N.C.G.S. § 15A-903(a)(3) to provide defendants with a list of the witnesses it intended to call during trial; (2) there was no indication from the record that either defendant made a request for voluntary discovery by the State, nor was there evidence of a written agreement between the State and either defendant to voluntarily comply with the provisions of Article 48; (3) absent a request or written agreement, the State's witness list is not deemed to have been made under an order of the trial court, and thus, such voluntary discovery would not need to be to the same extent as required by N.C.G.S. § 15A-902(a); (4) the trial court conducted a voir dire of the jury to determine whether any juror knew the witness personally or knew anything about him, and this voir dire disproved any bad faith on the part of the State in calling the witness; (5) defendants were not unfairly prejudiced by the witness's testimony which the jury was instructed to consider solely for the purpose of corroboration; and (6) the State made the requisite good faith showing and was permitted under N.C.G.S. § 15A-903(a)(3) to call the witness.

4. Assault— inflicting serious bodily injury—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendants' motions to dismiss the charge of assault inflicting serious bodily injury, because: (1) there was sufficient evidence to submit the question to the jury concerning whether defendant Brown perpetrated an assault on the victim when at trial two witnesses testified that defendant participated in the assault; (2) although defendant contends there were inconsistencies in the victim's testimony and that initially another witness did not identify defendant in a pho-

tographic lineup, alleged contradictions or issues of credibility are for a jury to resolve and do not warrant dismissal; and (3) viewing the evidence in the light most favorable to the State, the evidence was sufficient to show the victim's injuries created a protracted condition that caused extreme pain to satisfy the element of serious bodily injury.

5. Robbery— common law—intent—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of common law robbery even though defendant contends there was insufficient evidence of his intent to permanently deprive the victim or the victim's girlfriend of property or to convert it to defendant's own use, because: (1) a witness testified that both defendants took part in assaulting the victim, both took televisions and other electrical appliances from the apartment, loaded them into the trunk of their vehicle, and left the scene; (2) this evidence of a forceful taking was sufficient for the jury to infer defendant intended to deprive the victim and the victim's girlfriend of the property; and (3) although defendant contends there was some evidence tending to show he told the victim the property would be returned when the victim paid defendant, such discrepancy was for the jury to resolve.

6. Assault— verdict sheet—"felonious" assault inflicting serious bodily injury

The trial court did not err by submitting a verdict sheet to the jury that listed the assault charge as "felonious" assault inflicting serious bodily injury because, even assuming arguendo that it was error for the trial court to characterize the charge as felonious, upon examination of the record there was no reasonable possibility that the outcome would have differed absent this alleged error.

7. Criminal Law— prosecutor's argument—convicting of lesser-included offense would be slap on wrist—motion for mistrial

The trial court did not abuse its discretion in an assault inflicting serious bodily injury case by denying defendant's motion for a mistrial based on the State's alleged statements to the jury that the lesser-included assault inflicting serious injury was a misdemeanor and that convicting defendants of the lesser-included offense would be a slap on the wrist, because: (1)

the jury arguments are not contained in the record on appeal and thus are presumed to be proper; and (2) even assuming arguendo that defendant's characterization of the argument is proper, there was no abuse of discretion when the argument did not unfairly prejudice defendant.

8. Evidence— exhibit—credibility of codefendant—limiting instruction—plain error analysis

The trial court did not commit plain error in a common law robbery and assault inflicting serious bodily injury case by allowing the introduction of an exhibit pertaining to a real estate transaction between defendant Gadson and another man even though defendant Brown contends the taint attributed to his codefendant attached itself to his character and credibility as well, because: (1) the trial court instructed the jury that the exhibit and testimony were admitted against Gadson only and not to consider the evidence against defendant Brown; and (2) a jury is presumed to be able to comply with the trial court's instructions.

9. Evidence— prior crimes or bad acts—federal probation—not impermissible details—motive

The trial court did not err by allowing the State to ask defendant on cross-examination whether he denied involvement in the crimes for which he was on trial since he knew his commission of those crimes would violate his federal probation for a prior felony since the State's question did not concern impermissible details about defendant's prior felony conviction in violation of N.C.G.S. § 8C-1, Rule 609, and the question was permissible under N.C.G.S. § 8C-1, Rule 404(b) to show motive.

10. Sentencing— consecutive sentences—abuse of discretion standard

The trial court did not abuse its discretion in a common law robbery and assault inflicting serious bodily injury case by sentencing defendant to consecutive sentences, because: (1) defendant acknowledges the trial court's authority under N.C.G.S. § 15A-1354 to impose a sentence consecutively; and (2) this question is best left for the legislature to resolve.

Appeal by defendants from judgments dated 22 October 2004 by Judge W. Douglas Albright in Superior Court, Forsyth County. Heard in the Court of Appeals 23 January 2006.

Attorney General Roy Cooper, by Assistant Attorney General Jeffrey R. Edwards, for the State.

White and Crumpler, by David B. Freedman, for defendant-appellant Henry Willis Brown, Jr.

Moser Schmidly & Roose, by Richard G. Roose, for defendant-appellant Albert Gadson.

McGEE, Judge.

Henry Willis Brown, Jr. (Brown) and Albert Gadson (Gadson) (collectively defendants) were convicted of common law robbery and assault inflicting serious bodily injury. Brown was sentenced to a minimum of 15 months and maximum of 18 months on the common law robbery conviction, and a minimum of 19 months and maximum of 23 months on the assault conviction. Gadson also pleaded guilty to the status of habitual felon and was sentenced to a minimum of 120 months and maximum of 153 months.

The State's evidence at trial tended to show that in November 2002, Steven Allen Hall (Hall) was introduced to defendants by a friend, Stanley Blair (Blair). Defendants introduced themselves as brothers. Hall and Blair agreed to do some roofing work on Brown's home. Before Hall and Blair began work on the roof, they met defendants at Home Depot to purchase lumber. Hall testified that Brown paid for the lumber and gave Hall and Blair a check to cover partial payment of the roofing work and to cover the cost of shingles that Hall was to purchase later. Gadson spent eight hours one day helping Hall and Blair with the roofing job. Hall and Blair paid Gadson forty dollars for his help and owed him another forty dollars.

On the afternoon of 21 November 2002, defendants went to the apartment Hall shared with his girlfriend and demanded the forty dollars owed to Gadson. Defendants told Hall they were going to find Blair and collect the forty dollars. Brown told Hall they were "going to get that money because they'd been known to f—- people up before." Defendants left Hall's apartment, and Hall called the police because he felt "threatened."

The next day, defendants returned to Hall's apartment and ordered Hall to go with them to find Blair. Hall attempted to call 911, but Brown yanked the phone cord out of the wall. Gadson hit Hall in the mouth, knocking out one of Hall's teeth. Defendants grabbed Hall in order to take him out to their vehicle, but Hall fell to the ground,

and defendants stomped on his head. Defendants went back inside Hall's apartment, and Hall followed. Gadson again hit Hall in the mouth, and Brown threw a coffee table at Hall. Hall's neighbor, Joel Chapman (Chapman), testified that he saw defendants take two television sets from Hall's apartment and saw defendants load the televisions into the trunk of their vehicle.

Dr. Mark Hess (Dr. Hess) testified that Hall suffered multiple facial fractures around his eye and multiple lacerations. He also testified that Hall had lost a lower tooth. Hall's vision in his injured eye was 20/100 after the assault and his vision was still affected at the time of trial two years later.

[1] On appeal, Brown argues eight assignments of error, and Gadson argues four assignments of error. Defendants' assignments of error not argued on appeal are deemed abandoned. N.C.R. App. P. 28(b)(6).

I.

[2] Defendants argue the trial court erred in denying their motions to sequester the State's witnesses. Brown filed a pretrial motion to sequester, and Gadson made an oral motion at trial. The trial court denied the motions, stating:

> Well, the last couple of times I've tried to sequester witnesses, frankly stated, it's been a miserable experience. . . . There's no central place where I can put witnesses. It inevitably becomes a time-consuming process. And when I weigh what, if any, gain might be had by keeping the witnesses out versus keeping them in, in the exercise of my discretion I'm going to deny that motion.

"A ruling on a motion to sequester witnesses rests within the sound discretion of the trial court[.]" *State v. Call*, 349 N.C. 382, 400, 508 S.E.2d 496, 507-08 (1998). A trial court's denial of a motion to sequester will not be disturbed "in the absence of a showing that the ruling was so arbitrary that it could not have been the result of a reasoned decision." *Id.* Citing *State v. Fullwood*, 323 N.C. 371, 373 S.E.2d 518 (1988), *vacated and remanded on other grounds*, 494 U.S. 1022, 108 L. Ed. 2d 602 (1990), defendants argue that the trial court failed to consider the merits of the motion to sequester. However, we find the trial court's ruling shows adequate deliberation and weighing of the merits of the motion. Moreover, in *State v. Anthony*, 354 N.C. 372, 396, 555 S.E.2d 557, 575 (2001), *cert. denied*, 536 U.S. 930, 153 L. Ed. 2d 791 (2002), our Supreme Court held that where a defendant failed to point to any instance in the record where a witness con-

formed his or her testimony to that of another witness, the defendant failed to show an abuse of discretion in the trial court's denial of a motion to sequester witnesses. In the present case, neither defendant identified any instance of a witness conforming testimony to that of another witness. Accordingly, we find no error.

II.

[3] Defendants argue the trial court erred in allowing Hall's father, Clarence Hall, to testify at trial when Clarence Hall's name did not appear on the witness list disclosed by the State prior to trial. For the reasons below, we find no error.

Gadson argues the State was required, under N.C. Gen. Stat. § 15A-903(a)(3), to provide a written list of the names of all witnesses the State reasonably expected to call at trial. N.C. Gen. Stat. § 15A-903 provides:

> (a) *Upon motion of the defendant*, the court must order the State to:
>
> . . . .
>
> (3) Give the defendant, at the beginning of jury selection, a written list of the names of all other witnesses whom the State reasonably expects to call during the trial. . . . If there are witnesses that the State did not reasonably expect to call at the time of the provision of the witness list, and as a result are not listed, the court upon a good faith showing shall allow the witnesses to be called. Additionally, in the interest of justice, the court may in its discretion permit any undisclosed witness to testify.

(emphasis added). The record does not reveal that either defendant made a motion requesting the trial court to order the State to provide a list of witnesses. Therefore, the State was not required by N.C.G.S. § 15A-903(a)(3) to provide defendants with a list of the witnesses it intended to call during trial. Gadson's assignment of error is overruled.

Brown concedes the State was not required to provide defendants with a witness list under N.C.G.S. § 15A-903(a)(3). Instead, he argues that because the State volunteered to provide defendants with a witness list, the State's voluntary list should have complied with N.C. Gen. Stat. § 15A-903(b) and should have provided the names of all witnesses the State expected to call. N.C. Gen. Stat. § 15A-903(b) (2005) provides that "[i]f the State voluntarily provides disclosure

under N.C.G.S. § 15A-902(a), the disclosure shall be to the same extent as required by subsection (a) of this section." N.C. Gen. Stat. § 15A-902 provides in pertinent part:

> (a) A party seeking discovery under [Article 48] must, before filing any motion before a judge, request in writing that the other party comply voluntarily with the discovery request. A written request is not required if the parties agree in writing to voluntarily comply with the provisions of [this Article]. . . .
>
> (b) To the extent that discovery authorized in this Article is voluntarily made in response to a request or written agreement, the discovery is deemed to have been made under an order of the court for the purposes of this Article.

N.C. Gen. Stat. § 15A-902(a)(b) (2005).

Brown cites *State v. Smith*, 291 N.C. 505, 231 S.E.2d 663 (1977), in which our Supreme Court held that where the State provides a list of witnesses pursuant to a court order, and the State subsequently seeks to call a witness not on the list, the trial court must "look to see whether the district attorney acted in bad faith, and whether the defendant was prejudiced thereby." *Id.* at 523, 231 S.E.2d at 675 (internal citations omitted). Brown argues the standard set forth in *Smith* should be "equally applicable in the case of a voluntary disclosure as court ordered disclosure." In noting the distinction between court-ordered discovery and voluntary discovery, Brown presages our analysis. Unlike the facts of *Smith*, in the present case, there is no indication from the record that either defendant made a request for voluntary discovery by the State. Nor is there any evidence in the record of a written agreement between the State and either defendant to voluntarily comply with the provisions of Article 48. Reading the plain language of N.C.G.S. § 15A-902(b), it seems that absent a request or written agreement, the State's witness list is not deemed to have been made under an order of the trial court. *See* N.C.G.S. § 15A-902(b) ("To the extent that discovery authorized in this Article is voluntarily made *in response to a request or written agreement*, the discovery is deemed to have been made under an order of the court for the purposes of this Article.") (emphasis added). If not deemed to have been made under a court order, such voluntary discovery would seem not to need to be "to the same extent as required by [N.C.G.S. § 15A-902(a)]." N.C.G.S. § 15A-903(b).

However, we note that North Carolina cases since *Smith* have used the *Smith* standard in cases where discovery was not court-

ordered. In *State v. Myers*, 299 N.C. 671, 263 S.E.2d 768 (1980), the defendant made an oral request during jury selection that the State orally list the names of all witnesses the State planned to call to testify. *Id.* at 675, 263 S.E.2d at 771. When the State complied with the oral request, but then later sought to call witnesses not named during jury selection, our Supreme Court analyzed the case pursuant to *Smith*. The Court held that the trial court's *voir dire* examination of the jury satisfied the requirements of *Smith*: "The voir dire established that the jurors did not know either of the witnesses the State had failed to name during jury selection. Such inquiry negated the possibility that the State was surreptitiously attempting to place before the jury witnesses who were friendly or influential with the jurors." *Myers*, 299 N.C. at 676, 263 S.E.2d at 772. In *State v. Mitchell*, 62 N.C. App. 21, 302 S.E.2d 265 (1983), this Court applied the *Smith* standard absent any evidence that the defendant had requested or received a list of witnesses from the State. The defendant in *Mitchell* appealed the admission of testimony by a witness whose name had not been disclosed by the State prior to jury selection. *Id.* at 27, 302 S.E.2d at 269. The trial court conducted a *voir dire* of the jury, was satisfied that none of the jurors knew the witness, and allowed the witness to testify. *Id.* On review, our Court noted that there was no indication from the record whether the State had voluntarily provided a list of witnesses to the defendant. *Id.* Applying the *Smith* standard, our Court found an insufficient showing of bad faith or prejudice, and upheld the trial court's decision. *Id.*

In the present case, the trial court conducted a *voir dire* of the jury to determine whether any juror knew Clarence Hall personally or knew anything about him. None of the jurors was familiar with Clarence Hall. Accordingly, under *Myers* and *Mitchell*, we find this *voir dire* disproved any bad faith on the part of the State in calling Clarence Hall as a witness. Moreover, defendant was not unfairly prejudiced by Clarence Hall's testimony, which the jury was instructed to consider solely for the purpose of corroboration. *See State v. Harden*, 42 N.C. App. 677, 682, 257 S.E.2d 635, 639 (1979) (finding no unfair prejudice where exhibits not provided to the defendant served only to corroborate the testimony of witnesses).

Additionally, N.C.G.S. § 15A-903(a)(3) empowers the trial court "upon a good faith showing" to allow the State to call a witness whom the State "did not reasonably expect to call at the time of the provision of the witness list." In the present case, the State informed the trial court that prior to being approached by Clarence Hall the morn-

ing of trial, the State was not aware of Clarence Hall, or that he had observed his son's injuries. The trial court conducted a *voir dire* of Clarence Hall, who testified that he had not previously spoken with the State about the case. Following the *voir dire* of Clarence Hall and of the jury, the trial court, in its discretion, permitted Clarence Hall's testimony, which the trial court "strictly limited to corroboration." We hold that the trial court made the requisite good faith showing and was permitted under N.C.G.S. § 15A-903(a)(3) to allow the State to call Clarence Hall. This assignment of error is overruled.

III.

Defendants argue the trial court erred in denying their motions to dismiss the charges against them for lack of sufficient evidence. Brown challenges the sufficiency of the evidence as to both charges; Gadson argues only as to the charge of assault inflicting serious bodily injury.

In ruling on a motion to dismiss, 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. Williams*, 150 N.C. App. 497, 501, 563 S.E.2d 616, 618 (2002) (quoting *State v. Crawford*, 344 N.C. 65, 73, 472 S.E.2d 920, 925 (1996)). Substantial evidence is any evidence that a reasonable juror would consider sufficient to support a conclusion that each essential element of the crime exists. *State v. Baldwin*, 141 N.C. App. 596, 604, 540 S.E.2d 815, 821 (2000). A trial court must consider the evidence in the light most favorable to the State and give the State every reasonable inference to be drawn therefrom. *Williams*, 150 N.C. App. at 501, 563 S.E.2d at 619.

[4] Defendants were charged with assault inflicting serious bodily injury pursuant to N.C. Gen. Stat. § 14-32.4, which provides in pertinent part:

> (a) Unless the conduct is covered under some other provision of law providing greater punishment, any person who assaults another person and inflicts serious bodily injury is guilty of a Class F felony. "Serious bodily injury" is defined as bodily injury that creates a substantial risk of death, or that causes serious permanent disfigurement, coma, a permanent or protracted condition that causes extreme pain, or permanent or protracted loss or impairment of the function of any bodily member or organ, or that results in prolonged hospitalization.

N.C. Gen. Stat. § 14-32.4(a) (2005). The offense "requires proof of two elements: (1) the commission of an assault on another, which (2) inflicts serious bodily injury." *State v. Hannah*, 149 N.C. App. 713, 717, 563 S.E.2d 1, 4, *disc. review denied*, 355 N.C. 754, 566 S.E.2d 81 (2002).

Brown argues there was insufficient evidence as to the first element, that he perpetrated an assault on Hall. We disagree and find there was sufficient evidence to submit the question to the jury. At trial, both Hall and Chapman testified that Brown participated in the assault. Brown argues there were inconsistencies in Hall's testimony and that initially, Chapman did not identify Brown in a photographic lineup. These arguments, however, do not address the sufficiency of the evidence. Alleged contradictions or issues of credibility are for a jury to resolve and do not warrant dismissal. *State v. Smith*, 300 N.C. 71, 78, 265 S.E.2d 164, 169 (1980).

Both defendants argue the State failed to present substantial evidence of the element of serious bodily injury. The statute defines serious bodily injury in three ways: (1) bodily injury that creates a substantial risk of death, or (2) bodily injury that causes serious permanent disfigurement, coma, a permanent or protracted condition that causes extreme pain, or permanent or protracted loss or impairment of the function of any bodily member or organ, or (3) bodily injury that results in prolonged hospitalization. N.C.G.S. § 14-32.4. Serious bodily injury as defined in N.C.G.S. § 14-32.4 requires proof of more severe injury than the serious injury element in other assault offenses. *Williams*, 150 N.C. App. at 503, 563 S.E.2d at 619-20.

In the present case, as to Gadson, the trial court's instruction to the jury on the element of serious bodily injury was identical to the statutory definition. As to Brown, however, the trial court did not instruct the jury on the entire statutory definition of serious bodily injury. The trial court omitted the word "impairment" from the instruction regarding Brown. Since a defendant may not be convicted of an offense on a theory different from that presented to a jury, our Court must determine whether the State presented substantial evidence of each element of assault inflicting serious bodily injury based on the definition of the offense given to the jury in the trial court's instructions. *Williams*, 150 N.C. App. at 503, 563 S.E.2d at 620.

In *Williams*, our Court addressed the sufficiency of evidence of serious bodily injury where a jury instruction limited the definition of serious bodily injury to " 'an injury that creates or causes a perma-

nent or protracted condition that causes extreme pain.' " *Williams*, 150 N.C. App. at 503, 563 S.E.2d at 620. In that case, the State presented evidence that the victim suffered a broken jaw that was wired shut for two months, and suffered back spasms for eight months, which resulted in two visits to the emergency room because of difficulty breathing. *Id.* The treating physician testified the victim's injury was the type of injury that caused " 'quite a bit' of pain and discomfort." *Id.* at 503-04, 563 S.E.2d at 620. Our Court concluded that "a reasonable juror could find this evidence sufficient to conclude that [the victim's] injuries created a 'protracted condition that cause[d] extreme pain.' " *Id.* at 504, 563 S.E.2d at 620.

In the present case, Hall testified his facial injuries were "very" painful, he suffered pain in his mouth for "about a month," and his right eye "felt like it fell out of [his] head." Hall's father testified that Hall complained of pain for "about ten months." Dr. Hess testified that Hall suffered multiple facial fractures and multiple lacerations, and characterized Hall's injuries as the type of injuries that caused "severe" and "extreme" pain. Viewing this evidence in the light most favorable to the State, we find there was sufficient evidence that Hall's injuries created a "protracted condition that cause[d] extreme pain." N.C.G.S. § 14-32.4(a). Since the jury was instructed as to this part of the definition of serious bodily injury for both Gadson and Brown, we hold the State presented sufficient evidence of this element as to both defendants.

[5] Brown also challenges the sufficiency of the evidence on the charge of common law robbery. He argues there was insufficient evidence of Brown's intent to permanently deprive Hall or Hall's girlfriend of property, or to convert it to Brown's own use. We find no merit in this argument. 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). Chapman testified that both Gadson and Brown took part in assaulting Hall, and that both defendants took televisions and other electrical appliances from the apartment, loaded them into the trunk of their vehicle, and left the scene. This evidence of a forceful taking is sufficient evidence from which the jury could infer Brown intended to deprive Hall and Hall's girlfriend of the property. Although Brown claims there was some evidence tending to show he told Hall the property would be returned when Hall paid Brown, such discrepancy was for the jury to resolve. *See Smith*, 300 N.C. at 78, 265 S.E.2d at 169.

We find no error in the trial court's denial of defendants' motions to dismiss. This assignment of error is overruled as to both defendants.

IV.

[6] Defendants argue the trial court erred in submitting a verdict sheet to the jury that listed the assault charge as "felonious" assault inflicting serious bodily injury. Defendants contend that the inclusion of the word "felonious" improperly allowed the jury to consider the severity of the potential sentence. Defendants argue the error unfairly prejudiced them because, absent this error, there was a reasonable possibility that the jury result would have been different. We find no merit to this argument.

Defendants correctly state that "the function of the jury during the guilt phase is to determine the guilt or innocence of the defendant, not to be concerned about [the defendant's] penalty[.]" *State v. Artis*, 325 N.C. 278, 295, 384 S.E.2d 470, 479 (1989), *sentence vacated on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990). However, even assuming *arguendo* that it was error for the trial court to characterize the charge as "felonious," upon examination of the record, we conclude there is no reasonable possibility that the outcome would have differed had the jury verdict sheet not included the word "felonious."

V.

[7] Brown argues the trial court committed reversible error when it denied his motion for a mistrial after closing arguments. At trial, Brown objected to the State's statements to the jury that the lesser-included assault inflicting serious injury was a "misdemeanor," and that convicting defendants of the lesser-included offense would be "a slap on the wrist."

"It is within the trial court's discretion to determine whether to grant a mistrial, and the trial court's decision is to be given great deference because the trial court is in the best position to determine whether the degree of influence on the jury was irreparable." *State v. Hill*, 347 N.C. 275, 297, 493 S.E.2d 264, 276 (1997), *cert. denied*, 523 U.S. 1142, 140 L. Ed. 2d 1099 (1988). Absent a showing of gross abuse of a trial court's discretion, the trial court's ruling will not be disturbed on appeal. *State v. Roland*, 88 N.C. App. 19, 26, 362 S.E.2d 800, 805 (1987), *disc. review denied*, 321 N.C. 478, 364 S.E.2d 666 (1988).

Ordinarily, when the State's jury argument is challenged as improper, the argument of both counsel should be included in the record on appeal. *State v. Quilliams*, 55 N.C. App. 349, 352, 285 S.E.2d 617, 620, *cert. denied*, 305 N.C. 590, 292 S.E.2d 11 (1982). When arguments are not contained in the record, the arguments are presumed to be proper. *Id.* Brown explains that closing arguments are not included in the record on appeal because the arguments were not recorded at trial. Therefore, we have only the colloquy regarding Brown's objection and motion for mistrial in the record for our review. Without the transcript of the State's argument, we cannot be certain of the accuracy of Brown's characterization of the State's argument. However, even assuming *arguendo* that Brown's characterization is proper, we find no abuse of discretion.

The contested argument did not unfairly prejudice Brown. As discussed in Part III of this opinion, there was sufficient evidence to support the charge of assault inflicting serious bodily injury. The trial court, in its discretion, did not find the contested statements in the State's argument to constitute an impropriety sufficient for a mistrial. Given the degree of deference afforded a trial court's decision on a motion for a mistrial, we are not persuaded that the trial court's denial of Brown's motion amounted to an abuse of discretion.

VI.

[8] Brown next argues the trial court erred in allowing the introduction of an exhibit pertaining to a real estate transaction between Gadson and Blair. The State called Blair as a witness and questioned him about a proposed real estate sale between Blair and Gadson. Blair testified that Gadson offered to sell Blair some real property, but Gadson did not in fact own the property. The State then moved to introduce Exhibit 27, a bill for a survey of the property Gadson claimed to own. Over Gadson's objection, the trial court admitted Exhibit 27, stating: "I'll let it in as to Gadson only, to explain the relationship between the parties. Do not consider that land deal against Defendant Brown, members of the jury."

We first note that Brown failed to object to either the exhibit or the related testimony at trial. Therefore, Brown must show that any error by the trial court amounted to plain error, an error "so fundamental that it undermine[d] the fairness of the trial, or . . . had a probable impact on the guilty verdict." *State v. Floyd*, 148 N.C. App. 290, 295, 558 S.E.2d 237, 240 (2002). We also note the exhibit and testimony were admitted against Gadson only, and the trial court in-

structed the jury not to consider the evidence against Brown. Brown argues on appeal that "the taint attributed to Mr. Gadson's character through the improper questioning firmly attached itself to Mr. Brown's character and credibility." We are not persuaded.

"[O]ur legal system through trial by jury operates on the assumption that a jury is composed of men and women of sufficient intelligence to comply with the court's instructions and they are presumed to have done so." *State v. Glover*, 77 N.C. App. 418, 421, 335 S.E.2d 86, 88 (1985); *State v. Richardson*, 346 N.C. 520, 534, 488 S.E.2d 148, 156 (1997), *cert. denied*, 522 U.S. 1056, 139 L. Ed. 2d 652 (1998). In light of the fact that the evidence pertained only to Gadson, and the trial court's limiting instruction to the jury, Brown has not shown that any alleged error was so fundamental as to amount to plain error. This assignment of error is overruled.

VII.

[9] Brown next argues the trial court erred in overruling his objection to a question posed by the State to Brown during cross-examination. The questioning at issue was as follows:

> Q. What felony have you been convicted of in the last ten years for which you could have received a penalty of more than 60 days, Mr. Brown?
>
> A. Social Security fraud, for faulty paperwork.
>
> . . . .
>
> Q. And that's something you're on probation for right now. Correct?
>
> . . . .
>
> A. Yes, sir. It was up in April, I think.
>
> Q. And the reason you're denying any involvement in even going over to Mr. Hall's house is because you know it would violate this federal probation, don't you?
>
> MR. JORDAN: Objection.
>
> THE COURT: Overruled.
>
> . . . .

> Q. My question to you, Mr. Brown, is the reason why you don't want to admit any involvement in this thing is because you know you're going to have to do this federal time as a result of it. Correct?

On appeal, Brown concedes the State's initial questions about Brown's felony conviction were permissible under N.C. Gen. Stat. § 8C-1, Rule 609, which permits evidence that a witness has been convicted of a felony, for purposes of impeachment. N.C. Gen. Stat. § 8C-1, Rule 609 (2005). Brown argues the State's follow-up question about Brown's motivation for denying involvement went beyond the permissible scope of Rule 609, which limits details of a prior conviction to "name of the crime, the time and place of the conviction, and the punishment imposed." *State v. Lynch*, 334 N.C. 402, 409, 432 S.E.2d 349, 352 (1993). Brown's reliance on Rule 609 is misplaced. The State's question about Brown's denial of involvement did not concern any impermissible details about Brown's prior felony conviction. Rather, the State sought to elicit that Brown had a motive for untruthfulness when he denied involvement in the crime. The State concedes the question could be considered a question concerning a prior bad act, but contends the question was permissible under Rule 404(b), in that it was admitted for the purpose of showing motive. We agree. Under N.C. Gen. Stat. § 8C-1, Rule 404(b) (2005), evidence of prior bad acts or crimes is admissible for purposes other than to prove a witness's conformity with the prior act. Such evidence is admissible to show, *inter alia*, the witness's motive. *Id.* Accordingly, this assignment of error is overruled.

VIII.

[10] Brown argues the trial court abused its discretion by sentencing him to consecutive sentences upon conviction of the two offenses. Brown acknowledges the trial court's authority, under N.C. Gen. Stat. § 15A-1354, to impose a sentence consecutively, but urges this Court to reconsider its rulings upholding the trial court's statutory authority. We decline. We reiterate our response to a similar argument promulgated by the defendant in *State v. Love*, 131 N.C. App. 350, 507 S.E.2d 577 (1998), *aff'd*, 350 N.C. 586, 516 S.E.2d 382, *cert. denied*, 350 N.C. 586, 539 S.E.2d 653 (1999). In *Love*, our Court addressed the question of a trial court's discretion under N.C.G.S. § 15A-1354, and we reiterate our response in *Love*: "This is, at best, a question for the legislature to resolve, but for our purposes it is an argument without merit on appeal." *Id.* at 359, 507 S.E.2d at 584.

No prejudicial error.

Chief Judge MARTIN and Judge STEELMAN concur.

IN THE MATTER OF: H.S.F., MINOR CHILD

No. COA05-1157

(Filed 18 April 2006)

1. Child Support, Custody, and Visitation— custody—jurisdiction

The trial court did not erred by concluding that it had jurisdiction to review a child custody and placement case, because: (1) our Supreme Court has already rejected respondent father's argument on appeal that under N.C.G.S. § 7B-906(d) once DSS ceased to have custody and the father was given physical custody by the May order, the court no longer had jurisdiction to conduct the statutory periodic hearings; (2) in the context of the Juvenile Code, once the court obtains jurisdiction over a juvenile, that jurisdiction shall continue until terminated by order of the court or until the juvenile reaches the age of eighteen years or is otherwise emancipated; and (3) in this case, prior to the hearing in August, no order had been reached closing the case and the child had not yet reached the age of eighteen.

2. Child Support, Custody, and Visitation— custody—in camera interview of child—informal acquiescence

The trial court did not err in a child custody case by interviewing the minor child with her guardian ad litem outside the presence of the parties, because: (1) if a party had the opportunity to object to an in camera interview of a child and did not do so, the interview is said to have been conducted with that party's informal acquiescence and cannot be the basis for an objection on appeal; and (2) the transcript revealed that the mother and the guardian both consented to the trial court's interview of the child in chambers while the father simply remained silent, and the father's silence in the face of an opportunity to object precludes review of this issue on appeal.

3. Child Support, Custody, and Visitation— physical custody—best interests of child

The trial court erred in a child custody case by concluding in its September order that it was in the child's best interests to return physical custody to the mother while providing for physical placement with the maternal grandfather, and the case is reversed and remanded for further proceedings, because: (1) nothing in N.C.G.S. § 7B-903 permits a court to grant physical custody to a parent, but order physical placement to be with another person; (2) except when custody has been granted to DSS, the statute anticipates that any person with whom the person is placed shall be given custody, even though the Court of Appeals has recently held in the Chapter 50 custody context that approval of physical placement with a grandparent, when physical custody has been granted to a parent, does not grant the grandparent any custodial rights; (3) the disposition ordered is inconsistent with the concept of physical custody when the law uses the phrase to refer to the rights and obligations of the person with whom the child resides whereas the trial court purported to grant physical custody to a parent who does not reside with the child; (4) the trial court's findings of fact do not support its conclusion that physical custody should be awarded to the mother; (5) prior to returning a child to the custody of a parent from whose custody the child was originally taken, a trial court must find that the child will receive from that parent proper care and supervision in a safe home; and (6) it appears from the transcript that the principal basis for the change in custody was the fact that the father was unmarried, and such reasoning was explicitly rejected by the United States Supreme Court in 1972.

Appeal by respondent father from order entered 17 September 2004 by Judge Charles A. Horn in Cleveland County District Court. Heard in the Court of Appeals 7 March 2006.

Charles E. Wilson, Jr., for petitioner-appellee.

Rebekah W. Davis for respondent-appellant.

GEER, Judge.

This appeal stems from an order entered by the Cleveland County District Court, following a review hearing, changing primary physical custody of the minor child, H.S.F., from her father to her mother.

Because we hold that the trial court's findings of fact do not support its conclusion of law that this change was in the minor child's best interests and because the disposition ordered by the court is not one authorized by statute, we reverse the trial court's order and remand this case for further proceedings.

Factual and Procedural History

The respondent father and H.S.F.'s mother were married on 14 July 1990. H.S.F. was born on 19 January 1993. The parents divorced in 1994 or 1995, and the child's mother later remarried. Subsequent to her parents' separation, the child lived primarily with her mother, but stayed in contact with her father. On 28 January 2004, the Cleveland County Department of Social Services ("DSS") filed a petition pursuant to N.C. Gen. Stat. § 7B-402 (2005). The petition alleged that the child was a neglected juvenile under N.C. Gen. Stat. § 7B-101(15) (2005) because she was living in an environment injurious to her welfare as a result of domestic violence occurring between the mother and her second husband, the child's stepfather.

On 28 January 2004, District Court Judge Larry Wilson signed a non-secure custody order, pursuant to N.C. Gen. Stat. § 7B-504 (2005), on the grounds that the child was exposed to a substantial risk of physical injury under N.C. Gen. Stat. § 7B-503(a)(3) (2005). Pursuant to the seven-day deadline mandated by N.C. Gen. Stat. § 7B-506 (2005), Judge Wilson signed a second order on the need for continued non-secure custody on 6 February 2004. This order continued DSS' non-secure custody over the child and sanctioned continued placement of the child with her father and her paternal grandmother. The order found that (1) the mother and stepfather had refused to cooperate with services offered by DSS, and (2) the couple's failure to comply with domestic violence protective orders, the incidents of domestic violence, and the couple's failure to cooperate with DSS exposed the child to a substantial risk of injury.

On 14 May 2004, District Court Judge Charles A. Horn entered an adjudication and dispositional order, following a four-day hearing that took place at the end of April. The May order found that (1) the mother had been abusing prescription drugs for more than 10 years; (2) loaded weapons were kept in the home in an unsecure location; (3) 99 telephone calls to 911 had been placed from the residence, mostly for the purpose of protecting the mother from the stepfather; (4) the stepfather had inflicted three broken limbs and at least four black eyes on the mother; (5) the mother and the child had planned

an escape route for the child, in case she was caught in the middle of an altercation; and (6) the mother and stepfather had consistently rejected all of DSS' attempts to work with the family. Based on these and other findings, the May order terminated DSS' custody, assigned joint legal custody of the child to the mother and father, and placed primary physical custody with the father, "but with the physical placement of the juvenile to be with her paternal grandmother."

Elsewhere in the May order, the mother and the maternal grandfather were given visitation rights, but strict parameters were placed on contact between the child and the stepfather. The order stated that "this matter shall be reviewed, as a peremptory setting, on this Court's Civil Domestic Term on Monday, August 2, 2004." The court specified that "further reunification efforts on the part of [DSS] with the respondent mother and stepfather would clearly be futile, and [DSS] should be relieved of its duty to make such continued efforts." Following the mother's appeal, this Court affirmed the May order. *In re H.S.F.*, 176 N.C. App. 189, 625 S.E.2d 916 (2006) (unpublished).

In June 2004, a month after Judge Horn's initial adjudication and disposition, the mother and father filed cross motions for contempt, each alleging that the other was not in compliance with the May order. At the outset of the August 2004 review hearing provided for in the May order, the trial judge asked why the matter was before him, and counsel for the parties explained that it was coming on for review pursuant to the May order and for resolution of the two cross-motions for contempt. The trial judge said, "So we're here on contempt motions," and the father's counsel said, "Essentially, Your Honor." A few minutes later, however, the trial court stated, "this matter is going to be reviewed as to the status of [the child] only this day. . . . And we're not going into any into any [sic] contempt hearings at all."

At the hearing, counsel for the mother attempted to tender the child (age 11) as a witness. The guardian ad litem objected. Counsel for the mother then requested that the court clear the room except for counsel, "so that [the child] can feel like she can express what she—whatever she needs to tell us." The trial judge declined to do so, stating instead that he would "take [the child] in chambers alone and discuss the matter with her." The guardian ad litem and the mother's counsel stated that they had no objection. Counsel for the father neither consented nor specifically objected to this procedure.

The trial judge then engaged in a private conference with the child and her guardian ad litem. The exact contents of this conversation have never been disclosed. Afterwards, the court heard testimony from the mother, who was examined by her counsel. Following the mother's testimony, the trial judge said to counsel for the father, "[D]o you wish to call a witness? I know you're shooting in the dark but I'm going to leave you there." When the father's counsel went to call his first witness—the paternal grandmother—to the stand, the trial court, acting *sua sponte*, refused to hear her testimony, stating, "I do not care to hear from her. I'll hear from your client."

After the father and the maternal grandfather testified, the following exchange occurred:

> THE COURT: The custody's getting ready to change because . . . I've given [respondent father] now four months to make a situation wherein he could come before this Court and present a situation where he could take this child into his custody.
>
> . . . .
>
> MR. CERWIN [father's counsel] . . . Your Honor, [the father]'s doing what the Court ordered him to do. He has the same home. His home is suitable. He's been wanting that child there since the beginning. It—his residence is suitable for that child.
>
> THE COURT: No, it isn't.
>
> MR. CERWIN: What—what's not suitable about it?
>
> THE COURT: It's a thing called marriage. . . . I guess I'm old time.

The court then stated, "the big thing [in the custody determination] is a little gal who pretty well opened up to me as we talked." The guardian ad litem, who had been present at the private conference in the judge's chambers, expressed grave concerns about a change in custody, because she did not think that the maternal grandfather could protect both the mother and the child from the stepfather's aggressiveness and violence.

Towards the end of the hearing, when it became apparent that the trial judge was planning to change the child's physical custody back to the mother, counsel for DSS repeated a concern he said he had already stated at the earlier adjudication hearing in April:

> [T]he other concerning issue for me . . . is . . . that this Court should be bound by the dispositional alternatives set forth in the Juvenile Code [N.C. Gen. Stat. § 7B-903 (2005)], and I do not believe that the Court has the authority to grant custody to a non-party grandparent in a juvenile court case brought under—under the Juvenile Code.
>
> . . . .
>
> Fault and no fault aside, the father in this case was a non-offending party and should be entitled by law to custody of this child. There have no—been no 50—Chapter 50 actions filed. There have been no findings by the Court under Chapter 50 that he is an unfit parent. And I just—I don't think the Court has the authority . . . .

At that point, the trial judge interrupted him: "I will [have the authority] when I finish up the order, sir. . . . I'm going to attempt to make it work."

Following the hearing, the trial court filed a written order on 17 September 2004 modifying the May 2004 custody order. The September order provided that the father and mother would continue to share joint legal custody. It further provided, however, that:

> the primary physical custody of the juvenile shall be with the respondent mother, [C.B.], but with the physical placement of the juvenile to be with her maternal grandfather, [T.A.], provided that the respondent mother is in the home of [T.A.] all evenings to assist with the minor child's school preparation from the time school lets out to the time [the child] goes to school in the morning.

Respondent father was granted visitation rights every other weekend, and the order also provided that the child could visit with her mother and stepfather at their home for two hours at a time on three separate days of the week. The child's father timely appealed.

I

[1] The respondent father first contends that the district court lacked jurisdiction to review the child's custody and placement. The May order scheduled the August review hearing pursuant to N.C. Gen. Stat. § 7B-906(a) (2005), which provides that a court has a duty to conduct periodic review hearings "[i]n any case where custody is removed from a parent, guardian, custodian, or caretaker." The father, however, points to N.C. Gen. Stat. § 7B-906(d), which pro-

vides: "If at any time custody is restored to a parent, guardian, custodian, or caretaker the court shall be relieved of the duty to conduct periodic judicial reviews of the placement." The father argues on appeal that, under § 7B-906(d), once DSS ceased to have custody and he was given physical custody by the May order, the court no longer had jurisdiction to conduct the statutory periodic hearings. This argument has been rejected by our Supreme Court.

In *In re Shue*, 311 N.C. 586, 319 S.E.2d 567 (1984), the Supreme Court considered the predecessor statute to N.C. Gen. Stat. § 7B-906, which contained essentially identical language to the current statute: "If any time custody is restored to a parent, the court shall be relieved of the duty to conduct periodic judicial reviews of the placement." N.C. Gen. Stat. § 7A-657 (1981). In *Shue*, the Court stressed that this language meant only that a trial court could terminate its jurisdiction; it was not required to do so: "If custody had been *restored* to [the mother], the trial court could have, although it was not required to, terminated its jurisdiction over [the child] and this case." 311 N.C. at 600 n.6, 319 S.E.2d at 576 n.6.

This Court has previously held, in the context of the Juvenile Code, that "[o]nce the court obtains jurisdiction over a juvenile, that 'jurisdiction shall continue until terminated by order of the court or until the juvenile reaches the age of 18 years or is otherwise emancipated . . . .' " *In re J.S.*, 165 N.C. App. 509, 513, 598 S.E.2d 658, 661 (2004) (quoting N.C. Gen. Stat. § 7B-201 (2003)). *See also* N.C. Gen. Stat. § 7B-1000(b) (2005) ("In any case where the court finds the juvenile to be abused, neglected, or dependent, the jurisdiction of the court to modify any order or disposition made in the case shall continue during the minority of the juvenile, until terminated by order of the court, or until the juvenile is otherwise emancipated."). In this case, prior to the hearing in August, no order had been entered closing the case, and the child had not yet reached age 18. The court, therefore, still had jurisdiction.

II

[2] The respondent father next assigns error to the trial judge's decision to interview the child with her guardian ad litem outside the presence of the parties. He argues that the interview was improper because he never expressly consented to the trial judge's interview of the child in chambers.

Respondent father is correct that "[i]n custody proceedings, the trial court may question a child in open court but the court may ques-

tion the children privately only with the consent of the parties." *Cox v. Cox*, 133 N.C. App. 221, 227, 515 S.E.2d 61, 65 (1999). If, however, the parties had an opportunity to object to an *in camera* interview of a child and did not do so, the interview is said to have been conducted with their "informed acquiescence" and cannot be the basis for an objection on appeal. *Stevens v. Stevens*, 26 N.C. App. 509, 510-11, 215 S.E.2d 881, 881-82, *cert. denied*, 288 N.C. 396, 218 S.E.2d 470 (1975).

In the present case, the transcript of the August hearing indicates that the mother and the guardian both consented to the trial judge's interview of the child in chambers, while the father simply remained silent. Under *Stevens*, the father's silence in the face of an opportunity to object precludes review of this issue on appeal.

III

[3] The final issue to be addressed regarding the September order is its conclusion that it was in the child's best interests to return physical custody to the mother while providing for "physical placement" with the maternal grandfather. We review a trial court's conclusions of law to determine whether they are supported by findings of fact. *In re Helms*, 127 N.C. App. 505, 511, 491 S.E.2d 672, 676 (1997). Further, we must determine whether the disposition adopted by the trial court is one authorized by statute. *In re Burrus*, 275 N.C. 517, 535, 169 S.E.2d 879, 891 (1969), *aff'd*, 403 U.S. 528, 29 L. Ed. 2d 647, 91 S. Ct. 1976 (1971).

N.C. Gen. Stat. § 7B-906 governs review by district courts of prior orders entered under the Juvenile Code and was the basis for the trial court's order in this case. That statute provides:

> The court, after making findings of fact, . . . may make any disposition authorized by G.S. 7B-903, including the authority to place the juvenile in the custody of either parent or any relative found by the court to be suitable and found by the court to be in the best interests of the juvenile. The court may enter an order continuing the placement under review or providing for a different placement as is deemed to be in the best interests of the juvenile.

N.C. Gen. Stat. § 7B-906(d). The statute further specifies that "[i]f the court determines that the juvenile shall be placed in the custody of an individual other than the parents . . ., the court shall verify that the person receiving custody . . . understands the legal significance of the placement or appointment and will have adequate resources to care appropriately for the juvenile." N.C. Gen. Stat. § 7B-906(g).

N.C. Gen. Stat. § 7B-903 specifies the "alternatives [that] shall be available to any court exercising jurisdiction" and provides that "the court may combine any of the applicable alternatives when the court finds the disposition to be in the best interests of the juvenile . . . ." The alternatives are limited to the following:

> (1) The court may dismiss the case or continue the case in order to allow the parent, guardian, custodian, caretaker or others to take appropriate action.
>
> (2) In the case of any juvenile who needs more adequate care or supervision or who needs placement, the court may:
>
> a. Require that the juvenile be supervised in the juvenile's own home by the department of social services in the juvenile's county, or by other personnel as may be available to the court, subject to conditions applicable to the parent, guardian, custodian, or caretaker as the court may specify; or
>
> b. Place the juvenile in the custody of a parent, relative, private agency offering placement services, or some other suitable person; or
>
> c. Place the juvenile in the custody of the department of social services in the county of the juvenile's residence . . . . *If a juvenile is removed from the home and placed in custody or placement responsibility of a county department of social services, the director shall not allow unsupervised visitation with, or return physical custody of the juvenile to, the parent, guardian, custodian, or caretaker without a hearing at which the court finds that the juvenile will receive proper care and supervision in a safe home. . . .*
>
> (3) In any case, the court may order that the juvenile be examined by a physician, psychiatrist, psychologist, or other qualified expert as may be needed for the court to determine the needs of the juvenile . . . .

N.C. Gen. Stat. § 7B-903(a) (emphasis added). The statute specifies no other dispositional alternatives. It, however, repeats the caveat also contained in N.C. Gen. Stat. § 7B-906(g) that "[i]f the court determines that the juvenile shall be placed in the custody of an individual other than the parents . . ., the court shall verify that the person

receiving custody . . . of the juvenile understands the legal significance of the placement . . . and will have adequate resources to care appropriately for the juvenile." N.C. Gen. Stat. § 7B-903(c).

The disposition entered in this case provided:

> the primary physical custody of the juvenile shall be with the respondent mother, [C.B.], but with the physical placement of the juvenile to be with her maternal grandfather, [T.A.], provided that the respondent mother is in the home of [T.A.] all evenings to assist with the minor child's school preparation from the time school lets out to the time [the child] goes to school in the morning.

This is not a disposition permitted by N.C. Gen. Stat. § 7B-903. Nothing in that statute permits a court to grant physical custody to a parent, but order "physical placement" to be with another person. Except when custody has been granted to DSS, the statute anticipates that any person with whom the child is "placed" shall be given custody. Yet, this Court has recently held, in the Chapter 50 custody context, that approval of physical placement with a grandparent—when physical custody has been granted to a parent—does not grant the grandparent any custodial rights. *Everette v. Collins*, 176 N.C. App. 168, 173-74, 625 S.E.2d 796, 799 (2006).

The disposition ordered below is also inconsistent with the concept of "physical custody." As the leading commentator on North Carolina family law has explained, "[t]he law uses the phrase 'physical custody' to refer to the rights and obligations of the person *with whom the child resides*." 3 Suzanne Reynolds, *Lee's North Carolina Family Law* § 13.2, at 13-16 (5th ed. 2002) (emphasis added). Here, the trial court purported to grant physical custody to a parent who does not reside with the child. Indeed, the court's order reflects this inherent inconsistency. While the child is required to live with the maternal grandfather, the order, in a nod to physical custody, includes the patently unrealistic specification that the child's mother spend every night at the grandfather's home rather than with her husband. Meanwhile, the maternal grandfather, whatever his good intentions, has no legal ability to make daily decisions affecting the child's welfare. Nothing in the Juvenile Code suggests that this type of disposition is appropriate.

Everette is not to the contrary. It addressed only whether the trial court, in applying Chapter 50, "violated [the mother's] constitutional

rights by approving of [the child's] physical placement with the paternal grandmother." 176 N.C. App. at 172, 625 S.E.2d at 799. The mother, who was physically incapable of caring for the child, contended that it was a "backdoor" way to grant the grandmother custody of the child. *Id.* The father, who had previously been awarded temporary physical custody, was in the military, had returned from active duty in Iraq, had chosen to place his child with his mother because of his continuing military service, and visited with his child every weekend. *Id.* at 171, 625 S.E.2d at 798. The trial court did not order placement with the paternal grandmother, but rather approved of the father's decision, in light of his military commitment, to place the child with the grandmother. *Everette* does not authorize an order under N.C. Gen. Stat. § 7B-903 granting physical custody to a parent, but ordering that the child will live elsewhere.[1]

Further, the trial court's findings of fact do not support its conclusion that physical custody should be awarded to the mother. N.C. Gen. Stat. § 7B-903(a)(2)(c) prohibits DSS from returning physical custody to the parent from whose custody the child was removed without a hearing at which the court "finds that the juvenile will receive proper care and supervision in a safe home." A "safe home" is defined as "[a] home in which the juvenile is not at substantial risk of physical or emotional abuse or neglect." N.C. Gen. Stat. § 7B-101(19). It is inconceivable that the General Assembly would preclude DSS from restoring custody to a parent without this judicial finding, while allowing a court to restore custody without making the same finding. We, therefore, hold that, prior to returning a child to the custody of a parent from whose custody the child was originally taken, a trial court must find that the child will receive from that parent proper care and supervision in a safe home.

In this case, the trial court made only a single finding of fact addressing the mother's fitness to have physical custody: "[S]ince the initial adjudication hearing the mother has had installed an insulin pump to regulate her medical condition of diabetes and the Court notes that there is a physical difference in her appearance and demeanor for the betterment." Nothing in the order addresses the conduct that resulted in an adjudication of neglect and a determination that reunification efforts with the mother and stepfather would "clearly be futile." The court made no findings suggesting that the longstanding and deep-seated problems with domestic violence be-

1. In the mother's appeal from the initial adjudication, this Court was not asked to address—and did not address—whether this type of disposition is permissible.

tween the mother and stepfather, reflected in the court's prior orders, had been resolved.[2] Indeed, the court's attempt to place the child with the maternal grandfather implies that it did not think the mother could provide "proper care and supervision in a safe home."

We also note that the trial court made only one finding of fact regarding why it was not in the best interests of the child for physical custody to be continued with her father: "The minor child is not totally happy in her current physical residence; the minor child missed her animals, her mother, her grandfather, and [the stepfather]; and the minor child is glad that her biological father is in her life now." This finding is not, standing alone, sufficient. It reflects no specific problem with the current physical residence. And, the fact that, along with missing her grandfather and animals, the child misses the two people who were adjudicated to have neglected her, can hardly support a finding that it is not in her best interests for custody to remain with her father.

It appears from the transcript that the principal basis for the change in custody was the fact that the father was unmarried. Such reasoning was explicitly rejected by the United States Supreme Court in 1972. In *Stanley v. Illinois*, 405 U.S. 645, 31 L. Ed. 2d 551, 92 S. Ct. 1208 (1972), the Court held that Illinois could not automatically consider a father unfit as a parent by virtue of the fact that he was not married; rather, individualized findings of unfitness must be made. The Court wrote:

> It may be, as the State insists, that most unmarried fathers are unsuitable and neglectful parents. It may also be that Stanley [the father in this case] is such a parent and that his children should be placed in other hands. But all unmarried fathers are not in this category; some are wholly suited to have custody of their children. . . . [N]othing in this record indicates that Stanley is or has been a neglectful father who has not cared for his children. Given the opportunity to make his case, Stanley may have been seen to be deserving of custody of his offspring.

Id. at 654-55, 31 L. Ed. 2d at 560-61, 92 S. Ct. at 1214. *See also*, *e.g.*, *Davis v. Davis*, 78 Ariz. 174, 178, 277 P.2d 261, 264 (1954) ("That Mrs. Davis has remarried does not automatically mean that Mr. Davis' bachelor residence is unfit. A showing of unfitness must be made—

2. We note that the General Assembly has mandated in Chapter 50 proceedings that a trial court consider "acts of domestic violence" when determining the best interest of the child in custody proceedings. N.C. Gen. Stat. § 50-13.2(a) (2005).

which we fail to find."); *In re Guardianship of Cameron D.*, 14 Neb. App. 276, 284-85, 706 N.W.2d 586, 593-94 (2005) ("We find that the evidence of [the mother's] relationship or marital status does not support a finding that [the mother] is unfit to perform the duties imposed by her parental relationship. . . . [There is] merit to [the mother]'s assertion that the court erred in determining that [the mother] is unfit by reason of her [non-marital] relationship or living arrangement.").

In sum, we hold that the trial court's conclusion of law that it is in the child's best interest to place her in the primary physical custody of her mother is unsupported by the findings of fact. Further, the disposition ordered by the trial court is not a disposition authorized by statute. We, therefore, reverse and remanded for further proceedings in accordance with this opinion.

Reversed and remanded.

Judges McGEE and CALABRIA concur.

JENNIFER PERKINS, Employee, Plaintiff v. U.S. AIRWAYS, Employer, RELIANCE NATIONAL INSURANCE COMPANY, Insolvent, NORTH CAROLINA INSURANCE GUARANTY ASSOCIATION, SEDGWICK CMS, Third Party Administrator, Carrier, Defendants

No. COA05-392

(Filed 18 April 2006)

1. Workers' Compensation— weight and credibility of medical testimony—sole purview of Commission

Arguments from a workers' compensation plaintiff about the weight and credibility of medical testimony did not justify overturning the Industrial Commission's denial of benefits. The Commission is entitled to give greater weight to the testimony of some doctors over others, and, as questions of weight and credibility are solely within the purview of the Commission to decide, the appellate court may not revisit those determinations.

2. Workers' Compensation— ex parte contact—failure to object—waiver

The failure to object in a workers' compensation case to an alleged ex parte contact between a doctor and the defendants resulted in the issue not being preserved for appeal.

3. Workers' Compensation— findings—not required on every point—reasonable inferences of Commission not revisited

Although a workers' compensation plaintiff argued that the record supported additional findings, the Industrial Commission is not required to make findings on a particular point merely because plaintiff has presented evidence on that subject, so long as the findings are sufficient to address the issues and the evidence before it. Also, the Court of Appeals may not revisit the Commission's reasonable inferences.

4. Workers' Compensation— lightning strike—denial of compensation—contrary testimony from one of several doctors

The testimony of one of the doctors in a workers' compensation case did not justify overturning the Industrial Commission's findings and conclusions denying compensation to a flight attendant who suffered a lightning strike injury. The testimony of other doctors supported the findings and conclusions.

5. Workers' Compensation— disability—capacity to return to work—evidence sufficient

The record in a workers' compensation proceeding contains evidence supporting the Commission's determination that the plaintiff was capable of returning to work and that she had failed to carry her burden of showing that she remained disabled.

6. Workers' Compensation— partial disability—evidence presented—not addressed

The Industrial Commission erred in a workers' compensation case by failing to address whether plaintiff was entitled to partial disability benefits where there was medical testimony of a 10% partial disability rating. The case was remanded.

Appeal by plaintiff from an opinion and award filed 21 December 2004 by the North Carolina Industrial Commission. Heard in the Court of Appeals 16 November 2005.

Bazzle & Carr, P.A., by Ervin W. Bazzle, for plaintiff-appellant.

Brooks, Stevens & Pope, P.A., by Daniel C. Pope, Jr. and Kimberley A. D'Arruda, for defendants-appellees.

GEER, Judge.

Plaintiff Jennifer Perkins appeals from an opinion and award of the Industrial Commission concluding that she is not entitled to workers' compensation benefits. On appeal, Ms. Perkins challenges the Commission's decision to give greater weight to the testimony of certain expert witnesses, whose testimony was less favorable to her position, rather than the more favorable testimony of other experts. Additionally, Ms. Perkins objects to the Commission's failure to make findings regarding certain details in the evidence and its failure to draw more inferences in her favor. Because Ms. Perkins' arguments are inconsistent with the applicable standard of review, we affirm the Commission's order. Nevertheless, since the Commission failed to address Ms. Perkins' entitlement to compensation under N.C. Gen. Stat. § 97-31 (2005), we remand for determination of this issue.

Facts

Ms. Perkins had been working as a flight attendant for 10 years when, on 10 May 2000, lightning struck a jet near her while she was helping passengers deplane from another U.S. Airways aircraft. Immediately after the strike, Ms. Perkins felt a "hot poker feeling" in her right arm that persisted as a burning, "pins and needles" sensation. She was treated by paramedics at the scene and told to follow up with a doctor if problems continued. U.S. Airways filed a Form 60 admitting compensability. Over the next ten months, Ms. Perkins continued to perform her regular duties as a flight attendant for U.S. Airways.

Within a week of the accident Ms. Perkins saw neurologist Dr. Jerry Williams for a pre-existing neurological condition and complaints of tightness in her right side. In a later appointment, Ms. Perkins also complained of right arm and shoulder pain. Dr. Williams diagnosed Ms. Perkins as having an electric shock injury. A lumbar MRI showed disc degeneration at L5-S1 with mild broad-based disc protrusion, marginal osteophytosis, facet joint degenerative joint disease, and mild concentric disc protrusion at L1-2. Dr. Williams continued to treat Ms. Perkins and ultimately excused her from work. As a result, Ms. Perkins began receiving temporary total disability benefits on 14 March 2001.

Defendants referred Ms. Perkins to Dr. Roger Hershline for treatment relating to the lightning strike. On 30 March 2001, Dr. Hershline diagnosed her as suffering a cervical strain or cervical disc bulge and an electrical shock injury. He continued to excuse Ms. Perkins from work and referred her to Dr. Nicholas Grivas, a neurosurgeon, for assessment of her cervical condition. Dr. Grivas found no neurological deficits or any signs consistent with degenerative disc disease or a ruptured disc. He also testified that he did not find any evidence that Ms. Perkins suffered from thoracic outlet syndrome or any other surgically correctable abnormality.

On 13 April 2001, Ms. Perkins complained to Dr. Hershline of pain in her neck, shoulder, and arm, as well as problems with her memory. Ms. Perkins was able to answer Dr. Hershline's standard clinical memory tests correctly. With respect to the pain, Dr. Hershline noted that Ms. Perkins' recent home remodeling efforts had required greater physical exertion than Ms. Perkins' previous duties as a flight attendant. Further, although Ms. Perkins presented symptoms of depression, Dr. Hershline concluded they were not related to her lightning injury. He recommended that Ms. Perkins complete two more weeks of physical therapy and return to work without restrictions. The Commission found—in a finding of fact not challenged on appeal—that "[f]rom this point forward, plaintiff's list of claimed symptoms expand[ed] dramatically."

On 8 June 2001, Ms. Perkins was seen by Dr. Rebecca Holdren in Greenville, South Carolina. Initially, Dr. Holdren diagnosed Ms. Perkins as suffering from reflex sympathetic dystrophy ("RSD"). Dr. Hershline, however, expressed the view that an RSD diagnosis was not supported by clinically observed symptoms and recommended a bone scan. A 13 July 2001 bone scan was normal. On 24 July 2001, Dr. Holdren agreed that the RSD diagnosis was incorrect and concluded that Ms. Perkins could return to work, from a physical standpoint, although she recommended three weeks of transitional work.

Defendants subsequently filed a Form 24 seeking to terminate Ms. Perkins' disability benefits on the grounds that she was no longer disabled. Special Deputy Commissioner Myra L. Griffith approved the application, and Ms. Perkins' disability benefits were ordered terminated on 12 September 2001.

Ms. Perkins learned of the Mensana Clinic in Maryland "through a lightning strike survivor's Internet website" and went there to see psychiatrist Dr. Nelson Hendler on 7 August 2001. At that time, Ms.

Perkins reported an extensive list of physical conditions, including headaches, numbness, weight gain, spasms, trembling, and pain throughout much of her body. Dr. Hendler diagnosed Ms. Perkins with, among other things, thoracic outlet syndrome and nonfatal lightning injury with brain damage.

Subsequent evaluation by neuropsychologist and Mensana Clinic affiliate Dr. Sheldon Levin found no neurocognitive disorders related to the lightning strike. Dr. Levin noted that Ms. Perkins was presenting a "mixed pattern of symptoms" that would normally be diagnosed as a somatization disorder, but declined to give this diagnosis based on Dr. Hendler's conclusion "that [Ms. Perkins] suffered from a physical rather than a mental illness."

The Commission ordered an independent medical examination and, on 11 December 2001, Ms. Perkins saw orthopaedist Dr. Robert Elkins. Dr. Elkins diagnosed Ms. Perkins as suffering from a lightning strike injury and related right upper extremity myofascial pain syndrome. Dr. Elkins concluded that Ms. Perkins had reached maximum medical improvement and assigned a 10% permanent partial disability rating to her upper right extremity. While Dr. Elkins believed that Ms. Perkins was disabled from her previous position as a flight attendant, he concluded she was capable of performing light to moderate duty work.

Dr. Hendler subsequently referred Ms. Perkins to neurologist Dr. Donlin Long, who found that Ms. Perkins had a normal EMG and cervical imaging study. Although he agreed that her complaints fit the classic definition of somatization disorder, he performed spinal fusion surgery based on Ms. Perkins' responses to "provocative disc blocks."

Dr. Hendler also referred Ms. Perkins to Dr. Avraam Karas. Dr. Karas performed several more surgeries on Ms. Perkins, including multiple rib resections and thoracic outlet syndrome surgeries. Ms. Perkins has requested additional surgery because of continuing pain.[1]

A hearing was held by Deputy Commissioner Adrian A. Phillips on 12 November 2002 for consideration of: (1) whether Ms. Perkins' compensable injury caused her cervical and lumbar spine injuries, thoracic outlet syndrome, depression, post-traumatic stress syn-

1. Ms. Perkins also received treatment from other practitioners whose findings are not necessary to recite for resolution of this appeal.

drome, and somatization disorder; and (2) to what degree Ms. Perkins was disabled as a result of her compensable injury. The deputy commissioner concluded that the lightning strike had caused Ms. Perkins' physical conditions as well as her "severe depression and psychiatric illness" and ordered defendants to pay temporary total disability benefits and all related medical expenses.

On appeal, the Full Commission reversed. The Commission decided to give "greater weight to the testimony of Dr. Hershline, Dr. Williams, Dr. Holdren, Dr. Grivas, Dr. Demas and Dr. Elkins than to Dr. Hendler, Dr. Levin, Dr. Long and Dr. Karas," noting that Drs. Hershline and Williams were Ms. Perkins' primary treating physicians immediately following the accident, whereas Dr. Hendler "did not see [Ms. Perkins] until more than a year after her initial injury." The Commission noted further that (1) "Dr. Hendler [had] relied on [Ms. Perkins'] subjective complaints even when they [were] contradicted by the documentation provided by her previous physicians," and (2) Drs. Levin, Long, and Karas had "deferred to the opinion of Dr. Hendler even when the objective evidence . . . contradicted Dr. Hendler's diagnoses . . . ."

Although the Commission agreed that Ms. Perkins had sustained an injury by accident on 10 May 2000, it concluded that she had:

> failed to establish though [sic] competent and credible medical evidence that [her] conditions with which she was diagnosed by Dr. Hendler and by the doctors to whom he referred [her] for the treatment of those conditions . . . were related to or aggravated by her compensable injury of May 10, 2000 as these diagnoses are contradicted by the objective medical evidence, records and testimony of Dr. Hershline, Dr. Williams, Dr. Grivas, Dr. Elkins, Dr. Demas and Dr. Holdren.

The Commission further concluded that "[a]s of July 1, 2001, [Ms. Perkins] was capable of returning to full-duty work without restrictions." With respect to the diagnosis of a somatization disorder, the Commission stated that "[m]erely being the 'precipitating' or 'triggering' event for her somatization disorder does not establish causation." Ms. Perkins timely appealed from this opinion and award.

Discussion

On appeal from a decision of the Full Commission, this Court reviews only (1) whether the Commission's findings of fact are supported by competent evidence in the record, and (2) whether the

Commission's findings justify its legal conclusions. *Counts v. Black & Decker Corp.*, 121 N.C. App. 387, 389, 465 S.E.2d 343, 345, *disc. review denied*, 343 N.C. 305, 471 S.E.2d 68 (1996). The Commission's findings are conclusive on appeal if they are supported by competent evidence, 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). Consequently, "[t]he Commission's findings of fact may be set aside on appeal only where there is a complete lack of competent evidence to support them." *Id.*

I

[1] Much of Ms. Perkins' argument on appeal rests on her contention that "[t]he Commission committed a reversible error by not affording greater weight to the testimony of the physicians with experience treating patients with lightning strike injuries, and to the physicians whom have treated Ms. Perkins on a regular basis." Similarly, Ms. Perkins contends that "[t]he record reflects that little, if any, weight should be given to the opinion of Dr. Hershline." The Commission is entitled, however, to give greater weight to the testimony of some doctors over others. *Hensley v. Indus. Maint. Overflow*, 166 N.C. App. 413, 420, 601 S.E.2d 893, 898-99 (2004), *disc. review denied*, 359 N.C. 631, 613 S.E.2d 690 (2005). Further, questions of weight and credibility are solely within the purview of the Commission to decide, and we may not revisit those determinations. *Adams v. AVX Corp.*, 349 N.C. 676, 680, 509 S.E.2d 411, 413 (1998) (" 'The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony.' " (quoting *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965))).

Ms. Perkins argues that "[t]o afford greater weight to a doctor with no experience in an area who has unabashed loyalty to the defendants when there are physicians treating the patient with extensive experience, is unfair and unjust." That argument was for the Commission to assess and is not a proper subject for appellate review. *See Alexander v. Wal-Mart Stores, Inc.*, 166 N.C. App. 563, 573, 603 S.E.2d 552, 558 (2004) (Hudson, J., dissenting) ("In reviewing a workers' compensation claim, this Court does not have the right to weigh the evidence and decide the issue on the basis of its weight." (internal quotation marks omitted)), *adopted per curiam by*, 359 N.C. 403, 610 S.E.2d 374 (2005). Accordingly, Ms. Perkins' arguments regarding weight and credibility cannot justify overturning the Commission's opinion and award.

[2] With respect to Dr. Hershline in particular, Ms. Perkins also argues that an *ex parte* communication between Dr. Hershline and defendants rendered his testimony incompetent under *Salaam v. N.C. Dep't of Transp.*, 122 N.C. App. 83, 468 S.E.2d 536 (1996), *disc. review improvidently allowed*, 345 N.C. 494, 480 S.E.2d 51 (1997). Ms. Perkins did not, however, object on *Salaam* grounds before the Commission, and, therefore, her contentions on this issue have not been preserved for appellate review. N.C.R. App. P. 10(b)(1).

[3] With respect to individual findings of fact, Ms. Perkins argues that the record supports additional findings not made by the Commission. So long as the Commission makes findings sufficient to address the issues and evidence before it, the Commission is not required to make findings of fact as to a particular point merely because the plaintiff has presented evidence on that subject. *See Dunn v. Marconi Commc'ns., Inc.*, 161 N.C. App. 606, 611, 589 S.E.2d 150, 154 (2003) ("[M]erely because plaintiff presented credible evidence, the Commission was not required to make findings of fact regarding that evidence."). Ms. Perkins also asserts that the Commission should have drawn different inferences from the evidence upon which it did rely. As with decisions regarding credibility and weight, this Court may not revisit reasonable inferences drawn by the Commission. *Norman v. N.C. Dep't of Transp.*, 161 N.C. App. 211, 224, 588 S.E.2d 42, 51 (2003), *disc. review denied*, 358 N.C. 235, 595 S.E.2d 153, *cert. denied*, 358 N.C. 545, 599 S.E.2d 404 (2004).

[4] In arguing further that the Commission erred when it failed to find that Ms. Perkins' conditions were caused by her 10 May 2000 injury, Ms. Perkins relies on the testimony of Drs. Hendler, Long, Karas, Levin, and Demas. With the exception of Dr. Demas, the Commission chose not to rely upon those doctors' opinions, as it was entitled to do.

As for Dr. Demas, Ms. Perkins asserts that he stated that she "is disabled due to a psychological impairment due to her post traumatic reaction to the trauma of her lightning strike event." The Commission acknowledged this diagnosis in its finding relating to Dr. Demas, but further found that "Dr. Demas testified that he felt plaintiff had a somatization disorder, and as evidence cited her overly dramatic descriptions of her symptoms, her refusal to consider that there might be a psychological reason for her problems, and her seeking treatment from more and more physicians. *He concluded the lightning itself would not have caused the condition but may have been a precipitating event*." (Emphasis added.) This finding is supported by the

record. The Commission ultimately found that "[t]he greater weight of the evidence shows that plaintiff suffers from somatization disorder, which causes her to turn emotional anxiety into physical complaints." It concluded, however, that "[m]erely being the 'precipitating' or 'triggering' event for her somatization disorder does not establish causation," citing *Brewington v. Rigsbee Auto Parts*, 69 N.C. App. 168, 316 S.E.2d 336 (1984).

In his dissent, Commissioner Thomas J. Bolch did not disagree with the Commission's assessment of the medical evidence, but concluded that "the majority erred in failing to find that plaintiff's somatization disorder is causally related to the lightning strike that she experienced on May 10, 2000. The majority should have found that plaintiff is mentally incapable of any employment as the consequence of her work-related injury . . . ." Ms. Perkins, however, has chosen not to bring forth any argument on this issue on appeal and, accordingly, we may not address it. *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005) ("It is not the role of the appellate courts . . . to create an appeal for an appellant.").

As a result, we conclude that the testimony of Dr. Demas does not justify overturning the Commission's findings and conclusions. Since Dr. Hershline's testimony, together with evidence and testimony from other doctors, supports the Commission's findings of fact and its conclusion that the Ms. Perkins failed to establish that the "conditions with which she was diagnosed by Dr. Hendler and by the doctors to whom he referred [her] . . . were related to or aggravated by her compensable injury," we are required to uphold this aspect of the Commission's opinion and award.

II

[5] Ms. Perkins next argues that the Commission erred by concluding that she was not entitled to compensation for loss of wage earning capacity after 12 September 2001, the date that defendants' Form 24 was approved. "The burden is on the employee to show that [s]he is unable to earn the same wages [s]he had earned before the injury, either in the same employment or in other employment." *Russell v. Lowes Prod. Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993). An employee may meet this burden in one of four ways:

> (1) the production of medical evidence that he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment; (2) the production of evidence that

> he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment; (3) the production of evidence that he is capable of some work but that it would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, to seek other employment; or (4) the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury.

Id. (internal citations omitted).

Ms. Perkins relies primarily on the first option, arguing that the medical evidence establishes that her work injury rendered her incapable of work in any employment. Of all the doctors to see Ms. Perkins, however, only Dr. Long stated that Ms. Perkins was incapable of doing any kind of work. Several of the other doctors—including Drs. Elkins, Karas, and Demas—testified that Ms. Perkins was capable of performing some kind of work. While we agree with Ms. Perkins that there is medical evidence to support a determination that she could not return to full-time work as a flight attendant, this alone is insufficient to establish that she was incapable of earning wages at any job.

Ms. Perkins alternatively argues that because she contacted U.S. Airways about a light duty position and they did not offer her one, the Commission erred by not concluding she was disabled under the second option, *i.e.*, that she is capable of some work but had been unable to obtain employment after a reasonable effort. Ms. Perkins cites to no authority—and we know of none—that would have required U.S. Airways to offer Ms. Perkins such a position. The record contains no indication that Ms. Perkins made any other attempts to obtain employment. The Commission was free to decide, as it did, that Ms. Perkins' single contact with U.S. Airways was insufficient to establish she had made a reasonable effort to obtain employment under the second *Russell* option.

We, therefore, conclude that the record contains evidence to support the Commission's determination that "[a]s of July 1, 2001, plaintiff was capable of returning to full-duty work without restrictions" and that "plaintiff failed in her burden of proving that, after that date, she remained disabled as a result of the compensable injury of May 10, 2000." These determinations in turn support the Commission's conclusion that plaintiff is not entitled to compensation under N.C. Gen. Stat. §§ 97-29 or 97-30 (2005) after 12 September 2001, the date upon which the Form 24 was approved.

[6] Ms. Perkins, however, contends alternatively that the Commission erred by failing to specifically address whether she was entitled to compensation under N.C. Gen. Stat. § 97-31. "It is well established that the full Commission has the duty and responsibility to decide all matters in controversy between the parties, and, if necessary, the full Commission must resolve matters in controversy even if those matters were not addressed by the deputy commissioner." *Payne v. Charlotte Heating & Air Conditioning*, 172 N.C. App. 496, 501, 616 S.E.2d 356, 360 (2005) (internal quotation marks omitted).

The Commission found that "Dr. Elkins concluded that plaintiff was suffering from a probable lightning strike injury and right upper extremity myofascial pain syndrome which he felt were related to her compensable injury, and mild degenerative changes of the neck and back which he did not feel were related." The Commission did not, however, address Dr. Elkins' opinion that Ms. Perkins had a 10% permanent partial disability rating to the right upper extremity. Further, the Commission's opinion and award contains no explanation why it did not believe Ms. Perkins to be entitled to compensation for permanent partial disability benefits based on that rating. Nor do defendants address this issue on appeal. Accordingly, we remand to the Commission for a determination whether Ms. Perkins is entitled to compensation under N.C. Gen. Stat. § 97-31.

Affirmed in part and remanded in part.

Judges HUNTER and McCULLOUGH concur.

JOSEPH E. TEAGUE, JR., P.E., C.M., Petitioner-Appellant v. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, Respondent-Appellee

No. COA05-522

(Filed 18 April 2006)

1. Public Officers and Employees— dismissal of state employee—personal misconduct—final agency decision

The trial court did not err in a case involving the dismissal of a state employee for personal misconduct by determining that the ALJ's recommended decision became the final decision of the State Personnel Commission under N.C.G.S. § 150B-44, because:

(1) after failing to reach a majority vote during its 20 February 2003 meeting, the Commission issued a Memorandum of Consideration on 1 April 2003, and absent any findings of fact or conclusions of law, the Memorandum of Consideration cannot be considered a final decision under N.C.G.S. § 150B-36(b); (2) in order to protect petitioner dismissed employee from unreasonable delay, N.C.G.S. § 150B-44 provided petitioner the remedy of making the ALJ's recommended decision the final decision of the agency so the administrative appeals process could continue; and (3) this situation, in which an administrative agency failed to issue a final decision within the statutorily prescribed period, is the situation N.C.G.S. § 150B-44 was intended to remedy.

2. Administrative Law— whole record review—de novo review—dismissal of state employee

The trial court did not err in a case involving the dismissal of a state employee for personal misconduct by using the whole record standard of review instead of reviewing the matter de novo, because: (1) in cases where petitioner contends the agency decision was not supported by substantial evidence, the whole record test is the proper standard of review, and the first ground for relief in his petition stated that the ALJ's findings of fact and conclusions of law were not supported by evidence in the record; (2) as to petitioner's second ground for relief, the trial court properly employed a de novo review of the question of the application of N.C.G.S. § 150B-44; and (3) the trial court's erroneous application of the standard of review would not automatically necessitate remand, provided the appellate court can reasonably determine from the record whether the petitioner's asserted grounds for challenging the agency's final decision warrant reversal or modification of the decision under the applicable provisions of N.C.G.S. § 150B-51(b), and the Court of Appeals' de novo review of the issue revealed no error.

3. Public Officers and Employees— dismissal of state employee—just cause

A whole record review revealed that the trial court did not err by determining there was sufficient evidence to support the ALJ's findings and conclusions justifying petitioner state employee's dismissal for just cause, because: (1) the State Personnel Act permits disciplinary action against career state employees for just cause which may consist of unacceptable personal conduct; (2) petitioner's denial of knowledge of the statement of understand-

ing was not credible when he was a computer security liaison for DOT for ten years, he signed the internet policy which explicitly referenced the statement of understanding, and he was advised by a DOT computer systems administrator on several occasions that he needed to obtain permission to install software; (3) the ALJ explained her disbelief of petitioner based on his educational background, intellectual abilities, and on-the-job computer experience, and it is within the ALJ's discretion to analyze the credibility of witnesses and to resolve conflicting testimony; (4) petitioner's own testimony supported the finding that he did not ask or get permission to install the software discovered on his computer; and (5) evidence supported the finding that petitioner's installation of servers and protocols breached DOT's network security and exposed DOT's systems to invasion by external computer hackers.

Appeal by petitioner from order entered 18 February 2005 by Judge Henry W. Hight, Jr. in Superior Court, Wake County. Heard in the Court of Appeals 9 January 2006.

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

Attorney General Roy Cooper, by Assistant Attorney General Tina A. Krasner, for respondent-appellee.

McGEE, Judge.

Joseph E. Teague (Teague) was employed as an engineer by the North Carolina Department of Transportation (DOT) in the Program Analysis Unit. By letter dated 17 May 2001, DOT dismissed Teague from employment based on unacceptable personal conduct. Teague filed a grievance, and DOT upheld its dismissal decision. Thereafter, Teague filed a petition for a contested case hearing in the Office of Administrative Hearings. A hearing was held before an administrative law judge (the ALJ) on 9 and 10 April 2002. The ALJ rendered a decision on 17 October 2002 upholding DOT's dismissal of Teague for unacceptable personal conduct.

The State Personnel Commission (the Commission) considered the decision of the ALJ at its 20 February 2003 meeting. The Commission issued a Memorandum of Consideration on 1 April 2003, stating that four members of the Commission voted to adopt the ALJ's decision and four members voted against the adoption of the ALJ's deci-

sion. The Memorandum of Consideration continued: "Being unable to sustain a majority in favor of a motion to adopt or reject the [ALJ's] decision, the Commission took no further action with regard to the recommended decision." The Memorandum of Consideration concluded: "Note: G.S. 150B-44 provides the following: If an agency subject to Article 3 of this Chapter has not made a final decision within [the time limit specified in the statute], the agency is considered to have adopted the [ALJ's] recommended decision as the agency's final decision." Teague filed a petition for judicial review. The trial court determined the ALJ's decision to be the final agency decision, and affirmed the ALJ's decision. Teague appeals.

The evidence before the ALJ tended to show that Teague was continuously employed by DOT from 1988 until his discharge in 2001. Teague received an A.B.S. degree in Mechanical Engineering from Georgia Tech University, an M.B.A. in Economics from the University of Oklahoma, and a Master's Degree in Civil Engineering from North Carolina State University. From 1998 until 2000, Teague's responsibilities at DOT involved computer security and software licensing issues. On 11 April 2001, DOT staff conducted a routine, random scan of local ports and Internet Protocol addresses in Teague's unit. As a result of the scan and a subsequent inspection of Teague's computer, DOT discovered nineteen software applications on Teague's computer that were not issued by DOT. Teague was placed on "investigatory placement" with pay while a full investigatory audit of Teague's computer was completed. Ultimately, Teague was dismissed from his employment for unacceptable personal conduct, specifically for the willful violation of known or written work rules.

The ALJ determined that Teague willfully violated two sets of work rules: (1) a document entitled "Internet and Email Policy and Procedure" (Internet Policy); and (2) a document entitled "Statement of Understanding Regarding Use of Computers" (Statement of Understanding). The ALJ found that Teague admitted to reading and signing the Internet Policy, the first paragraph of which stated that the Internet Policy was to be understood "[a]s a supplement to and in conjunction with" the Statement of Understanding.

I.

[1] Teague first assigns error to the trial court's determination that the ALJ's recommended decision became the final decision of the Commission pursuant to N.C. Gen. Stat. § 150B-44. The statute provides that "[i]f an agency subject to Article 3 of [Chapter 150B] has

not made a final decision within the [relevant] time limit[], the agency is considered to have adopted the [ALJ's] decision as the agency's final decision." N.C. Gen. Stat. § 150B-44 (2005). In interpreting the statute, our Court has held that, "[b]ecause the primary purpose of [Chapter 150B] is to provide procedural protection for persons aggrieved by an agency decision, the provisions thereof are to be 'liberally construed . . . to preserve and effectuate such right.' " *Holland Group v. N.C. Dept. of Administration*, 130 N.C. App. 721, 725, 504 S.E.2d 300, 304 (1998) (quoting *Empire Power Co. v. N.C. Dept. of E.H.N.R.*, 337 N.C. 569, 594, 447 S.E.2d 768, 783 (1994)). Moreover, "[t]he plain language of [N.C.]G.S. § 150-44 indicates the section is intended to guard those involved in the administrative process from the inconvenience and uncertainty of unreasonable delay." *Id.*; *see Occaneechi Band of the Saponi Nation v. N.C. Comm'n of Indian Affairs*, 145 N.C. App. 649, 653, 551 S.E.2d 535, 538, *disc. review denied*, 354 N.C. 365, 556 S.E.2d 575 (2001) (finding "no ambiguity in [the] statutory language [of N.C.G.S. § 150-44] that would give the trial court need to further explore legislative intent").

Teague argues that the Commission's act of voting, and failure to reach a majority vote, was in fact a final decision that DOT failed to carry its burden of showing just cause for Teague's dismissal. Therefore, he contends N.C.G.S. § 150B-44 does not apply. This is incorrect. The plain language of N.C.G.S. § 150B-44 provides that an agency, such as the Commission, that is subject to Article 3, "has 60 days from the day it receives the official record in a contested case . . . or 60 days after its next regularly scheduled meeting, whichever is longer, to make a final decision in the case." N.C.G.S. § 150B-44. N.C. Gen. Stat. § 150B-36(b) (2005) provides that "a final decision in a contested case shall be made by the agency in writing . . . and *shall include findings of fact and conclusions of law.*" (emphasis added). Our Court has explained that N.C.G.S. § 150B-36(b) "clearly requires that a final agency decision be in writing and include findings of fact and conclusions of law." *Walton v. N.C. State Treasurer*, 176 N.C. App. 273, 276, 625 S.E.2d 883, 885 (2006) (holding that an oral announcement by an agency subject to Article 3 did not constitute a "final decision" under N.C.G.S. § 150B-36(b)).

In the present case, the Commission received the official record on 18 December 2002 and heard the case at its next regularly scheduled meeting on 20 February 2003. Therefore, the Commission had 60 days from its 20 February 2003 meeting in which to render a final decision in writing, including findings of fact and conclusions of law.

See N.C.G.S. § 150B-36(b); N.C.G.S. § 150B-44. After failing to reach a majority vote during its 20 February 2003 meeting, the Commission issued a Memorandum of Consideration on 1 April 2003. The Memorandum of Consideration did not recite any findings of fact or conclusions of law. Nor did it include any language that could be construed as a finding of fact or conclusion of law. Absent any findings of fact or conclusions of law, the Memorandum of Consideration cannot be considered a final decision under N.C.G.S. § 150B-36(b).

Because the Memorandum of Consideration did not constitute a final decision under N.C.G.S. § 150B-36, the Commission failed to make a final decision within the time limit set forth in N.C.G.S. § 150B-44. Accordingly, in order to protect Teague from unreasonable delay resulting from the Commission's failure to issue a final decision, the Commission "[was] considered to have adopted the [ALJ's] decision as the agency's final decision." N.C.G.S. § 150B-44. The ALJ's recommended decision became the final decision in the case "by operation of law." *Occaneechi*, 145 N.C. App. at 655, 551 S.E.2d at 539.

Teague correctly asserts that, under the State Personnel Act, the Commission had the burden of showing Teague was discharged for just cause. N.C. Gen. Stat. § 126-35 states in pertinent part that

> (a) No career State employee subject to the State Personnel Act shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause. . . .
>
> . . . .
>
> (d) In contested cases conducted subject to Chapter 150B of the General Statutes, the burden of showing that a career State employee subject to the State Personnel Act was discharged, suspended, or demoted for just cause rests with the department or agency employer

N.C. Gen. Stat. § 126-35 (2005).

Our Supreme Court has held that, for the purpose of procedural due process, "[t]he North Carolina General Assembly created, by enactment of the State Personnel Act, a constitutionally protected 'property' interest in the continued employment of career State employees." *Peace v. Employment Sec. Comm'n*, 349 N.C. 315, 321, 507 S.E.2d 272, 277 (1998). In the present case, Teague does not raise an argument as to procedural due process, but rather argues

that N.C.G.S. § 150-44 cannot be interpreted to apply to his situation because there was no prescribed delay by the Commission. We disagree.

We have determined that the Commission failed to issue a final decision within the meaning of N.C.G.S. § 150B-36(b). In order to protect Teague from unreasonable delay, N.C.G.S. § 150B-44 provided Teague the remedy of making the ALJ's recommended decision the final decision of the agency, so the administrative appeals process could continue. This situation, in which an administrative agency failed to issue a final decision within the statutorily prescribed period, is the situation N.C.G.S. § 150B-44 was intended to remedy. *See Holland*, 130 N.C. App. at 725, 504 S.E.2d at 304 (stating that N.C.G.S. § 150B-44 "is intended to guard those involved in the administrative process from the inconvenience and uncertainty of unreasonable delay"). This assignment of error is overruled.

II.

[2] Teague next argues the trial court erred in using the "whole record" standard of review in reviewing his petition. Teague contends the trial court should have reviewed the matter *de novo*.

When reviewing a trial court's order affirming a decision by an administrative agency, our Court must "examine the trial court's order for errors of law and determine whether the trial court exercised the appropriate scope of review and whether the trial court properly applied this standard." *Hilliard v. N.C. Dep't of Corr.*, 173 N.C. App. 594, 596, 620 S.E.2d 14, 17 (2005).

The particular legal standard applied by a reviewing trial court depends on the type of issues presented for judicial review. *Powell v. N.C. Dept. of Transportation*, 347 N.C. 614, 623, 499 S.E.2d 180, 185 (1998). In cases where a petitioner contends an agency decision was based on an error of law, the trial court conducts a *de novo* review. *Air-A-Plane Corp. v. N.C. Dept. of E.H.N.R.*, 118 N.C. App. 118, 124, 454 S.E.2d 297, 301, *disc. review denied*, 340 N.C. 358, 458 S.E.2d 184 (1995). In cases where the petitioner contends the agency decision was not supported by substantial evidence, the whole record test is the proper standard of review. N.C. Gen. Stat. § 150B-51(b)(5) (2005); *Dillingham v. N.C. Dep't of Human Res.*, 132 N.C. App. 704, 708, 513 S.E.2d 823, 826 (1999).

In the present case, Teague asserted two alternative grounds for relief in his petition: (1) the ALJ's findings of fact and conclusions of

law were not supported by evidence in the record; and (2) N.C.G.S. § 150B-44 did not apply to the Commission's act of voting and issuance of the Memorandum of Consideration. As to the first ground, the trial court stated that "[t]he appropriate standard of review is whether the decision is supported by the substantial evidence in view of the entire record." We hold that this determination was correct under N.C.G.S. § 150B-51(b)(5).

As to the second ground, the trial court did not specify that it was using a *de novo* review, but addressed the matter in depth in its order and determined that "the recommended decision of the ALJ in favor of the DOT became the final decision by operation of law . . . in accordance with *Occaneechi*." We find that the trial court properly employed a *de novo* review of the question of the application of N.C.G.S. § 150B-44. Moreover, our Supreme Court recently held that

> it is well settled that the trial court's erroneous application of the standard of review does not automatically necessitate remand, provided the appellate court can reasonably determine from the record whether the petitioner's asserted grounds for challenging the agency's final decision warrant reversal or modification of that decision under the applicable provisions of N.C.G.S. § 150B-51(b).

N.C. Dep't of Env't and Natural Res. v. Carroll, 358 N.C. 649, 665, 599 S.E.2d 888, 898 (2004). As discussed above, our own *de novo* review of the issue reveals no error in the application of N.C.G.S. § 150B-44 to the present case. This assignment of error is overruled.

III.

[3] Teague argues that, even employing a whole record review, the trial court erred in determining there was sufficient evidence to support his dismissal for just cause. The State Personnel Act permits disciplinary action against career state employees for just cause. N.C.G.S. § 126-35. Just cause may consist of "unacceptable personal conduct." 25 N.C.A.C. 1J.0604(b) (August 2005). Unacceptable personal conduct includes "the willful violation of known or written work rules[.]" 25 N.C.A.C. 1J.0614(i) (August 2005). Our Court has held that a willful violation of known or written work rules occurs when an employee "willfully takes action which violates the rule and does not require that the employee intend [the] conduct to violate the work rule." *Hilliard*, 173 N.C. App. at 597, 620 S.E.2d at 17.

" '[T]he "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." ' " *ACT-UP Triangle v. Commission for Health Services*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997) (quoting *Amanini v. N.C. Dep't of Human Resources*, 114 N.C. App. 668, 674, 443 S.E.2d 114, 118 (1994)). Substantial evidence is evidence that a reasonable mind would deem adequate to support a particular conclusion. *Walker v. N.C. Dept. of Human Resources*, 100 N.C. App. 498, 503, 397 S.E.2d 350, 354 (1990), *disc. review denied*, 328 N.C. 98, 402 S.E.2d 430 (1991). In conducting a whole record review, a trial court " 'may not substitute its judgment for the agency's,' even if a different conclusion may result under a whole record review." *Gordon v. N.C. Dep't of Corr.*, 173 N.C. App. 22, 34, 618 S.E.2d 280, 289 (2005) (quoting *Watkins v. N.C. State Bd. of Dental Exam'rs*, 358 N.C. 190, 199, 593 S.E.2d 764, 769 (2004)).

In his petition for judicial review, Teague excepted to four findings of fact and four conclusions of law. The first three contested findings assert that Teague was, in fact, aware of the terms of the Statement of Understanding. Teague contends the only direct evidence in the record on this issue was Teague's own testimony that he had never seen nor signed the Statement of Understanding. He further argues that DOT did not present a copy of the Statement of Understanding signed by Teague. For the reasons discussed below, we find no error.

In finding number twenty-three, the ALJ explained that she found Teague's denial of knowledge of the Statement of Understanding "simply not credible for several reasons." Among those reasons were: (1) Teague was a Computer Security Liaison for DOT for ten years; (2) Teague signed the Internet Policy, which explicitly referenced the Statement of Understanding; and (3) Teague was advised by a DOT computer systems administrator on several occasions that Teague needed to obtain permission to install software, which was part of the substance of the Statement of Understanding. Each of these reasons is supported by evidence of record. Moreover, the credibility of witnesses and the resolution of conflicting evidence is a matter for the agency, and not for the reviewing court. *Huntington Manor of Murphy v. N.C. Dept. of Human Resources*, 99 N.C. App. 52, 57, 393 S.E.2d 104, 107 (1990).

Similarly, in finding number twenty-four, the ALJ discredited Teague's assertion that Teague was unaware he was required to

obtain his supervisor's approval before installing software onto his work computer. The ALJ explained that her disbelief of Teague was based on Teague's educational background, intellectual abilities, and on-the-job computer experience. This finding was supported by evidence of record, and it was within the ALJ's discretion to analyze the credibility of witnesses and to resolve conflicting testimony. *Id.* Accordingly, the trial court did not err in upholding finding number twenty-four.

Finding twenty-five, that Teague admitted not having permission, or even asking permission, to install the software discovered on his computer, is supported by Teague's own testimony as follows:

> Q. In fact, did anyone ever explicitly give you permission to put any of these items that are listed in this time line—any of these software applications onto your own computer?
>
> A. No. I never asked.
>
> Q. You never asked permission?
>
> A. No.

Therefore, the trial court did not err in upholding finding number twenty-five.

In finding number thirty-one, the ALJ found Teague's unauthorized installation of applications such as remote access servers, virtual private networking servers, and Point-to-Point Protocol was "inconsistent with [DOT's] objective to insure its files and computer network system were properly protected by the appropriate security devices[,]" in violation of the Internet Policy. This finding is supported by evidence that Teague did not have permission to install such software and that installing the servers and protocols breached DOT's network security and exposed DOT's systems to invasion by external computer hackers. The trial court did not err in upholding finding number thirty-one.

Conclusion of law number seven, which simply quotes language from the Statement of Understanding, was supported by substantial evidence, and was therefore correctly upheld by the trial court. Conclusion eight, that Teague was dismissed for unacceptable conduct, was based upon the finding that Teague knowingly violated the Statement of Understanding. As we uphold the finding that Teague was aware of the Statement of Understanding, we likewise find no error in the trial court's upholding this conclusion, as well as conclu-

sion nine, which stated that DOT had just cause to dismiss Teague for unacceptable conduct, which constitutes just cause under N.C. Gen. Stat. § 126-35. Finally, conclusion eleven, that Teague knowingly violated the Internet Policy, is supported by evidence that Teague signed the Internet Policy, which stated that "use of all telecommunications and computer systems and resources must be in support of NCDOT activities and consistent with NCDOT objectives" and that "[c]omputing systems include, but are not limited to host computers, file servers, workstations, . . . and internal and external communication networks." Substantial evidence of the security risk posed by Teague's installation of software on his computer system further supports this conclusion. Accordingly, the trial court did not err in affirming conclusion eleven.

Affirmed.

Chief Judge MARTIN and Judge STEELMAN concur.

STATE OF NORTH CAROLINA v. MICHALE GREYLEN ROBINSON, DEFENDANT

No. COA05-499

(Filed 18 April 2006)

1. Criminal Law— request to withdraw guilty plea—confusion as to terms of plea agreement

The trial court did not err in a trafficking in cocaine case by denying defendant's request to withdraw his guilty plea made before sentencing based on alleged confusion as to the terms of the plea agreement regarding whether he had to testify against his brother truthfully, or truthfully and consistently with his earlier statement to law enforcement, because: (1) defendant moved to withdraw his guilty plea approximately three and one-half months after its entry; (2) defendant asserted neither legal innocence nor lack of representation by counsel at all relevant times; (3) defendant did not argue misunderstanding of the consequences of a guilty plea, hasty entry of the plea, or coercion; (4) the plea agreement stated defendant would testify truthfully and consistently with prior statements to law enforcement, and there was no ambiguity in the written statement; (5) defendant testified

to his understanding of the agreement, and defendant understood the guilty plea process; and (6) defendant did not present any fair or just reason to allow the withdrawal of his guilty plea.

2. Criminal Law— request to withdraw guilty plea—meeting of minds

The trial court did not err in a trafficking in cocaine case by denying defendant's request to withdraw his guilty plea even though defendant contends the plea agreement was void as there was no meeting of the minds as to whether defendant was to testify against his brother truthfully, or truthfully and in conformity with his earlier statements to law enforcement, because: (1) defendant testified that he understood the plea agreement required him to testify truthfully and consistently with his previous statement to law enforcement officers; (2) although defendant contends a sergeant testified that defendant only had to testify truthfully, the sergeant's understanding is irrelevant when he is not a party to the plea agreement; and (3) defendant presented no evidence that the prosecutor had a different understanding than that of the text of the agreement.

3. Criminal Law— plea agreement—failure to provide substantial assistance to law enforcement

The trial court did not abuse its discretion in a trafficking in cocaine case by finding that defendant did not provide substantial assistance to law enforcement and by failing to depart from the statutorily mandated sentence, because the trial court's decision was not manifestly unsupported by reason.

Appeal by Defendant from judgment entered 5 November 2004 by Judge J. Gentry Caudill in Superior Court, Catawba County. Heard in the Court of Appeals 6 March 2006.

Attorney General Roy Cooper, by Assistant Attorney General Ashby T. Ray, for the State.

Anne Bleyman, for defendant-appellant.

WYNN, Judge.

A criminal defendant seeking to withdraw a guilty plea before sentencing is "generally accorded that right if he can show any fair and just reason." *State v. Handy*, 326 N.C. 532, 536, 391 S.E.2d 159, 161 (1990) (citation omitted). In this case, Defendant argues that the

trial court should have allowed him to withdraw his guilty plea because there was confusion as to the terms of the plea agreement. Because the written terms of the plea agreement were clear and Defendant testified to his understanding of the terms of the agreement, we hold that Defendant presented no fair or just reason to allow the withdrawal of his guilty plea.

The State's evidence tended to show the following: In August 2001, law enforcement found between 200 and 400 grams of cocaine at Defendant's residence pursuant to a search warrant. In September 2002, Defendant's brother, Eric Wimbush, was indicted on federal drug charges. Shortly thereafter, the United States Attorney's office served Defendant with a target letter identifying him as a target, in the same case as his brother, on conspiracy charges involving the sale of cocaine.

Christopher Patrick LaCarter, a sergeant for the Hickory Police Department and a member of the Federal Bureau of Investigation's Catawba Valley Drug Task Force, interviewed Defendant on 9 December 2002. During the interview, Defendant stated he had purchased crack cocaine from Wimbush and had seen Wimbush sell crack cocaine to other people and provided their names. Sergeant LaCarter provided this information to the Assistant United States Attorney handling Wimbush's case.

On 10 February 2003, Defendant was indicted by the State of North Carolina for trafficking in cocaine by possession of more than 200 grams but less than 400 grams of cocaine; feloniously maintaining a place for controlled substances; and, misdemeanor possession of drug paraphernalia. On 12 July 2004, Defendant pled guilty to the charge of trafficking pursuant to a plea agreement with the State and the remaining charges were dismissed. The transcript of plea agreement included the following terms and conditions:

> Sentencing shall be continued. The [defendant] shall testify truthfully if called upon to do so in the case US v Wimbush. The State stipulates that said testimony shall be considered "substantial assistance" at sentencing.

Before entry of the plea, the phrase "[Defendant] will testify truthfully [and] consistent w[ith] prior statements to law enforcement" was added to the terms and conditions of the transcript of plea and was initialed by Defendant, defense counsel, and the prosecutor. The

trial judge entered a judgment accepting Defendant's plea and deferring sentencing until the 1 November 2004 Criminal Session to give Defendant the opportunity to provide substantial assistance to law enforcement in the federal government's case against Wimbush.

Approximately one month before Wimbush's trial was scheduled to begin, Assistant United States Attorney Matt Martens met with Defendant in preparation for the trial. During this meeting, Defendant denied most of the key elements of his 2002 statements to Sergeant LaCarter, including any personal knowledge of Wimbush's involvement in cocaine distribution. Mr. Martens attempted to meet with Defendant again before trial, but Defendant would not agree to meet with him. Defendant testified that he was unable to meet with Mr. Martens due to a job interview. Defendant stated that he would testify truthfully if called as a witness, but refused to tell Mr. Martens what his testimony would be until he was under oath on the witness stand. Mr. Martens did not call Defendant as a witness in the Wimbush case although Defendant was present for the duration of the trial pursuant to a subpoena.

At Defendant's sentencing hearing on 5 November 2004, Defendant moved to withdraw his guilty plea to trafficking in cocaine prior to sentencing. In support of his motion, defense counsel argued:

> When we pled guilty, the substantial assistance that my client was to render was to testify at his brother's federal trial, Your Honor, and testify truthfully. It was to testify truthfully at that trial and also consistently with his earlier statement. And I think the evidence will come out that my client was willing to testify truthfully at his brother's trial. However, in doing so, it may have been inconsistent with his earlier statement, which put him in a position where he could not comply with what he had agreed to do because if he testified truthfully it may have been inconsistent with his earlier statement.

At the same hearing, the State presented a letter dated 4 November 2004 from Mr. Martens to Officer Bryan Adams informing him that "[a]ny claim by [Defendant] to have provided assistance to the United States would be absolutely false."

After holding an evidentiary hearing at which Sergeant LaCarter testified as a witness for the State and Defendant testified on his own behalf, the trial court denied Defendant's motion to withdraw his guilty plea. The trial court found that Defendant had not provided

substantial assistance to law enforcement and sentenced Defendant to seventy to eighty-four months imprisonment and ordered him to pay a fine in the sum of $100,000.00. Defendant appeals.

On appeal, Defendant argues that the trial court (1) erred in denying his motion to withdraw his guilty plea and (2) abused its discretion by finding he had not provided substantial assistance to law enforcement.

[1] First, Defendant argues that the trial court erred in denying his motion to withdraw his guilty plea because there was confusion regarding his plea agreement. We disagree.

In reviewing a trial court's denial of a defendant's motion to withdraw a guilty plea made before sentencing, "the appellate court does not apply an abuse of discretion standard, but instead makes an 'independent review of the record.' " *State v. Marshburn*, 109 N.C. App. 105, 108, 425 S.E.2d 715, 718 (1993) (citation omitted). There is no absolute right to withdraw a plea of guilty, however, a criminal defendant seeking to withdraw such a plea before sentencing is "generally accorded that right if he can show any fair and just reason." *Handy*, 326 N.C. at 536, 391 S.E.2d at 161 (citation omitted). The defendant has the burden of showing his motion to withdraw his guilty plea is supported by some "fair and just reason." *State v. Meyer*, 330 N.C. 738, 743, 412 S.E.2d 339, 342 (1992). Our Supreme Court has set out the following factors for consideration of plea withdrawals:

> [1] whether the defendant has asserted legal innocence, [2] the strength of the State's proffer of evidence, [3] the length of time between entry of the guilty plea and the desire to change it, [4] and whether the accused has had competent counsel at all relevant times. [5] Misunderstanding of the consequences of a guilty plea, [6] hasty entry, [7] confusion, and [8] coercion are also factors for consideration.

Handy, 326 N.C. at 539, 391 S.E.2d at 163 (internal citation omitted).

This Court has placed heavy reliance on the length of time between a defendant's entry of the guilty plea and motion to withdraw the plea. *See State v. Graham*, 122 N.C. App. 635, 637-38, 471 S.E.2d 100, 101-02 (1996) (denying the defendant's motion to withdraw guilty plea made more than one month after its entry); *Marshburn*, 109 N.C. App. at 109, 425 S.E.2d at 718 (denying the defendant's motion to

withdraw guilty plea made at least eight months after entry of the guilty plea). In *Marshburn*, this Court elaborated,

> This context [referring to the eight month period between entry of the plea and the motion to withdraw] requires that the reasons given by a defendant must have considerably more force than would be the case if the motion comes only a day or so after the plea was entered or if the defendant did not have competent counsel at the time he entered the plea.

Id. (internal quotations and citations omitted).

Here, Defendant moved to withdraw his guilty plea approximately three and one-half months after its entry. This delay is similar to the facts in *Marshburn* and *Graham* where relief from the plea was denied, and distinguishes *Handy* which allowed the plea withdrawal where the plea had been entered twenty-four hours earlier. *See Handy*, 326 N.C. at 534-35, 391 S.E.2d at 160; *Marshburn*, 109 N.C. App. at 109, 425 S.E.2d at 718-19.

Moreover, Defendant asserted neither legal innocence nor lack of representation by counsel at all relevant times. *See Handy*, 326 N.C. at 539-40, 391 S.E.2d at 163 (in seeking to withdraw his guilty plea the defendant asserted his legal innocence). Nor has Defendant argued misunderstanding of the consequences of a guilty plea, hasty entry of the plea, or coercion. *See id.* at 539, 391 S.E.2d at 163.

The sole factor Defendant asserts is confusion over the conditions of the plea agreement. Defendant cites to *State v. Deal*, 99 N.C. App. 456, 393 S.E.2d 317 (1990), to support his argument that his guilty plea should have been withdrawn due to confusion. In *Deal*, this Court found that the defendant had low intellectual abilities and had a "basic misunderstanding of the guilty plea process." *Id.* at 464, 393 S.E.2d at 321.

Unlike in *Deal*, here, Defendant argues that there was confusion over whether he had to testify truthfully or truthfully and consistently with his earlier statement to law enforcement. Defendant asks the question, "What if it was impossible to do both?" But the written plea agreement specifically states "[Defendant] will testify truthfully [and] consistent w[ith] prior statements to law enforcement." There is no ambiguity in the written agreement. Moreover, Defendant testified to his understanding of the agreement as follows:

MR. REILLY: Okay.—did you plead guilty to that charge?

DEFENDANT: Plea bargain, yes.

MR. REILLY: Okay. And what did you believe that plea bargain to be?

DEFENDANT: It was supposed to have been probation if I testified to those statements that I made against my brother.

MR. REILLY: Did you know—You knew there was a possibility that case would come to trial and that you would have to testify at that trial; is that correct?

DEFENDANT: Yes.

MR. REILLY: And that you were to testify truthfully?

DEFENDANT: To those statements. That's what I was told, to the statements that I made.

Defendant understood that his plea agreement obligated him to testify truthfully and consistently with his previous statement. Defendant also testified that he lied in his first interview with law enforcement, so he was unable to testify both truthfully and consistently with his earlier statement. However, that is irrelevant, because Defendant was not confused as to the content of his plea agreement. Also, unlike in *Deal*, Defendant understood the guilty plea process. *See Deal*, 99 N.C. App. at 464, 393 S.E.2d at 321.

[2] Next, Defendant argues that the trial court erred in denying his motion to withdraw his guilty plea because the plea agreement was void as there was no "meeting of the minds" as to whether Defendant was to testify truthfully or truthfully and in conformity with his earlier statements to law enforcement. We disagree.

"In analyzing plea agreements, 'contract principles will be 'wholly dispositive' because neither side should be able . . . unilaterally to renege or seek modification simply because of uninduced mistake or change of mind.' " *State v. Lacey* 170 N.C. App. 370, 372, 623 S.E.2d 351, 356 (2006) (quoting *United States v. Wood*, 378 F.3d 342, 348 (4th Cir. 2004)). "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.' " *Creech v. Melnik*, 347 N.C. 520, 527, 495 S.E.2d 907, 911-12 (1998) (citation omitted).

As we stated previously, Defendant testified that he understood the plea agreement required him to testify truthfully and consistently with his previous statements to law enforcement. Defendant argues that Sergeant LaCarter testified that Defendant only had to testify truthfully. But Sergeant LaCarter's understanding is irrelevant as he is not a party to the plea agreement, as the prosecutor was the other party to the agreement. Defendant presented no evidence that the prosecutor had a different understanding than that of the text of the agreement.

Accordingly, the trial court did not err in denying Defendant's motion to withdraw his guilty plea.

[3] Lastly, Defendant argues that the trial court abused its discretion in concluding that he failed to provide substantial assistance to law enforcement and not departing from the statutorily mandated sentence for trafficking in cocaine. We disagree.

Section 90-95(h)(5) of the North Carolina General Statutes allows the trial court to depart from the statutorily mandated sentence if the defendant has rendered substantial assistance. Section 90-95(h)(5) provides in pertinent part:

> The sentencing judge *may* reduce the fine, or impose a prison term less than the applicable minimum prison term provided by this subsection, or suspend the prison term imposed and place a person on probation when such person has, to the best of his knowledge, provided substantial assistance in the identification, arrest, or conviction of any accomplices, accessories, co-conspirators, or principals if the sentencing judge enters in the record a finding that the person to be sentenced has rendered such substantial assistance.

N.C. Gen. Stat. § 90-95(h)(5) (2005) (emphasis added). "This Court has held 'that whether a trial court finds that a criminal defendant's aid amounts to 'substantial assistance' is *discretionary*.' " *State v. Wells*, 104 N.C. App. 274, 276, 410 S.E.2d 393, 394 (1991) (emphasis original) (citation omitted). The reduction of the sentence is also in the judge's discretion, even if the judge finds substantial assistance was given. *State v. Willis*, 92 N.C. App. 494, 498, 374 S.E.2d 613, 616 (1988), *disc. review denied*, 324 N.C. 341, 378 S.E.2d 808 (1989). "[T]o overturn a sentencing decision, the reviewing court must find an 'abuse of discretion, procedural conduct prejudicial to defendant, circumstances which manifest inherent unfairness and injustice, or con-

duct which offends the public sense of fair play.' " *Id.* (citation omitted). The trial court's decision to not reduce Defendant's sentence was not manifestly unsupported by reason; therefore, the trial court did not abuse its discretion. As there was no abuse of discretion by the trial court, we will not disturb the sentence on appeal.

Affirmed.

Chief Judge MARTIN and Judge STEPHENS concur.

STATE OF NORTH CAROLINA v. CHRISTOPHER L. VEREEN, DEFENDANT

No. COA05-255

(Filed 18 April 2006)

Criminal Law— right to arraignment—proceeding to trial on same day as arraignment

The trial court erred in a resisting a public officer in the performance of his duties case by immediately proceeding to trial on the same day defendant was arraigned without defendant's consent when defendant adequately invoked N.C.G.S. § 15A-943(b) and did not waive his right to arraignment, because: (1) defendant twice moved the trial court to continue his case during his formal arraignment so he could obtain evidence he subpoenaed and so his witnesses would be available; (2) N.C.G.S. § 15A-941(d), which requires a defendant to file a written request for arraignment within twenty-one days, is inapplicable to defendants who are before the superior court for a trial de novo whose charges lie within the original jurisdiction of the district court; and (3) defendant was entitled to an arraignment in superior court since defendant's not guilty plea from the district court is completely disregarded when a trial de novo in the superior court is a new trial from the beginning to the end.

Judge JACKSON concurring.

Appeal by Defendant from judgment entered 9 June 2004 by Judge Henry W. Hight, Jr., in Superior Court, Durham County. Heard in the Court of Appeals 7 February 2006.

Attorney General Roy Cooper, by Assistant Attorney General M. Janette Soles, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Kelly D. Miller, for defendant-appellant.

WYNN, Judge.

In general, when a defendant pleads not guilty at an arraignment, he may not be tried without his consent in the week in which he is arraigned.[1] In this case, Defendant Christopher L. Vereen contends the trial court erred by beginning his trial (without his consent) the same day on which he was arraigned. Because Defendant twice moved the trial court to continue his case during his formal arraignment so he could obtain evidence he subpoenaed and so his witnesses would be available, we reverse the trial court's decision to conduct Defendant's trial on the same day as his arraignment.

The record shows that Defendant's case came before Superior Court, Durham County for trial *de novo* after Defendant was convicted in district court on 10 May 2004. When Defendant's case was called, the prosecutor informed the trial court that Defendant needed to be formally arraigned. The trial court asked Defendant how he pled to two of the charges, and defense counsel answered, "not guilty[.]" Before the trial court arraigned Defendant on the remaining charges, Defendant moved for a continuance on two grounds. First, Defendant stated that he had learned that morning that a police vehicle's surveillance tape, which Defendant had subpoenaed, had been destroyed, and Defendant requested that the "State produce some kind of explanation as to why this pertinent evidence was destroyed." Second, Defendant stated that some of his witnesses were in court "all day yesterday . . . and unable to come back at this time."

According to the prosecutor, it was the Durham Police Department's policy to destroy such tapes after ninety days. The prosecutor also told the trial court that he was not aware that there had been a subpoena issued. The trial court then inquired as to whether Defendant had been fully arraigned, and the prosecutor responded negatively.

Defense counsel reiterated that she "wanted to make that preliminary motion to hold this matter open until we could get those witnesses and those tapes[.]" The trial court continued with the arraign-

1. N.C. Gen. Stat. § 15A-943(b) (2005).

ment, and Defendant pled not guilty to charges of driving while impaired, misdemeanor fleeing to elude arrest, open container, assault on a government officer/employee, and resisting a public officer. After defense counsel spoke with Officer Swartz of the Durham Police Department, defense counsel told the trial court that the destroyed surveillance tapes were necessary to support Defendant's defense regarding some of the charges and asked the trial court to dismiss those matters. The prosecutor, who tried the case in district court, stated that there was no subpoena or request for the tapes at district court and that there was no evidence presented by Defendant that would have supported any type of witness on the scene "that would be able to explain away surveillance tapes by the officers." The prosecutor then stated that the State was ready to proceed since both officers who were involved in the arrest were present.

Defendant's attorney responded that Defendant's testimony at trial supported the need for the surveillance tape. Defendant's attorney then stated that she had "subpoenaed the convenience store" where the incident occurred and had not "heard back." She further stated that "it has been less than thirty days since the appeal . . . it has not been enough time for us to get those subpoenas out and get the information back from those persons." Defense counsel again brought it to the court's attention that some defense witnesses were not present. The court denied the motion to continue, stating "[i]f it comes to the point that you present evidence today, I'll recess until in the morning so you can have your witnesses present." The trial then began, Defendant was convicted of resisting a public officer in the performance of his duties. Defendant appealed.

On appeal, Defendant asserts the trial court violated N.C. Gen. Stat. § 15A-943, which sets forth the following rules with respect to calendaring trials and formal arraignments:

> (a) In counties in which there are regularly scheduled 20 or more weeks of trial sessions of superior court at which criminal cases are heard, and in other counties the Chief Justice designates, the prosecutor must calendar arraignments in the superior court on at least the first day of every other week in which criminal cases are heard. No cases in which the presence of a jury is required may be calendared for the day or portion of a day during which arraignments are calendared.

> (b) When a defendant pleads not guilty at an arraignment required by subsection (a), he may not be tried without his consent in the week in which he is arraigned.

N.C. Gen. Stat. § 15A-943.

Failure to follow the requirements of N.C. Gen. Stat. § 15A-943(a) "is not necessarily reversible error; a defendant still must demonstrate prejudice." *State v. Cates*, 140 N.C. App. 548, 551, 537 S.E.2d 508, 510 (2000) (citation omitted). However, "[u]nless a defendant has waived the statutory protection[,]" violation of the requirements of N.C. Gen. Stat. § 15A-943(b) "constitutes automatic reversible error; no prejudice need be shown." *Id.* (citation omitted). While the statute may be waived by a defendant's failure to object, *State v. Davis*, 38 N.C. App. 672, 675, 248 S.E.2d 883, 886 (1978), to preserve the statutory right, a defendant need not explicitly cite the statute in his objection. Rather, it is sufficient if the defendant's objection or motion to continue relates to the "purposes for which the statute was enacted." *Cates*, 140 N.C. App. at 551, 537 S.E.2d at 510. "[T]he purpose of section 15A-943(b) is to allow both sides a sufficient interlude in order to prepare for trial." *Id.* (citing *State v. Shook*, 293 N.C. 315, 318, 237 S.E.2d 843, 846 (1977)).

It is undisputed that Defendant was arraigned on the same day on which his trial began. Defendant twice moved the trial court to continue his case during his formal arraignment so he could obtain evidence which he subpoenaed and so his witnesses would be available. Defense counsel specifically stated that "it has not been enough time for us to get those subpoenas out and get the information back from those persons." The trial court, by immediately proceeding to trial, violated N.C. Gen. Stat. § 15A-943(b), which Defendant adequately invoked. The trial court therefore committed reversible error in proceeding to try Defendant on the same day as he was arraigned.

The State contends that Defendant waived his statutory protection under N.C. Gen. Stat. § 15A-943(b) by failing to assert that his need for a continuance was based upon the purposes for which the statute was enacted. In support of its argument, the State cites *Davis*, 38 N.C. App. 672, 248 S.E.2d 883. Crucially, however, in *Davis*, the defendant "did not move for a continuance under N.C. Gen. Stat. 15A-943(b), but moved for a continuance on the very narrow ground that a subpoena had been issued but not served on an essential defense witness." *Id.* at 675, 248 S.E.2d at 885.

The instant case is analogous not to *Davis* but to the unpublished *State v. McCluney*, 2002 N.C. App. LEXIS 2395 (No. COA02-359) (Nov. 5, 2002). In *McCluney*, this Court found a new trial warranted where the "defendant sought a continuance so he could obtain additional evidence in preparation for trial[,]" namely evidence regarding the defendant's medical status at the time of the offense charged. *Id.* at *2-4. Here, as in *McCluney*, Defendant sought a continuance to obtain additional evidence in preparation for trial. "Consequently, the court committed reversible error in proceeding to try defendant on the same day as he was arraigned. Defendant is entitled to a new trial." *Id.*

However, we note that N.C. Gen. Stat. § 15A-941(d) (2005) provides that: "A defendant will be arraigned in accordance with this section only if the defendant files a written request with the clerk of superior court for an arraignment not later than 21 days after service of the bill of indictment." This Court has held that "it would be illogical to require the State to schedule an arraignment pursuant to one statute where the right to such has been waived pursuant to another[.]" *State v. Trull*, 153 N.C. App. 630, 634, 571 S.E.2d 592, 595 (2002) (rejecting the defendant's claim of N.C. Gen. Stat. § 15A-943 violations in the absence of a written arraignment request in the record); *see also State v. Lane*, 163 N.C. App. 495, 503, 594 S.E.2d 107, 113 (2004) (same).

In this case, while Defendant did not file a written request for an arraignment, N.C. Gen. Stat. § 15A-941(d) requires the request must be filed no "later than 21 days after service of the bill of indictment." N.C. Gen. Stat. § 15A-941(d). However, Defendant appealed his conviction from the district court for a trial *de novo* in the superior court. N.C. Gen. Stat. §§ 7A-290, 15A-1431(b) (2005). As the superior court was not the court of original jurisdiction, the prosecutor never submitted a bill of indictment for Defendant nor was Defendant indicted. *See* N.C. Gen. Stat. § 15A-627(b) (2005) ("A prosecutor may submit a bill of indictment charging an offense within the original jurisdiction of the superior court."). Nor does an indictment appear in the record on appeal. As Defendant was never charged or served within an indictment, there was no twenty-one day period from which he needed to file a written request for an arraignment. *See* N.C. Gen. Stat. § 15A-941(d). When a defendant appeals a conviction from district court for a trial *de novo* in superior court, there is no indictment to start the twenty-one day tolling period in which to file a written request for an arraignment. Therefore, N.C. Gen. Stat. § 15A-941(d) is

inapplicable to defendants who are before the superior court for a trial *de novo*, whose charges lie within the original jurisdiction of the district court.

Additionally, while there has been no indictment, an arraignment is still required pursuant to N.C. Gen. Stat. § 15A-943 to enable a defendant to submit a plea to the superior court. *See* N.C. Gen. Stat. § 15A-941(a) (2005) ("Arraignment consists of bringing a defendant in open court or as provided in subsection (b) of this section before a judge having jurisdiction to try the offense, advising him of the charges pending against him, and directing him to plead."). While Defendant already submitted a plea of not guilty in the district court, a trial *de novo* in the superior court is a new trial from the beginning to the end, disregarding completely the plea below. *State v. Spencer*, 276 N.C. 535, 543, 173 S.E.2d 765, 771 (1970). Therefore, since Defendant's plea from the district court is completely disregarded, Defendant was entitled to an arraignment in superior court.

Accordingly, since Defendant adequately invoked N.C. Gen. Stat. § 15A-943(b) and did not waive his right to an arraignment, the trial court erred by immediately proceeding to trial.

New trial.

Judge HUNTER concurs.

Judge JACKSON concurs in a separate opinion.

JACKSON, Judge concurs in a separate opinion.

I concur with the majority's decision that the trial court committed reversible error in proceeding to try defendant on the same day as he was arraigned. However, for the reasons stated below, I believe it was unnecessary for the majority to discuss the applicability of North Carolina General Statutes, section 15A-941(d) to the instant case.

In the instant case, neither defendant nor the State raised the issue of whether the State was required to submit a bill of indictment charging defendant with the various offenses. Neither party addresses section 15A-941(d) in their briefs, and they do not present any argument indicating that defendant was not entitled to an arraignment in superior court. There is no dispute that defendant was not indicted for the offenses, thus there was no indictment from which the twenty-one day tolling period would begin in which defendant

could file a written request for an arraignment. Both parties agree that defendant was entitled to an arraignment, he received that arraignment, and his trial began on the same day. The dispute between defendant and the State concerns whether or not defendant waived his statutory right not to be tried in the same week in which he was arraigned, pursuant to North Carolina General Statutes, section 15A-943(b). It is my opinion that we may fully address defendant's appeal, and reach the same conclusion, without addressing the applicability, or inapplicability, of section 15A-941(d) to defendant's case.

Accordingly, I concur that defendant is entitled to a new trial.

ASHLEY STEPHENSON, ET AL., PLAINTIFFS v. GARY O. BARTLETT, ET AL., DEFENDANTS

No. COA05-793

(Filed 18 April 2006)

1. Appeal and Error— notice of appeal—court to which appeal taken not specified—fairly inferred—jurisdiction assumed

Jurisdiction to decide an appeal was assumed where plaintiffs mistakenly specified the Supreme Court rather than the Court of Appeals as the court to which appeal was taken, as required by Appellate Rule 3(d). The intent to appeal to the Court of Appeals can be fairly inferred from the notice of appeal, which achieved the functional equivalent of an appeal to the Court of Appeals. Defendants were not misled by plaintiffs' mistake, and there is no reason to treat it any differently than mistakes involving other parts of Appellate Rule 3(d) despite which jurisdiction was found.

2. Costs— attorney fees—private attorney general doctrine—rejected

The trial court correctly denied plaintiffs' request for attorney fees, which was based on N.C.G.S. § 6-19.1, 42 U.S.C. § 1988, and the private attorney general doctrine. Neither statute authorizes attorney fees under the facts of this case, and the North Carolina Supreme Court has unequivocally noted that attorney fees are not allowed as part of court costs in the absence of statu-

tory authority. *Bailey v. State of North Carolina*, 348 N.C. 130, is not applicable.

Appeal by plaintiffs from order entered 19 November 2004 by Judge Robert H. Hobgood in Wake County Superior Court. Heard in the Court of Appeals 20 February 2006.

Ogletree, Deakins, Nash, Smoak & Stewart, P.C., by Thomas A. Farr and Phillip J. Strach; Maupin Taylor, P.A., by Charles B. Neely, Jr.; and Hunter Higgins Miles Elam & Benjamin, PLLC, by Robert N. Hunter, Jr., for plaintiff-appellants.

Roy Cooper, Attorney General, by Tiare B. Smiley and Alexander McC. Peters, Special Deputy Attorneys General, for the State.

MARTIN, Chief Judge.

The procedural context and operative facts of this case are fully set forth in *Stephenson v. Bartlett*, 355 N.C. 354, 562 S.E.2d 377 (2002) ("*Stephenson I*"), *Stephenson v. Bartlett*, 357 N.C. 301, 582 S.E.2d 247 (2003) ("*Stephenson II*"), and *Stephenson v. Bartlett*, 358 N.C. 219, 595 S.E.2d 112 (2004) ("*Stephenson III*"), which was consolidated for hearing with *Morgan v. Stephenson*, 358 N.C. 149 (2004). During the interim between *Stephenson II* and *Stephenson III*, plaintiffs filed a motion seeking costs and attorney fees, which was held in abeyance until our Supreme Court rendered its decision in *Stephenson III* on 22 April 2004. Subsequently, on 19 November 2004, the trial court entered an order denying plaintiffs' request for attorney fees "based on the lack of statutory authority for such an award."

Following entry of the trial court's order, plaintiffs gave "notice of appeal to the Supreme Court of North Carolina from the portion of the Order . . . by which the court denied plaintiffs' motion for attorney's fees." However, our Supreme Court denied plaintiffs' motion to allow direct appeal. *Stephenson v. Bartlett*, 359 N.C. 286, 610 S.E.2d 715 (2005). Plaintiffs did not, thereafter, file notice of appeal to this Court.

[1] Parties permitted by law to appeal from a judgment or order must do so by filing an appropriate notice of appeal. N.C.R. App. P. 3. Subdivision (d) of Rule 3 governs the content of the notice of appeal and provides as follows:

> The notice of appeal required to be filed and served by subdivision (a) of this rule . . . shall designate the judgment or order from which appeal is taken and the court to which appeal is taken . . . .

Id. "In order to confer jurisdiction on the state's appellate courts, appellants of lower court orders must comply with the requirements of Rule 3 of the North Carolina Rules of Appellate Procedure." *Bailey v. State*, 353 N.C. 142, 156, 540 S.E.2d 313, 322 (2000). "The provisions of Rule 3 are jurisdictional, and failure to follow the requirements thereof requires dismissal of an appeal." *Abels v. Renfro Corp.*, 126 N.C. App. 800, 802, 486 S.E.2d 735, 737 (1997) (citing *Currin-Dillehay Bldg. Supply, Inc. v. Frazier*, 100 N.C. App. 188, 189, 394 S.E.2d 683 (1990)).

Though defendants raised no objection to plaintiffs' designation of the Supreme Court as the "court to which appeal is taken," we raised this issue *sua sponte* at oral argument. Notwithstanding the opportunity to do so, plaintiffs did not claim the error was a mere mistake in drafting, and, indeed, claimed their mistaken notice of appeal was sufficient to confer jurisdiction on this Court under Rule 3(d).

"[W]e may liberally construe a notice of appeal in one of two ways to determine whether it provides jurisdiction." *Von Ramm v. Von Ramm*, 99 N.C. App. 153, 156, 392 S.E.2d 422, 424 (1990). As *Von Ramm* explains:

> First, "a mistake in designating the judgment, or in designating the part appealed from if only a part is designated, should not result in loss of the appeal as long as the intent to appeal from a specific judgment can be *fairly inferred* from the notice and the appellee is not misled by the mistake." *Smith v. Independent Life Ins. Co.*, 43 N.C. App. 269, 274, 258 S.E.2d 864, 867 (1979), citing 9 *Moore's Federal Practice* § 203.17[2], 3-80—3-82 (2d ed. 1990) (footnotes omitted) (emphasis added). Second, if a party technically fails to comply with procedural requirements in filing papers with the court, the court may determine that the party complied with the rule if the party accomplishes the "*functional equivalent*" of the requirement. *Torres*, at 317, 101 L.E.2d at 291 (overlooking a party's failure to comply with a federal notice of appeal requirement of designating the petitioner's name) (emphasis added).

Id. at 156-57, 392 S.E.2d at 424. *Accord Foreman v. Sholl*, 113 N.C. App. 282, 291, 439 S.E.2d 169, 175 (1994) (notes Rule 3 is jurisdictional, but proceeds to quote *Von Ramm* and considers whether intent to appeal could be "fairly inferred" or if the party accomplished the "functional equivalent"); *Monin v. Peerless Ins. Co.*, 159 N.C. App. 334, 343-44, 583 S.E.2d 393, 399 (2003) (citing *Von Ramm* and analyzing whether it could be " 'fairly inferred' from the face of the notice of appeal that plaintiff intended to appeal from anything other than the judgment notwithstanding the verdict"), *disc. review denied*, 357 N.C. 506, 587 S.E.2d 670 (2003).

Mistakes by appellants in following all the subparts of Appellate Procedure Rule 3(d) have not always been fatal to an appeal. For example, Rule 3(d) requires the appellant to "designate the judgment or order from which appeal is taken." In *Strauss v. Hunt*, 140 N.C. App. 345, 350-51, 536 S.E.2d 636, 640 (2000), however, the appellant omitted an earlier trial court order and referred only to a later order in her notice of appeal, but the Court of Appeals found it could fairly infer her intent to appeal from the earlier order. "Although defendant referred only to the 11 June 1999 order in her notice of appeal, we conclude the notice fairly inferred her intent to appeal from the 21 April 1999 order, and did not mislead the plaintiff." *Id.* at 340, 536 S.E.2d at 640. Similarly, in *Evans v. Evans*, 169 N.C. App. 358, 363, 610 S.E.2d 264, 269 (2005), the defendant gave notice she appealed an order "denying Defendant's claim for child custody and child support," but omitted from the notice of appeal the post-separation support and divorce from bed and board. The Court of Appeals nevertheless found jurisdiction over the post-separation support and divorce from bed and board, concluding "it is readily apparent that defendant is appealing from the order dated 18 December 2001 which addresses not only child custody and support but also post-separation support and divorce from bed and board." *Id.*

Similarly, Rule 3(d) requires the notice of appeal to "specify the party or parties taking the appeal," but appellants' omissions of this requirement have not prevented our assuming jurisdiction on appeal. In *Hummer v. Pulley, Watson, King & Lischer, P.A.*, 140 N.C. App. 270, 277, 536 S.E.2d 349, 353-54 (2000), the trial court held defendants' counsel jointly and severally liable for various monetary penalties, although defendants' counsel had not been parties to the case. Defendants' counsel signed the notice of appeal, but failed to name themselves in the body of the notice of the appeal. We determined this error was a "procedural rather than a jurisdictional error," and

therefore "defendants' counsel achieved the functional equivalent of naming themselves as appellants in the notice of appeal." *Id.*

In the instant case, plaintiffs failed to specify the Court of Appeals as the "court to which appeal is taken," per Rule 3(d). Despite this failing, we find the intent to appeal to this Court can be fairly inferred from plaintiffs' notice of appeal and the notice achieved the functional equivalent of an appeal to this Court.[1] Indeed, defendants were not misled by plaintiffs' mistake, as they inferred from the notice that the appeal would proceed in this Court. Furthermore, we can find no reason to treat one subpart of Rule 3(d) differently from another subpart. As in *Strauss* and *Evans*, where we found jurisdiction despite mistakes in designating the correct judgment or order from which appeal is taken, the mistake here falls under the same subpart, indeed within the same semi-coloned section, of Rule 3(d). Accordingly, we assume jurisdiction to decide this appeal under the logic of *Von Ramm*.

[2] We turn now to the merits of plaintiffs' appeal. The trial court's ruling denied plaintiffs' request for attorney fees, declining to endorse plaintiffs' reliance on 42 U.S.C. § 1988, N.C. Gen. Stat. § 6-19.1 (2005), and the private attorney general doctrine.

Neither N.C. Gen. Stat. § 6-19.1 (2005) (permitting award of attorney fees to parties appealing or defending against *agency action*) (emphasis added) nor 42 U.S.C. § 1988 (permitting an award of attorney fees to a prevailing party in an action or proceeding to enforce certain enumerated federal statutes listed therein) authorize an award of attorney fees under the facts of the instant case. Plaintiffs candidly conceded to the trial court that no court has applied the statutes upon which they rely in this manner. We, like-

1. The United States Supreme Court allows circuit courts to liberally construe similar rules in federal appellate procedure. *See*, *e.g.*, *Foman v. Davis*, 371 U.S. 178, 181-82, 9 L. E. 2d 222, 225-26 (1962) (reversing the court of appeals for rejecting an appeal because it "should have treated the appeal from the denial of the motions as an effective, although inept, attempt to appeal" and stating: " 'The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits' "); *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 316-17, 101 L. E. 2d 285, 291 (1988) ("We do not dispute the important principle for which *Foman* stands—that the requirements of the rules of procedure should be liberally construed and that 'mere technicalities' should not stand in the way of consideration of a case on its merits. *Ibid.* Thus, if a litigant files papers in a fashion that is technically at variance with the letter of a procedural rule, a court may nonetheless find that the litigant has complied with the rule if the litigant's action is the functional equivalent of what the rule requires.").

wise, decline to hold these statutory provisions applicable to the facts of the instant case.

The private attorney general doctrine is an equitable exception to the general American rule that each party bear its own attorney fees absent statutory or contractual authorization for a court to award the same. Under this doctrine, which serves as an incentive for the initiation of public interest litigation by a private party, a court may award attorney fees to a party vindicating a right that (1) benefits a large number of people, (2) requires private enforcement, and (3) is of societal importance. Ann K. Wooster, Annotation, *Private Attorney General Doctrine—State Cases*, 106 A.L.R.5th 523 (2003).

The large majority of our sister states that have considered the issue have declined to adopt the private attorney general doctrine. *See id. See, e.g., State Bd. of Tax Comm'rs v. Town of St. John*, 751 N.E.2d 657, 661 (Ind. 2001) ("Likewise, a number of states have rejected the private attorney general doctrine."); *Pearson v. Bd. of Health*, 525 N.E.2d 400, 402-03 (Mass. 1988) ("Most courts generally have determined that, absent a specific legislative directive, it is inappropriate to award attorneys' fees on a 'private attorney general' theory.") Frequently cited as the reason for declining to adopt the doctrine is that where the legislature has a policy of selecting special situations where attorney fees may be awarded, "it is inappropriate for the judiciary to establish under the private attorney general doctrine a broad rule permitting such fees whenever a private litigant has at substantial cost to himself succeeded in enforcing a significant social policy that may benefit others." *Doe v. Heintz*, 526 A.2d 1318, 1323 (Conn. 1987). *See also State Bd. of Tax Comm'rs*, 751 N.E.2d at 661-64 (rejecting adoption of the private attorney general doctrine where the Indiana General Assembly had created statutory exceptions to the American rule and had observed prudential considerations such as the possible attraction of "bounty hunters" in public interest litigation, as well as difficult and subjective determinations by courts as to whether private enforcement was necessary, whether the action was a burden, whether and in what amount a fee was appropriate, and whether a significant number of citizens benefitted irrespective of whether those citizens considered themselves benefitted).

Our own Supreme Court has unequivocally noted that "all costs are given in a court of law in virtue of some statute[,] [and the] simple but definitive statement of the rule is: [C]osts in this State are

entirely creatures of legislation, and without this they do not exist." *City of Charlotte v. McNeely*, 281 N.C. 684, 691, 190 S.E.2d 179, 185 (1972) (internal citations and quotation marks omitted). The Court further observed that "[i]n this jurisdiction, in the absence of express statutory authority, attorneys' fees are not allowable as part of the court costs in civil actions." *Id.* at 695, 190 S.E.2d at 187.

Notwithstanding this clear directive, plaintiffs direct the attention of this Court to *Bailey v. State of North Carolina*, 348 N.C. 130, 500 S.E.2d 54 (1998) and argue our Supreme Court's holding authorizes the award of attorney fees to the prevailing party in equitable actions to vindicate important constitutional rights for the benefit of many citizens. In *Bailey*, our Supreme Court struck down legislation that partially taxed state and local government retirement benefits on the grounds that it constituted (1) an unconstitutional impairment of the contractual relationship that included the tax exemption of benefits derived from the plaintiffs' retirement plans (348 N.C. at 153, 500 S.E.2d at 67), and (2) an unconstitutional taking of private property without just compensation (*id.* at 155, 500 S.E.2d at 69). In addition, the Court upheld the trial court's creation of a common fund for the payment of attorney fees and other costs incurred by the class representatives despite the fact that the common fund arose as a result of the litigation as opposed to litigation involving a preexisting fund of money. *Id.* at 159, 500 S.E.2d at 71. Defendants' reliance on *Bailey* is misplaced.

First, *Bailey* expressly reiterated the general rule that attorney fees "are ordinarily taxable as costs only when authorized by statute." *Id.* Notwithstanding, the Court further observed that the " 'common-fund doctrine' is a long-standing exception to the general rule in this country that every litigant is responsible for his or her own attorney's fees." *Id. Bailey's* adherence to a long-standing exception of the common fund doctrine has no application in this case, in which plaintiffs candidly concede, as they must, that there is no common fund resulting from the litigation. Second, *Bailey* involved a class action in which the attorney fees borne by the representatives of the class were then shared or equally distributed to the benefitted class by exaction out of the recovery of the litigation. *Id.* at 162, 500 S.E.2d at 72-73. By way of contrast, plaintiffs ask this Court to shift the burden of attorney fees to the State (and, by extension, to the taxpayers) instead of to a resulting fund from which those fees would be drawn.

Affirmed.

Judges WYNN and STEPHENS concur.

HOWARD AND MAYMIE PAGE, PLAINTIFFS-APPELLANTS v. LEXINGTON INSURANCE COMPANY, DEFENDANT-APPELLEE

No. COA05-1012

(Filed 18 April 2006)

1. Unfair Trade Practices— allegations—sufficiency to state claim

Plaintiffs' allegations stated a claim for unfair and deceptive trade practices under N.C.G.S. § 58-63-15(11)(b),(c),(e) and (f) in defendant's handling of an insurance claim, and the trial court erred by granting defendant's Rule 12(b)(6) motion to dismiss.

2. Unfair Trade Practices— statute of limitations—underlying insurance claim

The trial court erred by granting defendant's Rule 12(b)(6) motion to dismiss an unfair and deceptive practices claim with the statement that it would be "bad policy" to allow an unfair practices claim to proceed when the underlying insurance claim was barred by the statute of limitations. The General Assembly is the policy making body of the State.

3. Civil Procedure— Rule 12(b)(6) motion to dismiss—standard applied by trial court

The trial court applied the correct standard of review when granting defendant's motion for a Rule 12(b)(6) dismissal where the court's reference to the "forecast of evidence" referred to the allegations in the complaint; the court stated that it only considered the pleadings, motion, citations of law, and arguments of counsel; and plaintiffs have not established that the trial court relied upon any other information in ruling on defendant's motion.

Appeal by plaintiffs from order entered 23 May 2005 by Judge Anderson D. Cromer in Superior Court, Forsyth County. Heard in the Court of Appeals 7 March 2006.

Maupin Taylor, P.A., by Kurt J. Olson, for plaintiffs-appellants.

Cozen O'Connor, by Tracy L. Eggleston, for defendant-appellee.

McGEE, Judge.

Howard and Maymie Page (plaintiffs) filed a complaint on 28 July 2004 against Lexington Insurance Company (defendant), alleging claims for breach of contract, breach of fiduciary duty, bad faith, unfair and deceptive trade practices (UDTP), and waiver and estoppel.

Plaintiffs alleged the following: On 21 February 2001, an employee of BellSouth Telecommunications, Inc. ruptured an underground septic/sewer pipeline on plaintiffs' real property. The rupture caused an undetermined amount of wastewater to spill into plaintiffs' residence. As a result, plaintiffs suffered property damage and adverse physical reactions such as accelerated heart rates, shortness of breath, skin rashes and headaches. Plaintiffs vacated their residence on 23 February 2001.

Plaintiffs further alleged they filed an insurance claim with defendant in accordance with the terms and conditions of their insurance policy with defendant. A detailed recitation of the remainder of plaintiffs' allegations is not necessary to the determination of the legal issues presented by this appeal. Those allegations which are relevant are set forth in the analysis section of this opinion.

Defendant filed an answer and motion to dismiss plaintiffs' complaint based upon the applicable statutes of limitations. The trial court granted defendant's motion to dismiss in an order filed 23 May 2005. Plaintiffs appeal.

I.

Plaintiffs first argue the trial court committed reversible error by dismissing their UDTP claim. We agree. At the hearing on defendant's motion to dismiss, the trial court stated the bases for its dismissal of plaintiffs' UDTP claim:

> The [Trial] Court realizes that [the statute of limitations for] the [UDTP claim], nothing else appearing, is four years. However, the same factual basis for alleging estoppel is being alleged as the basis for the [UDTP claim].
>
> The [Trial] Court finds that that basis is not sufficient to raise a[] [UDTP] claim, and for that reason—plus that it would

> be bad policy to allow—for every expired claim against an insurance company to basically allow one more year to bring a[] [UDTP claim].
>
> The [Trial] Court is going to grant the motion.

When ruling upon a 12(b)(6) motion to dismiss, a trial court must determine as a matter of law whether the allegations in the complaint, taken as true, state a claim for relief under some legal theory. *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4, *aff'd per curiam*, 357 N.C. 567, 597 S.E.2d 673 (2003). On appeal of a 12(b)(6) motion to dismiss for failure to state a claim, our Court "conduct[s] a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Id.*

[1] In this case, the trial court stated two grounds for its ruling, which we address separately. The trial court first stated that plaintiffs' alleged factual basis for their UDTP claim was insufficient to state a claim. N.C. Gen. Stat. § 75-1.1(a) (2005) provides that "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." N.C. Gen. Stat. § 75-16 (2005) creates a cause of action to redress injuries caused by violations of Chapter 75 of the General Statutes and provides that any damages recovered shall be trebled. These two statutes establish a private cause of action for consumers. *Gray v. N.C. Ins. Underwriting Ass'n*, 352 N.C. 61, 68, 529 S.E.2d 676, 681 (2000). The statute of limitations applicable to UDTP claims is four years. N.C. Gen. Stat. § 75-16.2 (2005).

"In order to establish a violation of N.C.G.S. § 75-1.1, a plaintiff must show: (1) an unfair or deceptive act or practice, (2) in or affecting commerce, and (3) which proximately caused injury to [the] plaintiff[]." *Gray*, 352 N.C. at 68, 529 S.E.2d at 681. By statute, an unfair or deceptive act or practice includes:

> Unfair Claim Settlement Practices.—Committing or performing with such frequency as to indicate a general business practice of any of the following: Provided, however, that no violation of this subsection shall of itself create any cause of action in favor of any person other than the Commissioner:
>
> . . . .

> b. Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies;
>
> . . . .
>
> d. Refusing to pay claims without conducting a reasonable investigation based upon all available information;
>
> e. Failing to affirm or deny coverage of claims within a reasonable time after proof-of-loss statements have been completed;
>
> f. Not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear[.]

N.C. Gen. Stat. § 58-63-15(11) (2005).

In *Gray*, our Supreme Court held as follows:

> An insurance company that engages in the act or practice of "[n]ot attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear," N.C.G.S. § 58-63-15(11)(f), also engages in conduct that embodies the broader standards of N.C.G.S. § 75-1.1 because such conduct is inherently unfair, unscrupulous, immoral, and injurious to consumers. Thus, such conduct that violates subsection (f) of N.C.G.S. § 58-63-15(11) constitutes a violation of N.C.G.S. § 75-1.1, as a matter of law, without the necessity of an additional showing of frequency indicating a "general business practice," N.C.G.S. § 58-63-15(11).

Gray, 352 N.C. at 71, 529 S.E.2d at 683 (internal citation omitted). In *Country Club of Johnson Cty., Inc. v. U.S. Fidelity & Guar. Co.*, 150 N.C. App. 231, 563 S.E.2d 269 (2002), our Court relied upon *Gray* to hold that "[i]t follows that the other prohibited acts listed in N.C. Gen. Stat. § 58-63-15(11) are also acts which are unfair, unscrupulous, and injurious to consumers, and that such acts therefore fall within the 'broader standards' of N.C. Gen. Stat. § 75-1.1." *Country Club of Johnson Cty., Inc.* at 246, 563 S.E.2d at 279.

In the present case, plaintiffs alleged in their complaint, *inter alia*, that defendant: (1) "fail[ed] to acknowledge and act reasonably promptly upon communications with respect to [plaintiffs'] claims"; (2) "fail[ed] to promptly investigate the incident while having specific

knowledge that [plaintiffs] were incurring substantial additional living expenses . . . outside of their home"; (3) "fail[ed] to promptly affirm or deny coverage while having specific knowledge that [plaintiffs] were incurring substantial additional living expenses . . . outside of their home"; (4) "fail[ed] to promptly inform [plaintiffs] whether and under what circumstances additional living expenses would be reimbursable under the policy while having specific knowledge that [plaintiffs] were incurring substantial additional living expenses that [plaintiffs] believed were covered"; and (5) "fail[ed] to effectuate prompt, fair and equitable settlement of [plaintiffs'] claim[.]" Plaintiffs' allegations, taken as true, are sufficient to establish violations of N.C.G.S. § 58-63-15(11)(b), (d), (e), and (f). Therefore, pursuant to *Gray* and *Country Club of Johnson Cty., Inc.*, plaintiffs stated a claim for unfair and deceptive trade practices.

[2] The trial court also granted defendant's motion to dismiss on the ground that it would be "bad policy" to allow a claim for UDTP to proceed when the claim on the underlying insurance policy was barred by the statute of limitations. However, the trial court misconstrued the applicable law.

"[I]t is well-recognized that actions for unfair or deceptive trade practices are distinct from actions for breach of contract." *Boyd v. Drum*, 129 N.C. App. 586, 593, 501 S.E.2d 91, 97 (1998), *aff'd per curiam*, 350 N.C. 90, 511 S.E.2d 304 (1999). In *Bernard v. Central Carolina Truck Sales*, 68 N.C. App. 228, 314 S.E.2d 582, *disc. review denied*, 311 N.C. 751, 321 S.E.2d 126 (1984), our Court held that "[a]n action for unfair or deceptive acts or practices is 'the creation of . . . statute. It is, therefore, sui generis. It is neither wholly tortious nor wholly contractual in nature . . . .' " *Id.* at 230, 314 S.E.2d at 584 (quoting *Slaney v. Westwood Auto, Inc.*, 322 N.E.2d 768, 779 (Mass. 1975)); *see also*, *Marshall v. Miller*, 302 N.C. 539, 543, 276 S.E.2d 397, 400 (1981) (recognizing that the General Assembly created a private cause of action for unfair or deceptive trade practices because "common law remedies had proved often ineffective").

Moreover, our Court has consistently treated UDTP claims as separate and distinct from other claims with respect to statutes of limitations. *See Skinner v. Preferred Credit*, 172 N.C. App. 407, 414, 616 S.E.2d 676, 680-81, *cert. allowed*, 360 N.C. 177, 626 S.E.2d 650 (2005) (applying a four-year statute of limitations to the plaintiffs' UDTP claim, applying a two-year statute of limitations to the plaintiffs' usury claim, and finding that both were barred by their respective

statutes of limitations); s*ee also*, *Hunter v. Guardian Life Ins. Co. of Am.*, 162 N.C. App. 477, 485, 593 S.E.2d 595, 601, *disc. review denied*, 358 N.C. 543, 599 S.E.2d 48 (2004) (applying a four-year statute of limitations to the plaintiffs' UDTP claim, applying a three-year statute of limitations to the plaintiffs' fraud and negligent misrepresentation claims, and finding that none of the claims were barred by their respective statutes of limitations).

In the present case, plaintiffs' claims for breach of contract, breach of fiduciary duty, and bad faith arose on 21 February 2001, and plaintiffs did not file their complaint until 28 July 2004. Plaintiffs' claims for these causes of action were thus barred by the three-year statute of limitations applicable to these claims. *See* N.C. Gen. Stat. § 1-52(12) (2005) (providing that a claim for loss covered by an insurance policy is subject to a three-year statute of limitations). However, plaintiffs' UDTP claim was separate and distinct from plaintiffs' claims on the underlying insurance policy, and the UDTP claim is therefore governed by the four-year statute of limitations applicable to such claims. *See Hunter*, 162 N.C. App. at 485, 593 S.E.2d at 601. The incident giving rise to plaintiffs' UDTP claim occurred on 21 February 2001 and plaintiffs filed their complaint on 28 July 2004, less than four years later. Therefore, plaintiffs' UDTP claim was not barred by the statute of limitations.

We further note that the General Assembly is the policy-making body of the State of North Carolina. *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 169, 594 S.E.2d 1, 8 (2004). In *Rhyne*, our Supreme Court explained that "[t]he 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." *Id.*

For the reasons stated above, we reverse the trial court's grant of defendant's motion to dismiss plaintiffs' UDTP claim and remand this claim to the trial court. Because we reverse and remand, we need not address plaintiffs' remaining arguments pertaining to their UDTP claim.

II.

[3] Plaintiffs also argue "[t]he trial court improperly found, without referring to or giving full credit to the allegations in the complaint, that [plaintiffs] failed to state sufficient allegations to demonstrate that [defendant] waived the statute of limitations applicable to [plaintiffs'] action to recover on the insurance policy." At the hearing on

defendant's motion to dismiss, the trial court stated: "In this case the [Trial] Court finds that based on the forecast of the evidence from . . . plaintiff[s] that sufficient factual basis has not been alleged to create an estoppel of the three-year statute of limitations on the underlying claim[s] on the policy."

We note that plaintiffs do not argue that their complaint stated sufficient allegations of estoppel. Plaintiffs only argue that the trial court applied the incorrect standard of review. Although the trial court used the phrase "forecast of the evidence" in its ruling on defendant's motion to dismiss, it appears the trial court was referring to the allegations in plaintiffs' complaint. In fact, the trial court stated that "sufficient factual basis has not been alleged[.]" In its order, the trial court stated that it only "considered the pleadings, motion, citations of law, and arguments of counsel." Plaintiffs have not established that the trial court relied upon any other information in ruling on defendant's motion to dismiss. The trial court therefore applied the correct standard of review by determining that plaintiffs' allegations, taken as true, did not state sufficient facts to allege estoppel. *See Leary*, 157 N.C. App. at 400, 580 S.E.2d at 4. In that plaintiffs' claims for breach of contract, breach of fiduciary duty, and bad faith were barred by the applicable three-year statute of limitations, and because plaintiffs failed to state a claim for estoppel, we affirm the trial court's dismissal of those claims.

Affirmed in part; reversed and remanded in part.

Judges CALABRIA and GEER concur.

DORIS BANKS, PLAINTIFF v. N.A. DUNN, III, DEFENDANT

No. COA05-738

(Filed 18 April 2006)

Waters and Adjoining Lands— alteration of drainage by fill— expert testimony not required—expert qualified

Expert testimony was not required, and the trial court did not err by denying defendant's motion to exclude testimony by an expert, in a case in which plaintiff alleged that a portion of her property flooded during rainstorms after defendant placed

68 truckloads of fill dirt on the rear of his property. The case involved no scientific principle more complex than that water flows downhill and carries with it loose material. Even assuming that expert testimony was required, this witness was qualified and his opinion was based on a wide range of scientific data and information.

Appeal by defendant from judgment entered 1 October 2004 by Judge Robert Hobgood in Wake County Superior Court. Heard in the Court of Appeals 25 January 2006.

Stam, Fordham & Danchi, P.A., by Paul Stam and Theodore Danchi, for plaintiff-appellee.

Teague Campbell Dennis & Gorham, LLP, by John L. Tidball, for defendant-appellant.

LEVINSON, Judge.

Defendant appeals from a judgment awarding plaintiff damages for defendant's trespass and violation of N.C. Gen. Stat. § 113A Art. 4, the Sedimentation Pollution Control Act (the SPCA). We affirm.

Plaintiff filed a district court complaint against defendant on 3 March 2003, seeking damages for defendant's alleged common law trespass and nuisance, and his violation of the SPCA. Defendant answered in May 2003, denying the material allegations of plaintiff's complaint. In July 2003 the case was transferred by consent order to Superior Court, on the basis of the amount of damages claimed. The case was tried before a jury in September 2004; uncontradicted trial evidence established, in pertinent part, the following: Defendant and plaintiff are long-time residents of Apex, North Carolina. Defendant owns and operates a gas station on Apex's main street, and the rear of his property adjoins plaintiff's back yard. Behind defendant's gas station is a steep hill that slopes sharply down to the boundary between his property and plaintiff's, while on plaintiff's side of the boundary line, the land slopes gently up towards her home. The property line between plaintiff and defendant is marked by a small watercourse, described variously at trial as a "drainage ditch" and an "intermittent" stream.

Plaintiff, who was 83 years old at the time of trial, testified that she had lived in the same house since 1957. About 15 years earlier she and her husband planted a row of Leyland cypress trees in their

back yard, near the property boundary with defendant. The trees thrived, ultimately growing to about twenty-five feet high and eight feet across. When plaintiff's husband became ill in 2000, several people helped by mowing plaintiff's yard. Delman Williamson, plaintiff's brother-in-law, testified that when he mowed in 2000, the trees were healthy, the land was dry around the cypress trees, and he was able to take a riding lawn mower between the row of trees and the boundary creek. William Nolan Cooke testified that he had mowed plaintiff's lawn in 2000, and that the trees were healthy and the areas around them dry.

In April 2001 defendant dumped sixty-eight truckloads of fill dirt on the hill behind his gas station. The present lawsuit arises from damages allegedly caused by defendant's actions.

Cooke testified that, after defendant dumped the fill dirt on the hillside above the creek, he observed dirt running into the stream when it rained. Additionally, the plaintiff, Cooke, and Williamson all testified that, during the spring and summer of 2001, water ran onto plaintiff's back yard, and by summer of 2001 plaintiff's cypress trees were in standing water. Thereafter, the trees began to sicken and die. Phillip Crump, who was qualified as an expert witness arborist and nurseryman, testified that in the summer of 2001 plaintiff asked him to examine her dying cypress trees. He observed the standing water around the base of the trees, studied the trees' leaves and growth patterns, and analyzed the soil around the trees' roots. Crump found no evidence of disease or insect damage. His expert opinion was that the damage to plaintiff's trees was caused by their being in standing water, with their roots in wet, saturated soil. He also testified that it would cost about $20,000 to replace the trees.

Robert Ross testified that he was employed by the city of Apex to enforce the SPCA. During the spring and summer of 2001, he received complaints from defendant's neighbors that every time it rained, sediment washed down the hillside where defendant had dumped the fill dirt. Ross personally observed red clay washing down the slope and into the little stream at the bottom of the hill. He notified defendant that it was a violation of the SPCA to add soil on the creek bank without taking certain protective measures to keep the hillside from eroding. Charles Brown, a field agent with the North Carolina Department of Water Quality (DWQ), evaluated the site and determined that the watercourse was an intermittent stream that was subject to regulation by the SPCA and DWQ. Defendant disputed this conclusion, and

asked for a second opinion; Ross then asked Steve Mitchell, from the North Carolina Department of Water Quality, to become involved.

Steven Mitchell testified that he had worked for twenty-six years as an environmental specialist with the State of North Carolina. His academic background in biology and chemistry had been supplemented by numerous continuing education courses dealing with stream ecology. Mitchell was involved in the development of the administrative rules for enforcing the SPCA, including the rules that defendant was alleged to have violated. His experience also included years of evaluating sites for compliance with environmental regulations. Mitchell was qualified by the trial court as an expert in environmental science and pollution control regulations.

Mitchell testified that he had been asked to provide a second opinion on the nature of the stream behind defendant's gas station. After evaluating the site, Mitchell agreed with Brown that it was a "stream feature" that was subject to "protection under the riparian buffer rule." Mitchell also determined that defendant was in violation of the relevant environmental regulations. He testified that, in his expert opinion, defendant's fill activities had altered the course of the stream, caused backup and ponding of water in plaintiff's yard, and led to the deterioration of plaintiff's row of cypress trees.

Following the presentation of evidence, the case was submitted to the jury, which returned a verdict finding defendant liable for $14,000 damages to plaintiff for trespass and violation of the SPCA. On this verdict, the trial court entered judgment 1 October 2004, awarding plaintiff $14,000 plus interest and attorneys' fees. From this judgment, defendant timely appealed.

Defendant argues first that the trial court erred by denying defendant's motion to exclude opinion testimony by expert witness Steven Mitchell as to "causation on the alleged change of the subject water flow." Defendant does not challenge Mitchell's general qualifications as an expert in environmental science and pollution control regulations, and he did not object to any other aspects of Mitchell's trial testimony. However, as regards Mitchell's expert opinion that water ran onto plaintiff's yard as a result of defendant's dumping fill dirt on the hillside next to her property, defendant contends that Mitchell's "opinion was based solely on an assumption" that any violation of the SPCA automatically causes a change in the course of the subject body of water. We disagree with defendant's characterization

of Mitchell's testimony. Moreover, we conclude that expert testimony was not required on the facts of this case.

One of the elements of plaintiff's common law claims was that defendant caused the entry of water onto her property. Defendant asserts under *Davis v. City of Mebane*, 132 N.C. App. 500, 512 S.E.2d 450 (1999), that plaintiff had to present expert testimony establishing that defendant's actions caused a change in the course of the stream in order to prove this element. We disagree.

"In *Davis*, a hydroelectric dam allegedly caused atypical downstream flooding. Due to the complexity of the situation, the Court of Appeals held that 'expert testimony is necessary to prove causation in this case.' " *BNT Co. v. Baker Precythe Dev. Co.*, 151 N.C. App. 52, 57, 564 S.E.2d 891, 895 (2002) (quoting *Davis*, 132 N.C. App. at 503-04, 512 S.E.2d at 453). In many situations, "the facts in evidence are such that any layman of average intelligence and experience would know what caused the injuries complained of." *Davis*, 132 N.C. App. at 504, 512 S.E.2d at 453. However:

> [If] the subject matter . . . is 'so far removed from the usual and ordinary experience of the average man that expert knowledge is essential to the formation of an intelligent opinion, only an expert can competently give opinion evidence as to the cause of . . . [the] condition.'

Id. (quoting *Gillikin v. Burbage*, 263 N.C. 317, 325, 139 S.E.2d 753, 760 (1965) (citations omitted)).

Unlike *Davis*, the instant case does not involve a reservoir, a dam, or other large scale municipal water project; nor does it involve the interplay of water currents upstream and downstream of plaintiff's property; the calculation of water flow rates; consideration of rainfall rates; determination of the boundary of the 100 year flood plain; or any other complex calculation.

In the instant case, it is undisputed that the properties owned by plaintiff and defendant had a common boundary marked by a small stream, or drainage ditch, and that plaintiff had a row of Leyland cypress trees planted near the little stream. Uncontradicted evidence established: (1) defendant dumped 68 truckloads of fill dirt on the steep hillside adjoining plaintiff's property; (2) thereafter, witnesses observed red clay mud washing down the hill and into the stream at the bottom; (3) when the fill dirt clogged the creek, the water ran out over the low side of the creek, onto plaintiff's back yard; and (4)

water pooled around plaintiff's row of Cypress trees. Thus, determination of the causal relationship between the fill dirt dumped on the hillside above the creek, and the subsequent flooding in plaintiff's yard, implicates no scientific principle more complex than the truism that water flows downhill, and will carry loose material in its flow.

We conclude that the factual scenario of the instant case is similar to that of *BNT*. In *BNT*, the issue was whether flooding on plaintiff's property was caused by defendant's interference with a drainage ditch. This Court held that "[u]nlike the unusual circumstances in *Davis*, the facts of the instant case are such that a layperson could form an intelligent opinion about whether the flooding was caused by the closing of the ditch. Plaintiffs presented specific testimony on causation similar to that accepted by the North Carolina Supreme Court in the case of *Cogdill v. Highway Comm. and Westfeldt v. Highway Comm.*, 279 N.C. 313, 182 S.E.2d 373 (1971)." *BNT*, 151 N.C. App. at 57, 564 S.E.2d at 895. Evidence cited in *BNT* included the following:

> Harold Roseman, . . . testified that he had never experienced flooding on his property prior to June 1998, when defendant closed the ditch. Once the ditch was closed, . . . his land flooded every time it rained. . . . Bill Saffo, . . . testified that the BNT properties did not flood during Hurricanes Bertha and Fran in 1996, but following the closing of the ditch in June 1998, those properties flooded on several occasions. . . . Dan Dawson, an independent engineer . . . testified that the closing of the ditch interrupted the drainage flow in that area, which could result in flooding if the water could not escape in some alternate manner. . . . [P]laintiffs presented sufficient evidence to support the jury's verdict as to causation[.]

BNT, 157 N.C. App. at 57-58, 564 S.E.2d at 895-96. (internal quotation marks omitted). We conclude, based on *Davis*, *BNT*, and related cases, that plaintiff was not required to present expert testimony in order to establish that defendant's actions in dumping dirt on the hillside altered the creek at the bottom of the hill and caused water to run into plaintiff's back yard.

Moreover, even assuming *arguendo*, that expert testimony on this point were required, we easily conclude that Mitchell was qualified to offer an expert opinion on the change in course of the stream. He testified that, in his expert opinion, defendant's dumping of fill dirt on the hillside directly above the stream had altered its course. His opin-

ion, which was corroborated by his sworn affidavit, was based on a wide range of scientific data and information, including: (1) assessment of alluvial deposits, sinuosity of the stream, presence or absence of terrestrial plants and fibrous roots, and changes in the stream substrate; (2) examination of aerial photographs; (3) information obtained from Ross and other witnesses who had observed the fill dirt washing into the creek; and (4) his analysis of the evidence in the context of his decades of experience in the field. This assignment of error is overruled.

Defendant's remaining arguments are also based on his contention, discussed above, that Mitchell's expert testimony on the cause of the change in the stream should have been excluded. These remaining arguments are without merit. Accordingly, the judgment of the trial court is

Affirmed.

Judges McCULLOUGH and ELMORE concur.

THOMAS L. NOBLOT, AND WIFE DEBORAH J. NOBLOT, PLAINTIFFS v. RICKEY D. TIMMONS, TERESA LYNN TIMMONS, JULIE M. HANCE, ESQ., L. KEITH HANCE, AND HANCE & HANCE, P.A., DEFENDANTS

No. COA05-1165

(Filed 18 April 2006)

Attorneys— lease payments held in trust account-disbursement—duty to client only

Summary judgment was correctly granted for defendant-attorneys who had disbursed to their clients (the Timmonses) lease payments by plaintiffs where the lease included an option to purchase and the property was eventually lost in a foreclosure. Defendants' fiduciary duty was to their clients, the Timmonses, not to plaintiffs, and defendants were obligated to disburse the funds when requested. Moreover, defendants were also obligated not to disclose the Timmonses' confidential information to plaintiffs.

NOBLOT v. TIMMONS

[177 N.C. App. 258 (2006)]

Appeal by plaintiffs from order entered 26 August 2004 by Judge Timothy L. Patti in Lincoln County Superior Court. Heard in the Court of Appeals 29 March 2006.

Young, Morphis, Bach & Taylor, L.L.P., by Thomas C. Morphis, Valeree R. Adams, and Jimmy R. Summerlin, Jr., for plaintiffs-appellants.

Poyner & Spruill LLP, by E. Fitzgerald Parnell, III, for defendant-appellees Julie M. Hance, Esq., L. Keith Hance, and Hance & Hance, P.A.

No brief filed for defendant-appellees Rickey D. Timmons and Teresa Lynn Timmons.

TYSON, Judge.

Thomas L. and Deborah J. Noblot ("plaintiffs") appeal from order entered granting summary judgment to Julie M. Hance, Esq., L. Keith Hance, and Hance & Hance, P.A. ("defendants"). We affirm.

I. Background

On 11 August 1998, Rickey D. and Teresa Lynn Timmons (collectively, the "Timmonses") leased a house located at 3161 Cansler Road in Vale, North Carolina to plaintiffs. Defendants did not draft the lease, which is the subject of this appeal. The lease provided:

> Rent. Lessee [Noblot] agrees to pay without demand to Lessor [Timmons] as rent for the Demised Premises the sum of $930.00 per month in advance of the 1st day of each calendar month beginning September 1, 1998, payable at 2246 Magnolia Grove Road, City of Iron Station, State of North Carolina, or at such other place as Lessor may designate.
>
> . . . .
>
> Purchase Option. It is agreed that Lessee shall have the option to purchase real estate known as: 3161 CANSLER ROAD[,] VALE, NC, 28168 for the purchase price of ONE HUNDRED THIRTY NINE THOUSAND Dollars with a down payment of TEN THOUSAND FIVE HUNDRED dollars payable upon exercise of said purchase option, and with a closing date no later than 30 days thereafter.

Defendants agreed to represent the Timmonses after disputes arose between plaintiffs and the Timmonses. Defendants agreed to

receive plaintiffs' monthly rental payments under the lease on behalf of their clients, the Timmonses. The funds accumulated in defendants' trust account.

After several months' rental payments had accumulated in defendants' trust account, the Timmonses requested defendants to disburse the funds to them. Defendants contacted the North Carolina State Bar to determine the ethical requirements regarding the disbursement of funds. After consulting the State Bar and reviewing the North Carolina State Bar Rules of Professional Conduct, defendants disbursed the funds to their clients. Defendants did not disclose this disbursement to plaintiffs.

During the time plaintiffs rented from the Timmonses, at least four foreclosure actions of the property were initiated. Defendants represented the Timmonses in some of the foreclosure actions. The fourth foreclosure action was filed 31 October 2002. The Timmonses separated prior to that filing. Defendants were not retained to defend that action.

On 21 February 2003, plaintiffs filed suit against Richard P. McNeely, substitute trustee of a deed executed by the Timmonses, for use and benefit of the Federal National Mortgage Association, Fannie Mae; the Timmonses; and Julie M. Hance as trustee. Plaintiffs alleged breach of contract and fraud against the Timmonses and demanded an accounting of money held in trust by defendants for the Timmonses.

On 14 May 2004, plaintiffs filed a motion to amend their complaint. Plaintiffs added causes of action "for [d]amages as to [defendants]" and for punitive damages against defendants.

Defendants filed a motion for summary judgment on 3 August 2004. On 26 August 2004, the trial court granted defendants' motion and dismissed all claims against defendants. On 9 September 2004, plaintiffs filed a notice of appeal.

This Court dismissed plaintiffs' interlocutory appeal in an unpublished opinion on 19 July 2005. On 25 July 2005, plaintiffs filed a voluntary dismissal without prejudice of their claims against the Timmonses. Plaintiffs filed a second notice of appeal on 3 August 2005.

II. Issue

Plaintiffs argue the trial court's grant of summary judgment in favor of defendants was error.

III. Standard of Review

> In a motion for summary judgment, the movant has the burden of establishing that there are no genuine issues of material fact. The movant can meet the burden by either: 1) Proving that an essential element of the opposing party's claim is nonexistent; or 2) Showing through discovery that the opposing party cannot produce evidence sufficient to support an essential element of his claim nor [evidence] sufficient to surmount an affirmative defense to his claim.
>
> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Hines v. Yates, 171 N.C. 150, 157, 614 S.E.2d 385, 389 (2005) (internal quotations and citations omitted). "On appeal, an order allowing summary judgment is reviewed *de novo*." *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 470, 597 S.E.2d 674, 693 (2004).

IV. Summary Judgment

Plaintiffs argue the trial court erred when it granted summary judgment in favor of defendants and assert, "the [p]laintiffs have pleaded facts and provided supporting affidavits for the facts so pleaded to support the claims alleged in the [c]omplaint, as amended and to create genuine issues of material fact as to the Hance [d]efendants' liability for the acts and omissions alleged." We disagree.

Plaintiffs' original complaint alleged:

> 28. That Plaintiffs are entitled to an accounting of those monies placed in trust with Defendant Julie Hance and as to any sums not distributed for the purposes intended are entitled to the return of those funds.
>
> 29. That in addition thereto, in the event the subject property is foreclosed upon and lost to the Plaintiffs on account of said Defendant's failure to fulfill her fiduciary duties to the Plaintiffs, then and in that event, Plaintiffs are entitled to contract damages against said Defendant.

In the amended complaint, plaintiffs alleged:

> Damages as to Defendants Julie Hance, Keith Hance and Hance & Hance, PA
>
> . . . .
>
> 40. That at no time did Keith Hance or Julie Hance reveal to the Plaintiffs that the subject property was being foreclosed upon or that the payments that the Plaintiffs were making were going anywhere other than to the mortgage lender.
>
> 41. That both Keith Hance and Julie Hance had an obligation of fair dealings and truthfulness to the Plaintiffs and had an obligation to disclose the foregoing facts to the Plaintiffs and not to disburse any sums without having made said disclosures to the Plaintiffs.
>
> . . . .
>
> 44. That without the knowledge or consent of Plaintiffs beginning with a check written from Julie Hance's trust account dated 10/26/01, the Defendant Julie Hance ultimately distributed all funds paid by the Plaintiffs into her trust account to Rickey or Teresa Timmons or others at their discretion.
>
> . . . .
>
> Punitive Damages as to Defendants Keith Hance, Julie Hance and Hance & Hance, PA
>
> . . . .
>
> 48. That the action and conduct of Defendants Keith Hance and Julie Hance was done in wanton, willful, reckless and arrogant disregard of the rights and sensibilities of the Plaintiffs and are so aggravating as to justify an award of punitive damages.

On appeal, plaintiffs contend defendants should: (1) not have disbursed the rental proceeds to the Timmonses; (2) have disclosed the fact that they disbursed the funds to the Timmonses; and (3) have informed plaintiffs' attorney of the status of the pending foreclosure actions. Plaintiffs also argue defendants owed them a fiduciary duty. Plaintiffs contend a fiduciary obligation arose when plaintiffs, "in reliance upon Hance's status as a member of the legal profession, reposed confidence in her to receive and distribute their monies in

accordance with the Trust Agreement reached between the Plaintiffs, the Timmonses, and the Hance Defendants."

In their brief to this Court, plaintiffs also assert a right to damages as third-party beneficiaries of defendants' attorney/client relationship. Plaintiffs failed to allege a cause of action in their complaints for this claim. We decline to address it.

A. Disbursement and Disclosure

The North Carolina State Bar Rules of Professional Conduct, Rule 1.15-2(m) (2006) states, "[a] lawyer shall promptly pay or deliver to the client, or to third persons as directed by the client, any entrusted property belonging to the client and to which the client is currently entitled."

The North Carolina State Bar Rules of Professional Conduct, Rule 1.6(a) (2006) states, "[a] lawyer shall not reveal information acquired during the professional relationship with a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)."

B. Client Represented

The Timmonses retained defendants to represent them after a dispute evolved out of a lease, previously entered into between the Timmonses and plaintiffs. At no time did defendants represent plaintiffs. Defendants assert, "Mr. and Mrs. Hance have never met, nor talked to, nor entered into any agreement whether written or oral with [plaintiffs]." Defendants owed a fiduciary duty to the Timmonses, not to plaintiffs.

Defendants accepted plaintiffs' rental payments on behalf of the Timmonses. Defendants held the funds for the benefit of the Timmonses, not for the benefit of plaintiffs.

Pursuant to the lease, plaintiffs had a duty to make rental payments to the Timmonses. Failure to do so could have resulted in default of the lease and their eviction from the property. *See* N.C. Gen. Stat. § 42-44(c) (2005) ("The tenant may not unilaterally withhold rent prior to a judicial determination of a right to do so."). In accordance with Rule 1.15-2(m), defendants were obligated to disburse the Timmonses' funds to them upon request. The money belonged to the Timmonses. Because defendants' clients were the

Timmonses, defendants were also obligated to comply with Rule 1.6 to not disclose the Timmonses' confidential information to plaintiffs.

V. Conclusion

Defendants owed a fiduciary duty to their clients, the Timmonses. Defendants did not owe a fiduciary duty to plaintiffs. Defendants were obligated to: (1) disburse plaintiffs' rental payments to the Timmonses upon request, in accordance with Rule 1.15-2(m); and (2) not reveal the Timmonses' confidential information to plaintiffs in accordance with Rule 1.15-2(m) and Rule 1.6(a). The trial court's order granting summary judgment for defendants is affirmed.

Affirmed.

Judges GEER and JACKSON concur.

STATE OF NORTH CAROLINA v. MICHAEL ANTHONY STARKEY, DEFENDANT

No. COA05-1013

(Filed 18 April 2006)

Appeal and Error— appealability—trial court's own motion for appropriate relief—writ of certiorari—habitual felon

The State had no right to appeal from an order granting the trial court's own motion for appropriate relief vacating defendant's sentence for having attained the status of an habitual felon and sentencing defendant to a term of eight to ten months' imprisonment, and the State's petition for writ of certiorari is denied, because: (1) the State did not have a right to appeal from the underlying judgment when it did not dismiss a charge against defendant and the term of imprisonment was not unauthorized, and this appeal is not one regularly taken, N.C.G.S. § 15A-1445; and (2) the State's petition did not satisfy any of the conditions of N.C. R. App. P. 21, and the Court of Appeals declined to invoke N.C. R. App. P. 2.

Judge HUNTER concurring.

Appeal by the State from an order and judgment entered 3 February 2005 by Judge Ernest B. Fullwood in Lenoir County Superior Court. Heard in the Court of Appeals 15 March 2006.

Attorney General Roy Cooper, by Assistant Attorney General Christopher W. Brooks, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Benjamin Dowling-Sendor, for defendant.

BRYANT, Judge.

The State appeals from an order entered 3 February 2005, granting the trial court's own motion for appropriate relief, vacating Michael Anthony Starkey's (defendant) sentence for having attained the status of an habitual felon and sentencing defendant to a term of eight to ten months imprisonment. For the reasons below we dismiss this appeal and deny the State's Petition for Writ of Certiorari.

Facts and Procedural History

On 13 September 2001, police officers stopped defendant at a driver's license checkpoint in Kinston, North Carolina. Defendant was subsequently arrested for driving while impaired and driving with a revoked license. During a search of defendant's car officers found marijuana in a balled-up piece of paper and a small plastic bag containing what was later determined to be cocaine. The plastic bag contained 0.1 grams (0.004 ounces) of cocaine, the smallest amount the laboratory at the State Bureau of Investigation can weigh.

On 25 February 2002, defendant was indicted by the Lenoir County Grand Jury for the felony offense of possession of cocaine and for having attained the status of an habitual felon. On 16 July 2002, after a trial before a jury, defendant was found to be guilty of possession of cocaine and of having attained the status of an habitual felon. Defendant was found to have three non-overlapping prior felony convictions: felonious forgery on 29 January 1992; felonious possession of stolen goods on 1 August 1992; and felonious larceny on 18 April 1995. All three are Class H felonies. In a judgment entered consistent with the jury verdicts, the trial court sentenced defendant to a term of 100 to 129 months imprisonment. On 18 May 2004, for reasons not related to the appeal, this Court reversed defendant's convictions. *State v. Starkey*, 164 N.C. App. 414, 595 S.E.2d 815 (2004) (No. 03-454) (unpublished).

Defendant was retried at the 24 January 2005 Criminal Session of Lenoir County Superior Court before the Honorable Ernest B. Fullwood. On 27 January 2005, a jury found defendant guilty of one

count of possession of cocaine and of having attained the status of an habitual felon. The trial court subsequently found that, as an habitual felon, defendant had five prior record points and a prior record level of III. On 3 February 2005, the trial court entered a judgment consistent with the jury verdicts, sentencing defendant to a term of seventy to ninety-three months imprisonment.

Immediately after entering judgment on that sentence, the trial court, *sua sponte*, entered an order granting its own motion for appropriate relief. The trial court found that defendant's sentence as an habitual felon was grossly disproportionate in light of the mitigating factors found at sentencing and the crime committed, and was in violation of his rights under the Eighth and Fourteenth Amendments to the United States Constitution. The trial court vacated defendant's sentence as an habitual felon, found defendant had eleven prior record points and a prior record level of IV, and sentenced defendant to a term of eight to ten months imprisonment.

The State appeals the order granting the trial court's motion for appropriate relief. The State has also filed with this Court a Petition for Writ of Certiorari. Defendant has filed a motion to dismiss the State's appeal and a response to the State's Petition for Writ of Certiorari.

The dispositive issues before this Court are: (I) whether the State has a right to appeal from the entry of the order granting the trial court's motion for appropriate relief; and (II) whether this Court may grant the State's Petition for Writ of Certiorari.

Appeal from a Motion for Appropriate Relief

Our Supreme Court has held that "[t]he right of the State to appeal in a criminal case is statutory, and statutes authorizing an appeal by the State in criminal cases are strictly construed." *State v. Elkerson*, 304 N.C. 658, 669, 285 S.E.2d 784, 791 (1982) (citations omitted). The State argues it has a right to appeal the entry of the trial court's order granting the court's Motion for Appropriate Relief pursuant to Sections 15A-1422(b), 15A-1445(a)(1) and (a)(3)(c) of the North Carolina General Statutes.

As the State is appealing the entry of an order granting the trial court's Motion for Appropriate relief and not the judgment entered on the jury verdicts, whether or not the State has a right of appeal to this Court is controlled by Section 15A-1422 of the North Carolina

General Statutes. Pursuant to Section 15A-1422(b), the State seeks review of the trial court's grant of relief of a Motion for Appropriate Relief in an appeal regularly taken. N.C. Gen. Stat. § 15A-1422(b) (2005). Therefore, for this Court to review the trial court's grant of relief under its Motion for Appropriate Relief, the State must have a right to appeal the underlying judgment in an appeal regularly taken.

Whether an appeal by the State of criminal judgments is "regularly taken" is governed by Section 15A-1445 of the North Carolina General Statutes. *Cf. State v. Howard*, 70 N.C. App. 487, 489, 320 S.E.2d 17, 18-19 (1984) (holding N.C. Gen. Stat. § 15A-1444 governs "regularly taken" criminal appeals by defendants). Section 15A-1445 states in pertinent part:

> (a) Unless the rule against double jeopardy prohibits further prosecution, the State may appeal from the superior court to the appellate division:
>
> (1) When there has been a decision or judgment dismissing criminal charges as to one or more counts.
>
> . . .
>
> (3) When the State alleges that the sentence imposed:
>
> . . .
>
> c. Contains a term of imprisonment that is for a duration not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23 for the defendant's class of offense and prior record or conviction level[.]

N.C. Gen. Stat. § 15A-1445 (2005). The relief granted by the trial court might be considered to have effectively dismissed defendant's charge of having attained the status of an habitual felon or imposed an unauthorized prison term in light of defendant's status as an habitual felon. However, it is the underlying judgment and not the order granting this relief from which the State must have the right to take an appeal. *Howard*, 70 N.C. App. at 489, 320 S.E.2d at 18-19. The State does not argue and we do not find that the underlying judgment dismisses a charge against defendant or that the term of imprisonment imposed was not authorized. The State therefore has no right to appeal from the underlying judgment and this appeal is not one "regularly taken." This appeal must be dismissed.

Petition for Writ of Certiorari

Realizing it may not have a right to appeal the order of the trial court, the State has also filed a Petition for Writ of Certiorari with this Court asking us to review the trial court's order vacating the original sentence. Review by this Court pursuant to a Petition for Writ of Certiorari is governed by Rule 21 of the North Carolina Rules of Appellate Procedure. Pursuant to Rule 21, this Court is limited to issuing a writ of certiorari:

> "to permit review of the judgments and orders of trial tribunals when [1] the right to prosecute an appeal has been lost by failure to take timely action, or [2] when no right of appeal from an interlocutory order exists, or [3] for review pursuant to G.S. 15A-1422(c)(3) of an order of the trial court denying a motion for appropriate relief."

State v. Pimental, 153 N.C. App. 69, 76-77, 568 S.E.2d 867, 872 (quoting N.C. R. App. P. 21(a)(1)), *disc. review denied*, 356 N.C. 442, 573 S.E.2d 163 (2002). The State recognizes that its petition does not satisfy any of the conditions of Rule 21 and asks this Court to invoke Rule 2 of the North Carolina Rules of Appellate Procedure and review the trial court's order. *See* N.C. R. App. P. 2 (granting this Court the authority to suspend the rules of appellate procedure to prevent manifest injustice to a party). We decline the State's request to invoke Rule 2 and deny the State's Petition for Writ of Certiorari.

Appeal dismissed, Petition for Writ of Certiorari denied.

Judge HUDSON concurs.

Judge HUNTER concurs in a separate opinion.

HUNTER, Judge, concurring.

I agree with the State that the trial court's action in granting the motion for appropriate relief directly contradicts settled case law regarding Eighth Amendment challenges to habitual felon sentences and was therefore erroneous. *See*, *e.g.*, *State v. Todd*, 313 N.C. 110, 117-19, 326 S.E.2d 249, 253-55 (1985); *State v. McDonald*, 165 N.C. App. 237, 241-42, 599 S.E.2d 50, 52-53, *disc. review denied*, 359 N.C. 195, 608 S.E.2d 60 (2004), *cert. denied*, 544 U.S. 988, 161 L. Ed. 2d 748 (2005); *State v. Clifton*, 158 N.C. App. 88, 95-96, 580 S.E.2d 40, 45-46, *cert. denied*, 357 N.C. 463, 586 S.E.2d 266 (2003);

State v. Hensley, 156 N.C. App. 634, 638-39, 577 S.E.2d 417, 421, *disc. review denied*, 357 N.C. 167, 581 S.E.2d 64 (2003). The majority is correct, however, that the State has no statutory right of appeal to this Court from entry of the order granting the trial court's motion for appropriate relief, and that certiorari is also unavailable. Thus, this Court is precluded from reviewing the merits of the State's position. I note, however, that this issue may be subject to review by our Supreme Court pursuant to its constitutional authority. *See* N.C. Const. art. IV, § 12, cl. 1; *State v. Allen*, 359 N.C. 425, 429, 615 S.E.2d 256, 259 (2005) (citation omitted) (the Supreme Court may " 'exercise its general supervisory authority when necessary to promote the expeditious administration of justice' ").

STATE OF NORTH CAROLINA v. KARENNA T. JONES

No. COA05-901

(Filed 18 April 2006)

Larceny— trespass as necessary element—money dug from leased property by leaseholder—variance between indictment and evidence

Every larceny includes a trespass. There was a fatal variance between the indictment and the evidence in this case because defendant was leasing the property in which she found buried money. Her leasehold entitled her to lawful possession of the real property and the money; the crime she may have committed was conversion by a lessee.

Appeal by defendant from judgment entered 3 March 2005 by Judge Alma L. Hinton in Halifax County Superior Court. Heard in the Court of Appeals 22 March 2006.

Attorney General Roy Cooper, by Assistant Attorney General Hope Murphy White for the State.

Adrian M. Lapas, for defendant-appellant.

McCULLOUGH, Judge.

Karenna T. Jones ("defendant") appeals from judgment entered upon a jury verdict finding her guilty of felonious larceny. We reverse.

The State presented evidence tending to show: in June of 2002, Ora Evans ("the victim"), a resident of Onslow County, returned to 5226 Shields Road in Tillery, North Carolina, to take care of her ailing mother. The victim, uncomfortable with the presence of the many health care workers in her mother's home, buried $13,400 in cash ("the money") in her mother's backyard.[1] The victim testified she placed $3,400 in a zipper pouch ("the pouch"), while the remaining $10,000 was placed in a metal box ("the box"). In the pouch, the victim described through receipts how she accumulated the money. Further, the victim included a written note ("the note") in the pouch. The note stated she and her son were the owners of the money. The note included information such as the date she buried the money, her address in Tillery, and the total amount buried. The victim wrapped the money, the receipts, and the note in aluminum foil and then placed everything in a hole she dug in her mother's backyard. The victim also drew a map in order to locate the area where she buried the money. She placed the map in her personal files at home in Onslow County.

Shortly after the victim's mother died in November 2002, she returned to Onslow County. On 4 January 2004, the victim and her nephew came back to 5226 Shields Road to retrieve her money. Once there, the victim realized her mother's mobile home was rented to defendant. The victim identified herself and her nephew to defendant and told defendant she had work to do in the backyard. Defendant consented at first, but quickly came to the backyard, yelled at the victim, and eventually asked her to leave. After being threatened with a gun by defendant, the victim left and went to the Scotland Neck Police Department ("Department") for assistance. The victim returned with a deputy who permitted her to dig for ten minutes, however, the victim failed to locate her money.

Deputy Tim Parker ("Deputy Parker") testified he was called to 5226 Shields Road on 7 January 2004 "in reference to somebody inside of a residence." When Deputy Parker arrived, he spoke to defendant. Defendant informed Deputy Parker of the victim's digging in the backyard. Defendant admitted to Deputy Parker that "she got curious and went out there and got a shovel . . . [and] dug one time [and] hit a metal box . . . and dug it up. And she gave me the items in the box." Defendant told Deputy Parker the box contained approxi-

1. Victim testified this money was earned over the years from her labor, her now deceased husband's labor, and the sale of timber. Victim also testified she and her husband kept this money to avoid having to go to the bank.

mately $3,000 and that she spent it. Defendant gave Deputy Parker the pouch which only contained the receipts. The pouch previously contained the money and the note.

Detective Bruce Temple ("Detective Temple") investigated the situation and after conversing with Deputy Parker, testified a warrant was obtained for defendant's arrest on 27 January 2004. Detective Temple further testified in response to questioning, defendant admitted taking $3200 from the yard and spending it all on bills, shopping, and meals. Defendant presented no evidence.

Defendant was found guilty of felony larceny and was sentenced to a minimum of five months to a maximum of six months in the North Carolina Department of Correction. Defendant's sentence was suspended and she was placed on supervised probation for 24 months. Defendant was ordered to pay $14,666 in restitution, attorneys fees, and court costs. Defendant appeals.

I. *Motion to Dismiss—Variance Between Indictment and Evidence*:

Defendant argues the trial court erred in denying her motion to dismiss because a fatal variance existed between the indictment and the evidence presented at trial. Defendant contends no trespassory taking occurred since her leasehold granted her lawful possession of the real property at 5226 Shields Road. Defendant further contends that absent a trespass, there can be no felonious larceny. We agree.

" 'A variance between the criminal offense charged and the offense established by the evidence is in essence a failure of the State to establish the offense charged.' " *State v. Langley*, 173 N.C. App. 194, 197, 618 S.E.2d 253, 255 (2005) (quoting *State v. Pickens*, 346 N.C. 628, 646, 488 S.E.2d 162, 172 (1997)). However, "[a] variance between the offense alleged in the indictment and the evidence presented at trial *is not always fatal*." *Id.* (emphasis added). Thus, "[i]t is only 'where the evidence tends to show the commission of an offense not charged in the indictment [that] there is a fatal variance between the allegations and the proof requiring dismissal.' " *Id.* (citing *State v. Poole*, 154 N.C. App. 419, 423, 572 S.E.2d 433, 436 (2002) (quoting *State v. Williams*, 303 N.C. 507, 510, 279 S.E.2d 592, 594 (1981)). "Accordingly, the defendant must show a variance with respect to an essential element of the offense." *Id.*

"The crime of larceny requires the 'taking by trespass and carrying away by any person of the goods or personal property of another, without the latter's consent and with the felonious intent perma-

nently to deprive the owner of his property and to convert it to the taker's own use.' " *State v. Friend*, 164 N.C. App. 430, 438, 596 S.E.2d 275, 281-82 (2004) (quoting *State v. Boykin*, 78 N.C. App. 572, 576, 337 S.E.2d 678, 681 (1985)); *State v. Moore*, 46 N.C. App. 259, 261, 264 S.E.2d 899, 900 (1980). Further, "[w]hen the property has a value of more than one thousand dollars ($1,000), the larceny is a Class H felony. N.C. Gen. Stat. § 14-72(a) [(2005)]." *State v. Barbour*, 153 N.C. App. 500, 502, 570 S.E.2d 126, 127 (2002). Importantly, "[e]very larceny includes a trespass; and if there be no trespass in taking the goods, there can be no felony committed in carrying them away." *State v. Webb*, 87 N.C. 558, 559 (1882).

In the instant case and in alignment with *State v. Bailey*, 25 N.C. App. 412, 213 S.E.2d 400 (1975), the defendant here did not trespass and thus did not commit felonious larceny. *Bailey* involved a defendant who rented a mobile home including the inside furnishings. *Bailey*, 25 N.C. App. at 413, 213 S.E.2d at 400. The furnishings consisted of "a mattress and box springs . . . a couch, chair and three tables in the living room [] and a dinette set . . . [with] a table and four chairs in the kitchen area." *Id.* The defendant decided to move and "c[a]me out of [the] trailer . . . carrying . . . box springs [and a] mattress . . . a living room suite, a dining room suite, and tables." *Id.* The defendant was found guilty of misdemeanor larceny. *Id.* 25 N.C. App. at 414, 213 S.E.2d at 401. This Court framed the issue in *Bailey* as "whether defendant was in lawful possession of the furniture at the time it was allegedly taken and carried away by him." *Id.* 25 N.C. App. at 415. This Court reasoned "[i]f he was in lawful possession then there was no trespass in the taking and, hence, no larceny at common law." *Id.* 213 S.E.2d at 401-02. This Court determined the defendant was in lawful possession of the furnishings and reversed his conviction. *Id.* 25 N.C. App. at 416, 213 S.E.2d at 402.

Similarly, here the defendant was in lawful possession of the real property at 5226 Shields Road where the victim buried her money. The defendant had a valid lease to rent not only the mobile home, but also the property upon which the mobile home was located. Defendant's leasehold entitled her to lawful possession of the real property and consequently, the money the victim buried in the real property. In *Bailey*, proof the defendant lawfully possessed the property in question and thus did not engage in a trespassory taking existed in that "the furniture was in the trailer for [his] use and enjoyment, and he had *complete access as well as control over it by virtue of his tenancy* even though title remained in the landlord."

Id. (emphasis added). In the case *sub judice*, the defendant, pursuant to a valid leasehold, was entitled to lawful possession of both the mobile home and the real property. Moreover, she had access and control over the real property by virtue of her leasehold, including the money buried by the victim. Since defendant did not engage in a trespassory taking, an essential element of larceny is missing. Thus, a fatal variance exists between the indictment and the evidence presented at trial.

As noted by defendant, upon the facts presented in this case, "the crime [she] may have committed" (defendant's brief, p.15) would be conversion by a lessee. *See* N.C. Gen. Stat. § 14-168.1 (2005) ("[e]very person entrusted with any property as . . . lessee . . . who fraudulently converts the same, or the proceeds thereof, to his own use, or secretes it with a fraudulent intent to convert it to his own use, shall be guilty of a Class 1 misdemeanor" unless the value of the property converted exceeds $400.00 resulting in a "Class H felony.")

Reversed.

Judges McGEE and GEER concur.

BERNADETTE M. ROSENSTADT, TRUSTEE OF THE ROSENSTADT FAMILY TRUST, AND, ELAINE M. LEUSCHNER, PLAINTIFFS v. QUEENS TOWERS HOMEOWNERS' ASSOCIATION, INC., A NORTH CAROLINA NON-PROFIT CORPORATION, RANDY GROVES AND ROBERTA HAYES, DEFENDANTS

No. COA05-996

(Filed 18 April 2006)

1. Judges— clarification of order—not improper modification

A second superior court judge did not improperly modify or overrule the order of another superior court judge granting plaintiffs access to review the financial records of defendant homeowners association where the earlier order did not specify where the records could be examined or if copies of the records would be sufficient to comply with the order, and the second judge simply clarified how defendants were to make the records available to plaintiff.

2. Costs— attorney fees—failure to make findings of fact or conclusions of law—abuse of discretion standard

The trial court did not abuse its discretion in an action seeking access to review defendant homeowners association's financial records by denying plaintiffs' claim for attorney fees without making findings of fact or conclusions of law with respect to that claim, because the trial court's decision was not unsupported by reason. N.C.G.S. 47C-4-117.

3. Appeal and Error— notice of appeal—timeliness

Plaintiffs failed to file a timely notice of appeal from the 27 August 2004 order in an action seeking access to review defendant homeowners association's financial records, and plaintiffs' appeal is dismissed, because: (1) plaintiffs did not file notice until more than thirty days after entry of judgment for the 27 August 2004 order; (2) contrary to plaintiffs' contention, the 27 August 2004 order was not an interlocutory order since it resolved all issues in the complaint and counterclaim; and (3) an appeal must be dismissed if the jurisdictional requirements of N.C. R. App. P. 3 are not met.

Appeal by Plaintiffs from order entered 27 August 2004 by Judge Richard D. Boner and order entered 23 March 2005 by Judge Robert P. Johnston in Superior Court, Mecklenburg County. Heard in the Court of Appeals 6 March 2006.

Davies & Grist, LLP, by Kenneth T. Davies, for plaintiff-appellants.

Sellers, Hinshaw, Ayers, Dortch & Lyons, P.A., by Michelle Price Massingale & Timothy G. Sellers, for defendant-appellees.

WYNN, Judge.

"[O]rdinarily one judge may not modify, overrule, or change the judgment of another Superior Court judge previously made in the same action." *State v. Woolridge*, 357 N.C. 544, 549, 592 S.E.2d 191, 194 (2003) (citation omitted). In this appeal, Plaintiffs argue that Superior Court Judge Robert P. Johnston improperly modified an earlier order of Superior Court Judge Richard D. Boner. Because Judge Johnston's order clarified rather than changed the judgment of Judge Boner's previous order, we affirm Judge Johnston's order.

On 21 July 2003, Plaintiffs Bernadette Rosenstadt and Elaine M. Leuschner brought an action against Defendants Queens Towers Homeowners' Association, Inc., Randy Groves, and Roberta Hayes seeking the right to review Defendants' financial records, a declaratory judgment that they have the right to attend board meetings and a declaratory judgment that non-owners cannot be on association committees. Defendants filed an answer and counterclaim alleging conversion of records and breach of fiduciary duty.

On 27 August 2004, Superior Court Judge Richard D. Boner granted summary judgment in favor of Plaintiffs, allowing them to examine Defendants' financial records but denied Plaintiffs' requests for declaratory judgment. Judge Boner also granted Defendants' request that Plaintiffs return all records but denied their motion to dismiss the individual Defendants.

On 13 December 2004, Plaintiffs filed a Motion for Contempt, which included a request for attorneys' fees. On 13 January 2005, Defendants filed a "Motion for Protective Order and Request for Clarification of August 27, 2004 Order."

On 23 March 2005, Superior Court Judge Robert P. Johnston entered an order denying Plaintiffs' request for attorneys fees, denying Plaintiffs' Motion for Contempt, granting Defendants' Motion for Protective Order and clarifying the previous 27 August 2004 Order. Plaintiffs appeal from the 27 August 2004 and 23 March 2005 orders.

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[1] We first address Plaintiffs' argument that Judge Johnston erred in modifying the 27 August 2004 order as one superior court judge may not modify the order of another superior court judge. We disagree.

"The power of one judge of the superior court is equal to and coordinate with that of another[.]" *Michigan Nat'l Bank v. Hanner*, 268 N.C. 668, 670, 151 S.E.2d 579, 580 (1966).

> Accordingly, it is well established in our jurisprudence 'that no appeal lies from one Superior Court judge to another; that one Superior Court judge may not correct another's errors of law; and that ordinarily one judge may not modify, overrule, or change the judgment of another Superior Court judge previously made in the same action.'

Woolridge, 357 N.C. at 549, 592 S.E.2d at 194 (citation omitted). The purpose behind this rule was stated by our Supreme Court in *Woolridge*:

> The reason one superior court judge is prohibited from reconsidering the decision of another has remained consistent for over one-hundred years. When one party "waits for another judge to come around and [takes its] chances with him," and the second judge overrules the first, an " 'unseemly conflict' " is created. Given this Court's intolerance for the impropriety referred to as "judge shopping" and its promotion of collegiality between judges of concurrent jurisdiction, this " 'unseemly conflict' . . . will not be tolerated."

Id. at 550, 592 S.E.2d at 194 (internal citations omitted).

In this case, Judge Johnston neither overruled nor modified Judge Boner's 27 August 2004 order; instead, he simply clarified how Defendants were "to make such records available to the Plaintiffs." The earlier order by Judge Boner did not specify, for future requests to examine records, where the records could be examined or if copies of the records would be sufficient to comply with the order. Because the parties could not come to an understanding themselves, Judge Johnston's 23 March 2005 order clarified how Defendants would make records available to Plaintiffs. This was not "judge shopping" by Defendants; rather, it was a request by Defendants for clarification of a previous order after the parties could not agree. Accordingly, we reject this assignment of error.

[2] Next, we consider Plaintiffs' argument that Judge Johnston abused his discretion in denying their claim for attorneys' fees without making any findings of fact or conclusions of law with respect to that claim.

Section 47C-4-117 of the North Carolina General Statutes states that if a party violates provisions of Chapter 47C, then "[t]he court *may* award reasonable attorney's fees to the prevailing party." N.C. Gen. Stat. § 47C-4-117 (2005) (emphasis added). It is left to the sound discretion of the trial court whether attorney fees will be granted. To show an abuse of discretion, Plaintiffs must prove that the trial court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision. *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988). As we find that the trial court's decision was not unsupported by reason, we hold that the trial court did not abuse its discretion in denying Plaintiffs' request for attorney fees.

[3] Finally, regarding Plaintiffs' appeal from the 27 August 2004 order, we must hold that Plaintiffs did not timely file a Notice of

Appeal from it. Rule 3 of the North Carolina Rules of Appellate Procedure requires that: "In civil actions and special proceedings, a party must file and serve a notice of appeal: (1) within 30 days after entry of judgment . . . ." N.C. R. App. P. 3(c). Plaintiffs did not file Notice of Appeal until 4 April 2005, more than thirty days after entry of judgment for the 27 August 2004 order. However, Plaintiffs state in their statement of grounds for appellate review that the 27 August 2004 order was interlocutory and not immediately appealable. But since the 27 August 2004 order resolved all issues in the complaint and counterclaim, the order was final and immediately appealable. *Veazey v. City of Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950) ("A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court.").

Rule 3 is jurisdictional, and if the requirements of this rule are not complied with, the appeal must be dismissed. *Sillery v. Sillery*, 168 N.C. App. 231, 234, 606 S.E.2d 749, 751 (2005) (notice of appeal was not filed until after the time for filing had expired); *Von Ramm v. Von Ramm*, 99 N.C. App. 153, 156, 392 S.E.2d 422, 424 (1990) (notice of appeal from denial of a motion to set aside a judgment which does not also specifically appeal the underlying judgment does not properly present the underlying judgment for review). Accordingly, Plaintiffs' assignments of error and related arguments assigning error to the 27 August 2004 order must be dismissed.

Affirmed in part; Dismissed in part.

Chief Judge MARTIN and Judge STEPHENS concur.

MARTHA L. CARSON, PLAINTIFF v. EDWARD CARSON, DEFENDANT

No. COA05-857

(Filed 18 April 2006)

Appeal and Error— appellate rules violations—failure to file properly settled record

Defendant husband's appeal from an equitable distribution judgment and alimony order, an order for attorney fees and costs, and a qualified domestic relations order all filed on 24 February

2005 is dismissed for failure to file a properly settled record on appeal, because: (1) defendant's request to the trial court to settle the record on appeal was improper when a party may only request that the trial court settle the record on appeal if that party contends that materials proposed for inclusion in the record or for filing therewith were not filed, served, submitted for consideration, admitted, or made the subject of an offer of proof, and none of these contentions were made by either defendant or plaintiff; and (2) in his attempts to settle and file the record on appeal, defendant failed to comply with the requirements of N.C. R. App. P. 11 and has not complied with an order of the Court of Appeals.

Appeal by defendant from a judgment and orders entered 24 February 2005 by Judge Craig Croom in Wake County District Court. Heard in the Court of Appeals 15 March 2006.

Nicholls & Crampton, P.A., by Nicholas J. Dombalis, II, for plaintiff-appellee.

Edward Carson, pro se, defendant-appellant.

BRYANT, Judge.

Edward Carson (defendant) appeals from an Equitable Distribution Judgment and Alimony Order, an Order for Attorney Fees and Costs, and a Qualified Domestic Relations Order, all filed on 24 February 2005. The Qualified Domestic Relations Order was subsequently amended by the trial court on 3 March 2005. For the following reasons, we dismiss this appeal.

Facts and Procedural History

Plaintiff and defendant were married on 2 February 1962 and separated on 3 January 2003. On 24 March 2003, plaintiff filed a verified Complaint seeking equitable distribution of marital property and debts; an interim distribution of defendant's monthly pension benefits and rental income received from a leased house owned as marital property; a temporary restraining order and injunction enjoining defendant from wasting or disposing of any marital assets; alimony and postseparation support; and attorney's fees. On 2 April 2003, defendant filed a Motion, Answer and Counterclaim seeking a dismissal of plaintiff's claims for an unequal division of the marital property and for a temporary restraining order; denying plain-

tiff's allegations; and seeking a divorce from bed and board from plaintiff, and an unequal division of the martial property in his favor. The trial court entered a Consent Order Granting Injunctive Relief and Interim Distribution of Property on 9 April 2003, and plaintiff was granted an absolute divorce from defendant on 5 March 2004.

After a hearing before the Honorable Craig Croom on 10 January 2005 the trial court entered: (1) an order awarding attorney's fees and costs to plaintiff; (2) an equitable distribution judgment and order awarding plaintiff alimony and postseparation support; and (3) a qualified domestic relations order (amended on 3 March 2005) awarding plaintiff fifty-percent of defendant's monthly pension benefit. Defendant appeals the entry of these orders and judgment.

Defendant served plaintiff with a proposed record on appeal on 9 May 2005. Plaintiff filed objections to the proposed record on 3 June 2005. Defendant assented to some of plaintiff's objections and filed a request with the trial court for the judicial settlement of the record on appeal. No hearing was set concerning the settlement of the record on appeal and defendant subsequently filed a record on appeal with this Court on 5 July 2005.

On 16 September 2005, plaintiff filed a motion to dismiss this appeal because plaintiff had not consented to the record on appeal filed by defendant and therefore defendant had not filed a settled record on appeal. By order of this Court, entered 4 October 2005, the record on appeal was stricken and defendant was ordered to file a substitute record on appeal on or before 11 October 2005, "which is in accordance with plaintiff-appellee's objection to the original proposed record on appeal and which only includes the assignments of error found in the original proposed record on appeal."

On 10 October 2005, defendant filed with this Court a substitute record on appeal. Defendant did not serve plaintiff with a copy of the substitute record on appeal and the substitute record on appeal is not in compliance with the Order of this Court entered 4 October 2005. On 25 October 2005, plaintiff filed a motion to dismiss this appeal and defendant filed a response to plaintiff's motion on 31 October 2005. In his response, defendant "agrees that there is no settled Record on Appeal and that the Substitute Record on Appeal is not Proper."

"Appellate review is based solely upon the record on appeal; it is the duty of the appellant[] to see that the record is complete." *Collins v. Talley*, 146 N.C. App. 600, 603, 553 S.E.2d 101, 102 (2001) (citations

and quotations omitted). Under Rule 11 of the North Carolina Rules of Appellate Procedure, the first method of settling the record on appeal is by agreement of the parties. In the instant case, the record on appeal was not settled by agreement and defendant was required to and did serve a copy of the proposed record on appeal on plaintiff. Plaintiff then served defendant with a list of objections and proposed amendments to the proposed record on appeal. Defendant agreed to all but one of plaintiff's proposed amendments and the agreed upon amendments then became a part of the record on appeal. N.C. R. App. P. 11(c). The one amendment defendant did not agree to was plaintiff's request to exclude the Affidavit for Attorney Fees and the Order for Attorney Fees. These two documents should then have been "filed with the record on appeal [as exhibits], along with any verbatim transcripts, narrations of proceedings, documentary exhibits, and other items that are filed pursuant to Rule 9(c) or 9(d)[.]" *Id.*

Prior to filing a record on appeal with this Court, defendant requested the trial court to settle the record. Defendant's request was improper because a party may only request the trial court "settle the record on appeal" if that party "contends that materials proposed for inclusion in the record or for filing therewith . . . were not filed, served, submitted for consideration, admitted, or made the subject of an offer of proof . . . ." *Id.* None of these contentions were made by either defendant or plaintiff and thus review by the trial court would have been improper. Further, under Rule 11(c), the trial court's functions in settling the record on appeal are:

> 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.

N.C. R. App. P. 11(c) (as amended 6 May 2004). In the instant case, plaintiff's objection to the inclusion of the Affidavit for Attorney Fees and the Order for Attorney Fees in the record on appeal was based on her belief that defendant did not appeal from the Order for Attorney Fees. Therefore, whether these documents should have been included in the record on appeal was not an issue to be determined by the trial court.[1]

1. Prior to the 6 May 2004 amendments to Rule 11, the trial court had extensive authority to settle the record on appeal when requested by the parties.

In response to plaintiff's first motion to dismiss this appeal, this Court struck the filed record on appeal and ordered defendant to "file and serve a substitute record on appeal with this Court on or before 11 October 2005 which is in accordance with plaintiff-appellee's objections to the original proposed record on appeal . . . ." The substitute record on appeal filed by defendant on 10 October 2005 does not conform with this Court's Order in the following manner: (1) it does not include four documents (plaintiff's exhibits 2, 14, and 24; and a certificate of service filed by plaintiff on 8 March 2005) defendant agreed to include in the record on appeal; (2) it includes a document (plaintiff's exhibit 12) not found in the original proposed record on appeal or in the record on appeal filed with this Court on 7 July 2005; (3) it includes a document (the Qualified Domestic Relations Order) defendant agreed to remove from the original proposed record on appeal; and (4) it includes the Affidavit for Attorney Fees and the Order for Attorney Fees which should instead have been filed as exhibits to the record on appeal.

In his attempts to settle and file the record on appeal in this case defendant has failed to comply with the requirements of Rule 11 of the North Carolina Rules of Appellate Procedure and has not complied with an order of this Court. *See State v. Wooten*, 6 N.C. App. 628, 170 S.E.2d 508 (1969) (dismissing appeal for failure to comply with the rules and orders of this Court); *McLeod v. Faust*, 92 N.C. App. 370, 374 S.E.2d 417 (1988) (dismissing appeal for failure to file a properly settled record on appeal).

Appeal dismissed.

Judge HUNTER and Judge HUDSON concur.

STATE OF NORTH CAROLINA v. PRINCE V. ALEXANDER

No. COA05-971

(Filed 18 April 2006)

1. Evidence— hearsay—conversations leading to lineup—not introduced for truth of guilt

An officer's testimony in an armed robbery prosecution about conversations with others was not hearsay because it was introduced to explain defendant's inclusion in a photographic

lineup, rather than for the truth of defendant's guilt. There was no plain error.

2. Appeal and Error— preservation of issues—right to confrontation—no objection at trial

Defendant did not preserve for appeal a Confrontation Clause issue where he did not object at trial. Moreover, the testimony (about conversations which led to a photographic lineup) was not hearsay and raised no Confrontation Clause concerns.

3. Constitutional Law— failure to object—effective assistance of counsel

Defense counsel's failure to object to testimony which was not hearsay and did not violate defendant's confrontation rights was not ineffective assistance of counsel.

Appeal by defendant from judgment entered 8 March 2005 by Judge Richard D. Boner in Mecklenburg County Superior Court. Heard in the Court of Appeals 8 March 2006.

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

Public Defender Isabel Scott Day, by Assistant Public Defender Julie Ramseur Lewis, for defendant-appellant.

HUNTER, Judge.

Prince V. Alexander ("defendant") appeals from judgment of the trial court entered consistent with a jury verdict finding defendant guilty of robbery with a dangerous weapon. Defendant contends the trial court committed plain error in admitting hearsay evidence, and that he was denied effective assistance of counsel when his attorney failed to object to such evidence. For the reasons stated herein, we find no error in the judgment of the trial court.

On the morning of 23 September 2002, Sylvia Gyimah ("Gyimah") was working as a cashier at Carlton's 76 Service, a gasoline station located in Charlotte, North Carolina. Gyimah was alone in the store when defendant entered. Gyimah testified she recognized defendant because he was a customer and she had observed him outside the station spending time with friends. Gyimah stated that defendant was "[n]ormally . . . around the store." Gyimah did not know defendant's name, however, at that time. When defendant entered the store,

Gyimah greeted him, but he did not reply. As defendant passed her, he touched Gyimah's shoulder and she turned in response. When she turned, defendant pointed a gun at Gyimah's face and told her "to give him the money, or else he was going to shoot [her]." Gyimah opened the cash register and store safe, and defendant removed all of the cash, approximately $175.00. Defendant then left the store. Defendant's fingerprints were found on the interior glass of the gasoline station's front door.

Officer Chris Dozier ("Officer Dozier") of the Charlotte-Mecklenburg Police Department testified that, during his investigation of the robbery, one of the detectives in his unit informed him of an individual named Norbert Plaud ("Plaud") who claimed to have information regarding the crime. Officer Dozier met with Plaud, who gave him a partial name of "Vaughntray" and a description. Using this information, Officer Dozier "looked up the photograph of . . . the individual who [he] thought it may be based on his description and the name." "Vaughntray" is defendant's middle name. Officer Dozier presented Plaud with a photograph of defendant. After speaking with Plaud, Officer Dozier "[a]t this point [had] a suspect in mind [and] created a photograph lineup in order to show the victim." When shown the photographic lineup of six faces, Gyimah "almost immediate[ly]" selected defendant's photograph as the person who robbed the gasoline station.

Defendant testified that he lived near the gasoline station and was "freely in and out" of the store "basically every day." Defendant stated that he recognized Gyimah, having seen her at the gasoline station "many times." Defendant could not remember his whereabouts on the day of the robbery, but denied robbing the store.

Upon consideration of the evidence, the jury found defendant guilty of robbery with a dangerous weapon. The trial court sentenced defendant to seventy-two to ninety-six months imprisonment. Defendant appeals.

[1] In related assignments of error, defendant argues the trial court committed plain error in admitting the testimony of Officer Dozier regarding information allegedly supplied by Plaud. Defendant also assigns plain error to Officer Dozier's testimony regarding information given to him by one of the detectives in his unit. Defendant contends the evidence was inadmissible hearsay and violated his confrontation rights under the Sixth Amendment to the United States Constitution and Article I, Section 23 of the North Carolina

Constitution. Defendant concedes that he did not object to the testimony, and that this Court's review is therefore limited to that of plain error.

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c) (2005). "Out-of-court statements that are offered for purposes other than to prove the truth of the matter asserted are not considered hearsay." *State v. Gainey*, 355 N.C. 73, 87, 558 S.E.2d 463, 473 (2002). "Specifically, statements are not hearsay if they are made to explain the subsequent conduct of the person to whom the statement was directed." *Id.*

In the present case, Officer Dozier testified he was contacted by one of the detectives in his unit, who told him there was an individual who claimed to have "some information that may be important to one of [his] cases." Officer Dozier then spoke with Plaud. As a result of speaking with Plaud, he suspected defendant's involvement in the crime and therefore included his photograph in the lineup he presented to Gyimah.

We conclude Officer Dozier's testimony regarding his interaction with the detective and Plaud was nonhearsay and proper to explain his subsequent actions. It was not admitted to prove that the information Plaud offered was "important" or that someone named "Vaughntray" committed the crime. Rather, the testimony explained how Officer Dozier had received information leading him to form a reasonable suspicion that defendant was involved in the robbery, which in turn justified his inclusion of defendant's photograph in the lineup. *See id.* (holding that testimony by the witness regarding information he received from an anonymous informant was proper nonhearsay evidence admitted to explain his subsequent actions); *State v. Gray*, 55 N.C. App. 568, 573, 286 S.E.2d 357, 361 (1982) (holding that testimony by a police officer regarding information supplied to him by a fellow officer was not hearsay, in that it was not admitted to prove the truth of the matter asserted, but rather that the officer "had received information which would justify his forming a reasonable suspicion that [the] defendant was involved in criminal activity").

[2] Defendant also asserts that Officer Dozier's testimony violated his constitutional right to confrontation. This argument, however, is

not properly before this Court, as defendant did not object to this testimony. "Constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal." *Gainey*, 355 N.C. at 87, 558 S.E.2d at 473. Even if defendant had properly objected, the admission of nonhearsay raises no Confrontation Clause concerns. *See id.* Accordingly, we overrule these assignments of error.

[3] By further assignments of error, defendant argues that his counsel's failure to object to Officer Dozier's testimony constituted ineffective assistance of counsel. We have already determined, however, that the testimony was nonhearsay evidence properly admitted by the trial court, and that its admission did not constitute a violation of defendant's confrontation rights. As such, defense counsel's failure to object to the testimony cannot constitute the basis of an ineffective assistance claim. These assignments of error are overruled.

In conclusion, we find no error in the judgment of the trial court.

No error.

Judges HUDSON and BRYANT concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 18 APRIL 2006

ADAMS v. PULLIAM No. 05-1311	Forsyth (05CVS3707)	Affirmed
BIO-MEDICAL APPLICATIONS OF N.C., INC. v. N.C. DEP'T OF HEALTH & HUMAN SERVS. No. 05-820	Dept. of Health & Human Servs. (04DHR516)	Affirmed
CANTY v. HAYES MEM'L UNITED HOLY CHURCH, INC. No. 05-1054	Guilford (04CVS9633)	Appeal dismissed
DEVONE v. DEVONE No. 05-967	Durham (04CVS342)	Affirmed
GLOVER CONSTR. CO. v. N.C. DEP'T OF TRANSP. No. 05-525	Perquimans (02CVS118)	Affirmed
HEAD v. STATE No. 05-1015	Rutherford (04CVS1395)	Dismissed
IN RE A.D.P. No. 05-786	Robeson (04J212)	Vacated and remanded
IN RE B.C. No. 05-856	Mecklenburg (04J886)	Affirmed
IN RE C.W. & L.W. No. 05-929	Harnett (03J85) (03J86)	Affirmed
IN RE D.G.D. No. 05-1245	Forsyth (02J243)	Affirmed
IN RE J.D.R. & C.R.R. No. 05-1203	McDowell (04J109) (04J110)	Affirmed
IN RE K.J. No. 05-1192	Guilford (02J762)	Affirmed
IN RE K.M. No. 05-1284	Johnston (05J17)	Dismissed
IN RE M.E. No. 05-1129	Edgecombe (99J172)	Affirmed in Part, Vacated and Remanded in Part
JOHNSON v. HOME BUILDING CTR. No. 05-827	Harnett (03CVD2360)	Affirmed

JOINT REDEVELOPMENT COMM'N v. JACKSON-HEARD No. 05-1146	Pasquotank (00CVS641)	Dismissed
KNIGHT v. ABBOTT LABS. No. 05-1061	Ind. Comm. (I.C. #431374)	Affirmed in part; remanded to determine attorney's fees
SCHIELER v. CAMPBELL No. 05-797	Montgomery (04CVS17)	Affirmed
SHELBY INS. CO. v. GOODWIN No. 05-1043	Mecklenburg (02CVS10490)	Affirmed
STATE v. ADAMS No. 05-791	Buncombe (03CRS12657) (03CRS59648)	No error
STATE v. BARNES No. 05-930	Pitt (04CRS8482)	No error
STATE v. CHAMBERS No. 05-1247	Randolph (05CRS108)	Reversed and remanded
STATE v. FINCHER No. 05-642	Buncombe (03CRS65156)	Affirmed in part reversed and remanded in part
STATE v. HOWARD No. 05-835	Buncombe (01CRS64343) (01CRS64399) (02CRS12735)	Affirmed
STATE v. KNIGHT No. 05-1310	Edgecombe (03CRS53543)	No error
STATE v. MATTHEWS No. 05-1037	Moore (02CRS54965) (02CRS54968)	No error
STATE v. McPHAUL No. 05-1053	Robeson (00CRS16318) (00CRS16319) (00CRS16322) (01CRS4251) (01CRS4252) (00CRS16323) (00CRS16324) (00CRS16325) (01CRS4949) (01CRS4950)	No error
STATE v. McPHERSON No. 05-1108	Cabarrus (03CRS1003) (04CRS5382)	Affirmed

STATE v. NOLON No. 05-818	Carteret (04CRS51119) (04CRS51120) (04CRS51121)	No error
STATE v. PEMBERTON No. 05-1083	Stanly (03CRS50974)	No error
STATE v. PRUETT No. 05-1077	Cabarrus (03CRS6469)	No error
STATE v. REESE No. 05-558	Gaston (98CRS32925) (98CRS32926) (98CRS32927) (99CRS7184) (99CRS15235)	No error in part, reversed and remanded in part
STATE v. RIDDICK No. 05-652	Davidson (04CRS52906) (04CRS52907)	Affirmed
STATE v. SCOTT No. 05-1144	Buncombe (04CRS53048) (04CRS53049) (04CRS53050) (04CRS53051) (04CRS53052) (04CRS53053) (04CRS53054) (04CRS53055) (04CRS53056) (04CRS53057) (04CRS53058) (04CRS53059) (04CRS53060) (04CRS53061) (04CRS53062) (04CRS53063) (04CRS53064) (04CRS53065) (04CRS53066) (04CRS53067) (04CRS53068) (04CRS53069) (04CRS53070) (04CRS53071) (04CRS53072) (04CRS53073) (04CRS53074)	No error in part; remand for correction of clerical errors
STATE v. TEAGUE No. 05-1172	Watauga (03CRS51242)	Dismissed

STATE v. VERBAL No. 05-1000	Moore (03CRS50551) (03CRS50674)	No error
STATE v. WALKER No. 05-1100	Davidson (01CR6744)	Reversed
TAYLOR v. HENDERSON CTY. PUB. LIBRARY No. 05-536	Ind. Comm. (I.C. #283223)	Affirmed
WALKER v. WALKER No. 05-995	Iredell (01CVD2612)	Vacated and remanded
WEINBRENNER SHOE CO. v. GILLIS No. 05-855	Mecklenburg (03CVS21771)	Affirmed
WRIGHT v. SMITH No. 05-775	Henderson (92CVD881)	Dismissed

MARY LOUISE DIGGS, PLAINTIFF v. NOVANT HEALTH, INC., NOVANT HEALTH TRIAD REGION, L.L.C., FORSYTH MEMORIAL HOSPITAL, INC., ALL D/B/A FORSYTH MEDICAL CENTER, SHEILA CRUMB, JOSEPH MCCONVILLE, M.D., AND PIEDMONT ANESTHESIA & PAIN CONSULTANTS, P.A., DEFENDANTS

No. COA04-1415

(Filed 2 May 2006)

1. Evidence; Witnesses— nurse—qualifications—opinion about medical causation

The trial court erred in a medical malpractice case by granting summary judgment in favor of defendant Forsyth Memorial Hospital, Inc. (FMH), and the case is remanded for further proceedings with respect to the claims based on the acts of the hospital nursing staff, because: (1) plaintiff forecast sufficient evidence that their nurse witness was qualified to testify as an expert under N.C.G.S. § 8C-1, Rule 702(b)(2) when the deposition offered by defendants concerning the witness does not necessarily contradict the affidavit offered by plaintiff, the witness's affidavit stated that floor nurses are usually registered nurses, and the difference between the witness's work experiences and the work experience of the hospital nursing staff goes to the weight but not the admissibility of the witness's evidence; (2) plaintiff's expert was qualified to give an opinion about medical causation even though she was a nurse and not a licensed physician; and (3) FMH employed the nurses.

2. Medical Malpractice— acts of nurses—hospital owners not liable

The trial court did not err in a medical malpractice case by entering summary judgment in favor of defendants Novant Health, Inc. and Novant Health Triad Region, L.L.C., the owners of Forsyth Memorial Hospital, with respect to claims based on the acts of the hospital nursing staff, because: (1) these defendants did not employ the hospital nursing staff; and (2) plaintiffs did not offer evidence that the hospital loaned the employees to the owners or that the owners had in fact supervised and controlled the pertinent individuals.

3. Medical Malpractice— anesthesiology services—apparent agency

The trial court erred in a medical malpractice case by entering summary judgment in favor of defendant Forsyth Memorial

Hospital (FMH) but did not err by entering summary judgment in favor of defendants Novant Health Triad Region, L.L.C. (NHTR) and Novant Health, Inc. (NHI), the owners of FMH, with respect to the claims of negligence of the anesthesiology defendants based on apparent agency, because: (1) in regard to FMH, plaintiff submitted sufficient evidence of apparent authority when a jury could decide based on the consent form that plaintiff was, through the form, requesting anesthesia services from FMH and that, given the distinction made between plaintiff's personal physician and the unnamed anesthesiologist, plaintiff was accepting those services in the reasonable belief that the services would be provided by the hospital and its employees; and (2) in regard to NHTR and NHI, the record contains no evidence they, as opposed to the hospital, held themselves out as providing anesthesia services or that they contracted to supply the services.

4. Discovery— documents—attorney-client privilege—work product doctrine

The trial court erred by denying plaintiff's motion to compel defendant hospital to produce documents in its risk management file pertaining to the perforation of plaintiff's esophagus during surgery on the ground that the documents were protected under N.C.G.S. 1A-1, Rules 26(b)(3) by the attorney-client privilege and the work product doctrine where the record is insufficient to show whether the documents were prepared in the ordinary course of business pursuant to hospital policy or were prepared in anticipation of litigation, and this cause is remanded for findings as to the author of each document, the date each document was prepared, the purpose for which each document was prepared, and the recipients of each document.

5. Discovery— statistical reports—motion to compel

The trial court did not err in a medical malpractice case by denying plaintiff's motion to compel production of all statistical reports for Forsyth Medical Center for infection control for 1996-2000, because: (1) although plaintiff contends the documents would be admissible under N.C.G.S. § 8C-1, Rule 404(b), plaintiff does not explain to what issue in this case a pattern, practice, plan, or modus operandi would be relevant; and (2) in the absence of such a showing, the Court of Appeals cannot conclude the trial court's ruling denying this request was manifestly unreasonable.

Appeal by plaintiff from order entered 19 April 2004 by Judge Michael E. Helms in Forsyth County Superior Court. Heard in the Court of Appeals 22 August 2005.

Kennedy, Kennedy, Kennedy & Kennedy, L.L.P., by Harvey L. Kennedy, Harold L. Kennedy, III, and Annie Brown Kennedy; and Law Offices of Willie M. Kennedy, by Willie M. Kennedy, for plaintiff-appellant.

Bennett & Guthrie, P.L.L.C., by Richard V. Bennett, Roberta B. King, and Joshua H. Bennett, for defendants-appellees.

Sharpless & Stavola, P.A., by Joseph P. Booth, III, for Joseph McConville, M.D., Sheila Crumb, and Piedmont Anesthesia & Pain Consultants, P.A., amicus curiae.

GEER, Judge.

This appeal results from a medical malpractice action arising out of gall bladder surgery performed on plaintiff Mary Louise Diggs at the Forsyth Medical Center. Plaintiff's complaint alleges that defendants Forsyth Memorial Hospital, Inc., Novant Health, Inc., and Novant Health Triad Region, L.L.C. (collectively the "hospital defendants") are vicariously liable for the negligence of (1) the hospital nursing staff and (2) the team assigned to administer anesthesiology to plaintiff during her gall bladder surgery. Plaintiff has appealed from the trial court's order granting summary judgment in favor of the hospital defendants.

Based upon our review of the record, we hold that plaintiff has failed to establish a basis for holding Novant Health, Inc. ("NHI") or Novant Health Triad Region, L.L.C. ("NHTR") liable and, therefore, affirm the entry of summary judgment in favor of those two defendants. With respect to Forsyth Memorial Hospital, Inc. ("FMH"), however, we reverse.

In arguing that it is entitled to judgment as to plaintiff's claims based on the negligence of the hospital's nursing staff, FMH has only challenged the competency of the testimony of plaintiff's nursing expert. Since we hold that the testimony was admissible under N.C.R. Evid. 702 and *State v. Tyler*, 346 N.C. 187, 204, 485 S.E.2d 599, 608, *cert. denied*, 522 U.S. 1001, 139 L. Ed. 2d 411, 118 S. Ct. 571 (1997), the trial court erred in granting summary judgment on plaintiff's claims based on the negligence of the nursing staff. With respect to the anesthesiology team, FMH has argued that it could not be held vicariously

liable because the individuals responsible for the anesthesia were independent contractors. Although we agree with FMH that plaintiff has failed to present sufficient evidence of actual agency, the record reveals that genuine issues of material fact exist regarding the apparent agency of the anesthesiology team. Accordingly, we hold that the trial court also erred in granting summary judgment to FMH as to the claims based on the negligence of the anesthesiology team.

Factual and Procedural History

In September 1999, plaintiff, who was in her early eighties, was diagnosed by her gastroenterologist, Dr. Gary Poleynard, with common duct stones and complications due to gall stone disease. Dr. Poleynard recommended surgery and referred plaintiff to defendant Dr. Ismael Goco, a board-certified general surgeon. After examining plaintiff at his office, Dr. Goco concurred with Dr. Poleynard's diagnosis and his recommendation of surgery.

Plaintiff chose to have Dr. Goco perform the gall bladder surgery. Dr. Goco had hospital privileges at two hospitals in Winston-Salem: defendant Forsyth Medical Center ("FMC") and Medical Park Hospital, Inc. On 12 October 1999, plaintiff was admitted to FMC. FMC is operated by defendant FMH. NHTR owns FMH and is in turn owned by NHI.

Plaintiff's gall bladder surgery required general anesthesia. Piedmont Anesthesia & Pain Consultants, P.A. ("Piedmont") had a contract with FMH that granted Piedmont the exclusive right to provide anesthesia services at FMC. Piedmont employees Dr. Joseph McConville and nurse Sheila Crumb were responsible for administering anesthesia to plaintiff through an induction and intubation process. Ms. Crumb performed the intubation, which involved inserting a tube into plaintiff's trachea, under the supervision of Dr. McConville. Ms. Crumb made three attempts before successfully completing the intubation. At some point during the attempts, Ms. Crumb perforated plaintiff's esophagus, a fact that was not discovered until many hours after the gall bladder surgery was over. Plaintiff contends that as a result of that perforation, she has suffered severe and permanent injuries.

On 11 October 2002, plaintiff filed suit against not only the hospital defendants, but also Ms. Crumb, Dr. McConville, and Piedmont (collectively "the anesthesiology defendants"). The complaint alleged that the anesthesiology defendants were individually liable for their

negligence in administering the anesthesia and that the hospital defendants were vicariously liable for the anesthesiology defendants' negligence, as well as the negligence of the hospital floor nurses who, following plaintiff's surgery, failed to immediately notice the perforation.[1]

On 5 March 2004, plaintiff moved to compel the hospital defendants to respond to certain interrogatories and requests for production of documents. On 15 April 2004, the trial court entered an order allowing this motion in part and denying this motion in part. Plaintiff has appealed this order to the extent it refused to order production of certain documents.

On 22 March 2004, the hospital defendants moved for summary judgment. On 19 April 2004, the trial court granted that motion. Since plaintiff voluntarily dismissed her claims against the anesthesiology defendants on 16 April 2004, plaintiff's appeal of this summary judgment order is properly before this Court as an appeal from a final judgment.

Summary Judgment Order

This Court will uphold a trial court's grant of summary judgment "if considering the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, there is no genuine issue of material fact and a party is entitled to judgment as a matter of law." *Moore v. Coachmen Indus., Inc.*, 129 N.C. App. 389, 393-94, 499 S.E.2d 772, 775 (1998). The moving parties—in this case, the hospital defendants—bear the initial burden of showing the lack of any triable issue of fact and the propriety of summary judgment. *Id.* at 394, 499 S.E.2d at 775.

Once the moving party has met its initial burden, in order to survive summary judgment, the nonmoving party—here, plaintiff—must produce " 'a forecast of evidence demonstrating that the [nonmoving party] will be able to make out at least a prima facie case at trial.' " *Id.* at 394, 499 S.E.2d at 775 (quoting *Collingwood v. Gen. Elec. Real Estate Equities, Inc.*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989)). On appeal, we view the evidence in the light most favorable to the nonmoving party and decide whether summary judgment was appropriate under a *de novo* standard of review. *Falk Integrated Techs., Inc. v. Stack*, 132 N.C. App. 807, 809, 513 S.E.2d 572, 574 (1999).

1. On 14 October 2002, plaintiff amended her original complaint to include Dr. Goco and his practice, Goco Surgical Associates, P.L.L.C., as additional defendants. Plaintiff later voluntarily dismissed those claims.

I. Plaintiff's Claims Based on Negligence of the Nursing Staff

[1] Plaintiff contends that the hospital nurses breached their duty of care by failing to notify plaintiff's anesthesiologist promptly when they observed plaintiff's troubled breathing and sharp throat pain following her surgery. According to plaintiff, had the nurses done so, the perforation of her esophagus would have been identified earlier and lessened the seriousness of the injuries resulting from that perforation. In support of this claim, plaintiff relies upon the expert testimony of a nurse, Rosalyn Marie Harris-Offutt.

Defendants, however, argue that they are entitled to summary judgment because (1) Ms. Harris-Offutt was not qualified to testify as an expert witness under Rule 702(b)(2) of the Rules of Evidence,[2] and (2) Ms. Harris-Offutt, as a nurse, is not qualified to testify regarding medical causation. In opposing a motion for summary judgment in a medical malpractice case, a plaintiff must demonstrate that her expert witness is competent to testify and, in the absence of such a showing, summary judgment is properly granted. *See Weatherford v. Glassman*, 129 N.C. App. 618, 623, 500 S.E.2d 466, 469 (1998) (holding that deposition testimony offered in opposition to a motion for summary judgment in a medical malpractice case must reveal that the witness is competent to testify as to the matters at issue). The question before this Court is, therefore, whether the record reveals that Ms. Harris-Offutt is competent to testify.

A. Rule 702(b)(2) of the Rules of Evidence

Rule 702(b) provides that medical malpractice experts are not qualified to testify unless they are licensed health care providers who meet certain criteria, including the following:

> (2) During the year immediately preceding the date of the occurrence that is the basis for the action, the expert witness must have devoted a majority of his or her professional time to either or both of the following:
>
> a. The active clinical practice of the same health profession in which the party against whom or on whose behalf the testimony is offered, and if that party is a specialist, the active clinical practice of the same specialty or a similar

2. Defendants also contended at oral argument that Nurse Harris-Offutt does not meet the requirements of Rule 702(a). Since, however, defendants did not make this argument in their appellate brief, but rather limited their argument and citation of authority to Rule 702(b)(2), we do not address it.

> specialty which includes within its specialty the performance of the procedure that is the subject of the complaint and have prior experience treating similar patients . . . .

Defendants contend that Ms. Harris-Offutt is unqualified under Rule 702(b) because she had not been active in the clinical practice of nursing in the year preceding plaintiff's injury.

In support of their contention, defendants point to the deposition testimony of Janet Day Berrier, a representative of Thomasville Medical Center where Ms. Harris-Offutt was at one time employed. Ms. Berrier testified that the last date that Ms. Harris-Offutt worked for Thomasville Medical Center as a certified registered nurse anesthetist was 31 December 1986. Plaintiff, on the other hand, filed an affidavit from Ms. Harris-Offutt, stating: "During the year immediately preceding October 12, 1999, I devoted a majority of my professional time to the active clinical practice of nursing as a registered nurse[.]"

Although defendants point to Ms. Harris-Offutt's deposition as showing that she spends her time as a legal consultant rather than as a nurse, Ms. Harris-Offutt also stated in her deposition that she spends part of her time in the clinical practice of nursing and part of her time engaging in legal consulting. Thus, the deposition offered by defendants does not necessarily contradict the affidavit offered by plaintiff.

Defendants further argue that Ms. Harris-Offutt's clinical work is not relevant since she worked as a registered nurse and not as a floor nurse. Ms. Harris-Offutt's affidavit states, however:

> There is no specialty in nursing known as "floor nursing." Floor nurses in hospitals are usually registered nurses. Registered nurses are not limited to the hospital setting, but work in many different settings including nursing homes, the private offices of physicians and the private offices of registered nurses[.]

Defendants offered no expert testimony to the contrary.

Defendants' remaining arguments regarding the differences between Ms. Harris-Offutt's work experiences and the work experience of the hospital nursing staff go to the weight, but not the admissibility, of Ms. Harris-Offutt's evidence. *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 461, 597 S.E.2d 674, 688 (2004) (holding that once an expert has passed Rule 702's threshold of admissibility, "lingering

questions or controversy concerning the quality of the expert's conclusions go to the weight of the testimony rather than its admissibility"). Thus, for purposes of summary judgment, plaintiff has forecast sufficient evidence that Ms. Harris-Offutt is qualified to testify under Rule 702(b)(2).

B. Nurse Expert's Testimony Regarding Medical Causation

Plaintiff and defendants also disagree as to whether Ms. Harris-Offutt is qualified to give an opinion about medical causation because she is a nurse and not a licensed physician. Defendants' position has been rejected by our Supreme Court.

In *State v. Tyler*, 346 N.C. 187, 204, 485 S.E.2d 599, 608 (emphasis added) (internal citations omitted) (quoting *State v. Mitchell*, 283 N.C. 462, 467, 196 S.E.2d 736, 739 (1973)), *cert. denied*, 522 U.S. 1001, 139 L. Ed. 2d 411, 118 S. Ct. 571 (1997), the Supreme Court held:

> "The essential question in determining the admissibility of opinion evidence is whether the witness, through study or experience, has acquired such skill that he was better qualified than the jury to form an opinion on the subject matter to which his testimony applies." The evidence in the present case clearly indicates that [Nurse] Rosenfeld, through both study and experience, was better qualified than the jury to form an opinion on the cause of Fleetwood's death and on the effect of the sedative medication Versed. *Rosenfeld's position as a nurse was merely a factor to be considered by the jury in evaluating the weight and credibility of her testimony.*

See also State v. White, 340 N.C. 264, 294, 457 S.E.2d 841, 858 ("Nurses are qualified to render expert opinions as to the cause of a physical injury even though they are not licensed to diagnose illnesses or prescribe treatment, and there is no basis for any preference of licensed physicians for such medical testimony."), *cert. denied*, 516 U.S. 994, 133 L. Ed. 2d 436, 116 S. Ct. 530 (1995). These decisions are controlling. Ms. Harris-Offutt's testimony as to medical causation cannot be excluded simply because she is not a physician.

In sum, we hold that plaintiff has made the necessary forecast that Ms. Harris-Offutt is qualified to render expert testimony under Rule 702(b)(2) and that prior case law establishes that she may testify regarding medical causation. Since defendants have relied upon no other argument to justify summary judgment in connection with neg-

ligence by the hospital staff nurses, we further hold that the trial court erred in granting summary judgment as to those claims with respect to FMH, which employed the nurses.

C. Liability of NHI and NHTR

[2] Defendants NHI and NHTR, however, argue that the trial court properly dismissed them as defendants because they did not employ the hospital nursing staff. They submitted evidence that NHI is "the sole member" of NHTR, while NHTR is "the sole member" of FMH, which operates FMC. Further, according to defendants' evidence, "[n]either [NHTR] nor [NHI] operate the hospital presently known as Forsyth Medical Center." Specifically, "all of the employees of Forsyth Medical Center . . . are employed by Forsyth Memorial Hospital, Inc." Plaintiff has presented no contrary evidence.

Instead, plaintiff cites *Cahill v. HCA Mgmt. Co.*, 812 F.2d 170 (4th Cir. 1987), in support of her contention that "[b]oth the owners and operators of a hospital can be held liable for the negligence of its employees, servants and agents." In *Cahill*, the district court had entered a directed verdict in favor of a hospital management company when the negligent individual was employed by the hospital and not the management company. The Fourth Circuit reversed the directed verdict because the plaintiff presented evidence that the hospital loaned the employee to the management company and the management company had in fact supervised and controlled the individual. *Id.* at 171. Plaintiff in this case has offered no comparable evidence. Accordingly, the trial court properly entered summary judgment in favor of NHTR and NHI with respect to the claims based on the acts of the hospital nursing staff.

II. Plaintiff's Claims Based on Negligence of the Anesthesiology Defendants

[3] Plaintiff has also asserted claims against the hospital defendants based on the negligence of the anesthesiology defendants, including Dr. McConville, Ms. Crumb, and Piedmont. The hospital defendants contend that the trial court properly granted summary judgment because the anesthesiology defendants were independent contractors and not employees of the hospital. Plaintiff, on the other hand, argues that she has offered sufficient evidence of actual agency, apparent agency, and a non-delegable duty to warrant denial of the motion for summary judgment.

A. Liability Based on Actual Agency

As this Court has held, "[u]nder the doctrine of *respondeat superior*, a hospital is liable for the negligence of a physician or surgeon acting as its agent. There will generally be no vicarious liability on an employer for the negligent acts of an independent contractor." *Hylton v. Koontz*, 138 N.C. App. 629, 635, 532 S.E.2d 252, 257 (2000) (internal citations omitted), *disc. review denied*, 353 N.C. 373, 546 S.E.2d 603 (2001). This Court has established that "[t]he vital test in determining whether an agency relationship exists is to be found in the fact that the employer has or has not retained the right of control or superintendence over the contractor or employee as to details." *Id.* at 636, 532 S.E.2d at 257 (internal quotation marks omitted). Specifically, " 'the principal must have the right to control *both the means and the details of the process* by which the agent is to accomplish his task in order for an agency relationship to exist.' " *Wyatt v. Walt Disney World Co.*, 151 N.C. App. 158, 166, 565 S.E.2d 705, 710 (2002) (emphasis added) (quoting *Williamson v. Petrosakh Joint Stock Co. of the Closed Type*, 952 F. Supp. 495, 498 (S.D. Tex. 1997)). *See also Hoffman v. Moore Reg'l Hosp., Inc.*, 114 N.C. App. 248, 251, 441 S.E.2d 567, 569 (holding that the principal must have "control and supervision over the details of the [agent's] work"), *disc. review denied*, 336 N.C. 605, 447 S.E.2d 391 (1994).

In arguing that an agency relationship existed, plaintiff relies exclusively on two contracts entered into between Piedmont and FMH: the Anesthesia Agreement and the Anesthesia Services Agreement.[3] The Anesthesia Services Agreement specifically provided, however, that "FMH shall neither have nor exercise any control or direction over the methods by which [Piedmont] or any Physician shall perform it or his work and functions; the sole interest and responsibility of FMH and the Hospital are to assure that the services covered by this Agreement shall be performed and rendered in a competent, efficient and satisfactory manner." Further, under the agreements, (1) the physicians associated with Piedmont are not prohibited from practicing outside of the Hospital; (2) Piedmont and the hospital bill patients separately for their respective services; (3) Piedmont is responsible for meeting its own hiring needs; and (4) Piedmont is responsible for managing its own scheduling. Our review

3. The agreements were actually between FMH and Winston-Salem Anesthesia Associates, P.A. Apparently, the latter entity subsequently became Piedmont. The parties do not dispute that the two agreements governed the relationship between FMH and Piedmont at the time of plaintiff's surgery.

of the agreements and depositions in the record does not reveal that the hospital defendants had any "right to control the manner or method" of the anesthesiology work performed by Piedmont and its personnel. *Hylton*, 138 N.C. App. at 636, 532 S.E.2d at 257 (internal quotation marks omitted).

The contractual terms relied upon by plaintiff in opposing summary judgment do not address the actual provision of anesthesia services to patients. Instead, plaintiff primarily points to FMH's right (1) to require that doctors employed by Piedmont become members of FMH's Medical-Dental Staff and that they comply with the rules and regulations governing that Staff, (2) to approve and credential all Piedmont nurse anesthetists, and (3) to require Piedmont to remove from FMH's anesthesia service any physician for specified grounds. These provisions, however, relate only to a hospital's duty to ensure that all medical personnel permitted to provide services to FMH patients are qualified to do so. *See Blanton v. Moses H. Cone Mem'l Hosp., Inc.*, 319 N.C. 372, 376, 354 S.E.2d 455, 458 (1987) ("We hold that a reasonable man of ordinary prudence in the position of the hospital owes a duty of care to its patients to ascertain that a doctor is qualified to perform an operation before granting him the privilege to do so."). They do not establish the degree of control necessary for agency.

The remaining provisions cited by plaintiff constitute general policies detailing how the two businesses—FMH and Piedmont—would cooperate and coordinate their work. As such, they cannot support a finding of agency. *See Hoffman*, 114 N.C. App. at 251, 441 S.E.2d at 569 (holding that "general policy rules . . . are not indicative of that kind of control and supervision over the details of a physician's work that a plaintiff must show in order to prove that there was an employer-employee relationship").

We hold that the provisions in the agreements between Piedmont and FMH are materially indistinguishable from those in *Hylton* and *Hoffman* that this Court held, in the absence of any further evidence, warranted summary judgment. *See Hylton*, 138 N.C. App. at 636-37, 532 S.E.2d at 257-58 (upholding grant of summary judgment when the anesthesiology agreement provided that the hospital would have no control over the method and means by which the anesthesiologists performed their work, the physicians were not precluded from practicing outside the hospital, the physicians received no compensation from the hospital, the parties billed the patient separately, and the

hospital did not schedule the physicians); *Hoffman*, 114 N.C. App. at 250-51, 441 S.E.2d at 569 (upholding grant of summary judgment when the physician was a member of a private group, the physician's schedule was determined by the group rather than the hospital, and the patient was billed for the physician's services by the group and not the hospital). Plaintiff has, therefore, failed to present sufficient evidence to establish a *prima facie* case of actual agency.

B. Liability Based on Apparent Agency

It is well-established that even in the absence of an agency relationship, " '[w]here a person, by words or conduct, represents or permits it to be represented that another is his agent, he will be estopped to deny the agency as against third persons, who have dealt, on the faith of such representation, with the person so held out as agent, even if no agency exists in fact.' " *Univ. of N.C. v. Shoemate*, 113 N.C. App. 205, 215, 437 S.E.2d 892, 898 (quoting *Barrow v. Barrow*, 220 N.C. 70, 72, 16 S.E.2d 460, 461 (1941)), *disc. review denied*, 336 N.C. 615, 447 S.E.2d 413 (1994). This doctrine of apparent agency was first considered by our Supreme Court as a basis for hospital liability for malpractice in *Smith v. Duke Univ.*, 219 N.C. 628, 14 S.E.2d 643 (1941), *overruled on other grounds by Rabon v. Rowan Mem'l Hosp., Inc.*, 269 N.C. 1, 152 S.E.2d 485 (1967).

The Court initially established the principle—addressed above—that evidence that a physician has privileges at a hospital is not sufficient, standing alone, to make the physician an agent of the hospital: "Ordinarily, the hospital undertakes only to furnish room, food, facilities for operation, and attendance, and is not liable for damages resulting from the negligence of a physician in the absence of evidence of agency, or other facts upon which the principle of *respondeat superior* can be applied." *Id.* at 634, 14 S.E.2d at 647. After concluding that the plaintiff had failed to demonstrate that the doctor—the patient's treating physician—was an agent of the hospital, the Supreme Court turned to the question of apparent agency:

> There was no evidence that [the doctor] in treating [the patient] assumed to act for Duke University otherwise than in his individual capacity as a practicing physician, *or that [the doctor] was held out by the defendant as having been employed by it to treat pay patients, or that the hospital undertook to furnish physicians and surgeons for the treatment of the maladies of patients*, and hence no liability can attach to defendant on the

> theory that [the doctor] was acting within the scope of an apparent authority or employment.

Id. at 635, 14 S.E.2d at 648 (emphasis added).

Our Supreme Court has since recognized that, in the years following *Smith*, the nature of hospitals has substantially changed. After observing that the *Smith* assumptions regarding hospitals were "no longer appropriate in this era," *Harris v. Miller*, 335 N.C. 379, 389, 438 S.E.2d 731, 736-37 (1994), the Court explained:

> First of all, hospitals are now in the business of treatment. As stated in *Rabon v. [Rowan Memorial] Hospital*:
>
> > "The conception that the hospital does not undertake to treat the patient, does not undertake to act through its doctors and nurses, but undertakes instead simply to procure them to act upon their own responsibility, no longer reflects the fact. Present day hospitals, as their manner of operation plainly demonstrates, do far more than furnish facilities for treatment. They regularly employ on a salary basis a large staff of physicians, nurses and internes [sic], as well as administrative and manual workers, and they charge patients for medical care and treatment, collecting for such services, if necessary, by legal action. Certainly, the person who avails himself of 'hospital facilities' expects that the hospital will attempt to cure him, not that its nurses or other employees will act on their own responsibility."

Id., 438 S.E.2d at 737 (quoting *Rabon*, 269 N.C. at 11, 152 S.E.2d at 492).

In applying the doctrine of apparent agency, courts throughout the country have struggled with this change in the nature of hospitals from institutions providing only facilities to institutions actually providing medical services, such as emergency room care or, as in this case, anesthesia. In *Sword v. NKC Hosps., Inc.*, 714 N.E.2d 142 (Ind. 1999), the Indiana Supreme Court conducted a helpful and detailed analysis of the applicability of apparent agency with respect to a hospital's liability for negligence in the provision of services, such as anesthesia, by independent contractors.

In surveying other jurisdictions, the Indiana Supreme Court noted that courts have employed apparent agency to hold hospitals liable for the negligence of independent contractors in both emergency room and anesthesia contexts. *Id.* at 150. The court explained:

> While the language employed by these courts sometimes varies, generally they have employed tests which focus primarily on two basic factors. The first factor focuses on the hospital's manifestations and is sometimes described as an inquiry whether the hospital acted in a manner which would lead a reasonable person to conclude that the individual who was alleged to be negligent was an employee or agent of the hospital. Courts considering this factor often ask whether the hospital held itself out to the public as a provider of hospital care, for example, by mounting extensive advertising campaigns. In this regard, the hospital need not make express representations to the patient that the treating physician is an employee of the hospital; rather a representation also may be general and implied. The second factor focuses on the patient's reliance. It is sometimes characterized as an inquiry as to whether the plaintiff acted in reliance upon the conduct of the hospital or its agent, consistent with ordinary care and prudence.

Id. at 151 (internal quotation marks and citations omitted). With respect to the reliance factor, the court pointed out that some jurisdictions ask whether the plaintiff reasonably believed that the hospital was providing the pertinent medical care, while other jurisdictions presume reliance. *Id.* Over all, the court concluded that "[c]entral to both of these factors—that is, the hospital's manifestations and the patient's reliance—is the question of whether the hospital provided notice to the patient that the treating physician was an independent contractor and not an employee of the hospital." *Id.*

Following its survey of the development of the law in other jurisdictions, the Indiana Supreme Court adopted the formulation of apparent agency set forth in the Restatement (Second) of Torts § 429 (1965). *Sword*, 714 N.E.2d at 152. That section of the Restatement provides:

> One who employs an independent contractor to perform services for another which are accepted in the reasonable belief that the services are being rendered by the employer or by his servants, is subject to liability for physical harm caused by the negligence of the contractor in supplying such services, to the same extent as though the employer were supplying them himself or by his servants.

Restatement (Second) of Torts § 429. The Indiana Supreme Court construed § 429 to require that the "trier of fact . . . focus on the

reasonableness of the patient's belief that the hospital or its employees were rendering health care." *Sword*, 714 N.E.2d at 152.

According to *Sword*,

> This ultimate determination is made by considering the totality of the circumstances, including the actions or inactions of the hospital, as well as any special knowledge the patient may have about the hospital's arrangements with its physicians. We conclude that a hospital will be deemed to have held itself out as the provider of care unless it gives notice to the patient that it is not the provider of care and that the care is provided by a physician who is an independent contractor and not subject to the control and supervision of the hospital. A hospital generally will be able to avoid liability by providing meaningful written notice to the patient, acknowledged at the time of admission.

Id. The court noted, however, that written notice might not suffice if the patient did not have an adequate opportunity to make an informed choice, such as in the case of a medical emergency. *Id.*

After conducting a similar survey of the development of the law nationwide, the South Carolina Supreme Court also chose to adopt the approach set out in the Restatement (Second) of Torts § 429. *Simmons v. Tuomey Reg'l Med. Ctr.*, 341 S.C. 32, 50-51, 533 S.E.2d 312, 322 (2000). The court held:

> Under section 429, the plaintiff must show that (1) the hospital held itself out to the public by offering to provide services; (2) the plaintiff looked to the hospital, rather than the individual physician, for care; and (3) a person in similar circumstances reasonably would have believed that the physician who treated him or her was a hospital employee. When the plaintiff does so, the hospital will be held vicariously liable for any negligent or wrongful acts committed by the treating physician.

Id. at 51, 533 S.E.2d at 322. The court limited application of this test "to those situations in which a patient seeks services at the hospital as an institution, and is treated by a physician who reasonably appears to be a hospital employee." *Id.* at 52, 533 S.E.2d at 323. It stressed that its holding did "not extend to situations in which the patient is treated in an emergency room by the patient's own physician after arranging to meet the physician there. Nor does our holding encompass situations in which a patient is admitted to a hospital by a private, independent physician whose only connection to a par-

ticular hospital is that he or she has staff privileges to admit patients to the hospital. Such patients could not reasonably believe his or her physician is a hospital employee." *Id.*

Comparable tests have been adopted in numerous other jurisdictions, particularly with respect to the rendering of anesthesia or emergency services. *See*, *e.g.*, *Gilbert v. Sycamore Mun. Hosp.*, 156 Ill. 2d 511, 525, 622 N.E.2d 788, 796 (1993) (concluding (1) that the element of "holding out" is "satisfied if the hospital holds itself out as a provider of emergency room care without informing the patient that the care is provided by independent contractors," and (2) "[t]he element of justifiable reliance on the part of the plaintiff is satisfied if the plaintiff relies upon the hospital to provide complete emergency room care, rather than upon a specific physician"); *Gatlin v. Methodist Med. Ctr., Inc.*, 772 So. 2d 1023, 1027 (Miss. 2000) (with respect to a hospital's liability for the acts of an independent contractor anesthesiologist, holding that the controlling "analysis seeks to determine whether the patient was seeking treatment from the hospital, without regard for the identity of the particular physicians working at the hospital, or whether the patient instead sought the services of a particular physician who merely happened to be on staff at a particular hospital"); *White v. Methodist Hosp. South*, 844 S.W.2d 642, 647-48 (Tenn. Ct. App. 1992) (allowing, with respect to the provision of anesthesia services, an inference of reliance when a hospital offers a service and the patient has no choice as to who will perform that service); *Pamperin v. Trinity Mem'l Hosp.*, 144 Wis. 2d 188, 210, 423 N.W.2d 848, 857 (1988) ("[W]e conclude that, if [plaintiff] proves that [the hospital] held itself out as a provider of emergency room care without informing [plaintiff] that the care was provided by independent contractors, [plaintiff] has satisfied the first requirement for proving liability under the doctrine of apparent authority. . . . In determining that a plaintiff acted in reliance upon the conduct of the hospital or its agent, . . . [c]ourts have uniformly recognized that, except when the patient enters a hospital intending to receive care from a specific physician while in the hospital, it is the reputation of the hospital itself upon which a patient relies.").

We believe the analysis of these jurisdictions is persuasive and consistent with the prior holdings of our appellate courts. In *Smith*, our Supreme Court suggested that apparent agency would be applicable to hold the hospital liable for the acts of an independent contractor if the hospital held itself out as providing services and care. 219 N.C. at 635, 14 S.E.2d at 648. In *Shoemate*, this Court

established that this "holding out" may be accomplished through either verbal representations or conduct. 113 N.C. App. at 215, 437 S.E.2d at 898.

This Court has also addressed the element of reliance in circumstances similar to those addressed by the Restatement (Second) of Torts § 429: when the patient has relied upon a medical provider to render medical services, but that provider has caused those services to be provided by an independent contractor. In *Noell v. Kosanin*, 119 N.C. App. 191, 196-97, 457 S.E.2d 742, 746 (1995), the plaintiff chose a surgeon to perform her plastic surgery based on his reputation. That surgeon used a particular anesthesiologist, who was an independent contractor, to administer anesthesia to all of his patients requiring general anesthesia. *Id.* at 196, 457 S.E.2d at 746. Consistent with this practice, the plaintiff received a pamphlet stating that the anesthesiologist worked jointly with the surgeon. This Court held that "[t]hese facts are sufficient to create a jury question as to whether plaintiff reasonably assumed [the surgeon] was in charge of her entire surgical procedure, including anesthesia care and recovery." *Id.* at 197, 457 S.E.2d at 746. This holding parallels the principle in the Restatement (Second) of Torts § 429, which asks whether a patient accepts services from an independent contractor "in the reasonable belief that the services are being rendered by the employer or by his servants."

This Court pursued a similar analysis in *Sweatt v. Wong*, 145 N.C. App. 33, 549 S.E.2d 222 (2001), in which the plaintiff engaged a particular surgeon to remove her gallbladder. While the patient was still in the hospital recovering, that surgeon went on vacation, leaving the plaintiff in the care of another doctor, who was an independent contractor. In holding that the trial court had properly denied a motion for judgment notwithstanding the verdict because issues of fact existed as to apparent agency, this Court stressed that the patient was not given a choice as to which physician would continue her care in the surgeon's absence, but rather the surgeon had simply announced that the second doctor had assisted him in the surgery and would take good care of the patient. *Id.* at 42, 549 S.E.2d at 227. This Court held that these facts were sufficient for a finding that the patient justifiably relied upon representations of agency. *Id.* This analysis, like that of § 429 and *Noell*, does not require any showing of a change of position by the patient, but rather focuses on whether the patient was relying upon the surgeon to provide services and reasonably believed that the second doctor was an agent of the surgeon.

Defendants point to *Hoffman* as establishing a different test. As this Court explained in *Sweatt*, however, "[i]n [*Hoffman*], the plaintiff patient sought to recover damages for alleged medical negligence from a hospital under the theory of *respondeat superior* for the *negligence of the treating physician* who was found to be an independent contractor." *Id.* (emphasis added). Although the plaintiff in *Hoffman*, who was admitted to a hospital at the request of her private physician for a particular procedure, did not choose the doctor who would perform that procedure, the consent form specifically listed five possible doctors and the patient was looking to one of those doctors to provide her care. 114 N.C. App. at 249-50, 441 S.E.2d at 569. The case fell squarely within the traditional *Smith* analysis regarding treating physicians. There was no indication in the opinion that the hospital was holding itself out as providing the services involved as opposed to simply providing facilities for the performance of the procedure by private practitioners. Under those circumstances, this Court required evidence "that Mrs. Hoffman would have sought treatment elsewhere or done anything differently had she known for a fact that [the doctor] was not an employee of the hospital." *Id.* at 252, 441 S.E.2d at 570.

When, however, a hospital does hold itself out as providing services, we believe the approach of the Restatement (Second) of Torts § 429 is consistent with our prior decisions considering apparent agency. We are also persuaded by the weight of authority from other jurisdictions. Under this approach, a plaintiff must prove that (1) the hospital has held itself out as providing medical services, (2) the plaintiff looked to the hospital rather than the individual medical provider to perform those services, and (3) the patient accepted those services in the reasonable belief that the services were being rendered by the hospital or by its employees. A hospital may avoid liability by providing meaningful notice to a patient that care is being provided by an independent contractor. *See*, *e.g.*, *Cantrell v. Northeast Ga. Med. Ctr.*, 235 Ga. App. 365, 368, 508 S.E.2d 716, 719-20 (1998) (concluding that trial court did not err in granting a directed verdict to hospital when "conspicuous signage was posted and forms signed by the patient or representative revealed the independent contractor status of the doctor"), *cert. denied*, No. 599C0393, 1999 Ga. LEXIS 888 (Ga. Oct. 22, 1999).

Plaintiff has submitted sufficient evidence to meet this test. The hospital had a Department of Anesthesiology with a Chief of Anesthesiology and a Medical Director, a fact that a jury could rea-

sonably find indicated to the public that FMC was providing anesthesia services to its patients.[4] Further, defendants chose to provide those services by contracting with Piedmont to provide anesthesia services to the hospital on an exclusive basis. Piedmont doctors served as the hospital's Chief of Anesthesiology and anesthesia Medical Director. As Dr. McConville put it, his group "provide[d] the anesthesia services for the operating room at Forsyth and so there is—so our group covers the surgical caseload." Plaintiff and other surgical patients had no choice as to who would provide anesthesia services for their operations.

Plaintiff's affidavit states that she was unaware that Dr. McConville and Ms. Crumb were not employees of the hospital. She explained "I did not select Sheila Crumb nor Dr. Joseph McConville to provide medical care to me; that in choosing to have my operation at Forsyth Medical Center, I relied on the fact that medical care would be provided by employees of Forsyth Medical Center, excluding my surgeon, Dr. Goco." She further stated: "[O]ne of the reasons that I had my operation performed at Forsyth Medical Center was because it was part of Novant Health, a large healthcare organization . . . ."

In addition, plaintiff pointed to the form on FMC letterhead that she signed entitled "Consent to Operation and/or Other Procedures." The form specified: "I therefore authorize *my physician*, his or her associates or assistants to perform such surgical procedures as they, in the exercise of their professional judgment, deem necessary and advisable." (Emphasis added.) By contrast, with respect to anesthesia services, the form stated: "I authorize the administration of such anesthetics as may be necessary or advisable *by the anesthetist/anesthesiologist responsible for this service and I request the administration of such anesthetics*." (Emphasis added.) Finally, the form stated: "I have had sufficient opportunity to discuss my condition and treatment *with my physician* and his or her associates and all of my questions have been answered to my satisfaction." (Emphasis added.)

This consent form stands in contrast to that provided to the patient in *Hoffman*. A jury could decide based on this form that plaintiff was, through this form, requesting anesthesia services from FMC and that—given the distinction made between plaintiff's personal

4. *Cf. Harris*, 335 N.C. at 392, 438 S.E.2d at 738 ("That the hospital's anesthesiology department trained its anesthetists indicates a retention by the hospital of the right to control those anesthetists. Nothing else appearing, it can only be inferred that the anesthetists remained the servants of the hospital while performing their surgical duties.").

physician and the unnamed anesthesiologist—plaintiff was accepting those services in the reasonable belief that the services would be provided by the hospital and its employees. *See Jennison v. Providence St. Vincent Med. Ctr.*, 174 Or. App. 219, 234, 25 P.3d 358, 367 (2001) ("Nowhere did the consent form indicate that the radiologists were independent contractors. Thus, it is reasonable to assume that when a patient in [plaintiff's] situation signs a consent form like the one she signed and later has an x-ray taken, the patient would believe that it would be a hospital employee who would ultimately interpret that x-ray.").

Given the current record, we hold that the trial court erred in granting summary judgment with respect to plaintiff's claims based on apparent agency with respect to defendant FMH. With respect to defendants NHTR and NHI, plaintiff argues only that "Novant held itself out to the public as owning and/or operating Forsyth Medical Center and Plaintiff relied upon this." Her affidavit stated "that the hospital held itself out to me and the public as being part of Novant." Plaintiff, however, cites no authority in support of her contention that NHTR and NHI may be held liable based on apparent agency for the acts of Dr. McConville and Ms. Crumb. N.C.R. App. P. 28(b)(6) ("Assignments of error . . . in support of which no reason or argument is stated or authority cited, will be taken as abandoned."). The record contains no evidence that NHTR and NHI, as opposed to the hospital, held themselves out as providing anesthesia services or that they, as opposed to the hospital, contracted to supply the services. Accordingly, the trial court properly granted summary judgment as to NHTR and NHI.

Plaintiff has also argued (1) that the hospital defendants owed plaintiff a non-delegable duty and (2) that the hospital defendants are liable, even apart from agency principles, for the failure to obtain informed consent from plaintiff regarding anesthesia services. Plaintiff has cited no authority suggesting that these theories provide a basis for holding NHI or NHTR liable. With respect to FMH, because of our resolution of this appeal, we need not address these alternative arguments.

Discovery of Privileged Documents

[4] On appeal, plaintiff also argues that the trial judge erred in denying her motion to compel production of (1) certain documents contended by defendants to be protected by attorney-client privilege and the work product doctrine and (2) "[a]ll Statistical Reports for

Forsyth Medical Center for infection control for 1996-2000." It is well established, even with respect to claims of work product and attorney-client privilege, that "orders regarding discovery matters are within the discretion of the trial court and will not be upset on appeal absent a showing of abuse of discretion." *Evans v. United Servs. Auto. Assoc.*, 142 N.C. App. 18, 27, 541 S.E.2d 782, 788, *cert. denied*, 353 N.C. 371, 547 S.E.2d 810 (2001).

A. Attorney-Client Privilege and Work Product

Plaintiff's document request number 19 sought: "Any documents not in Plaintiff's hospital chart at Forsyth Medical Center which discuss the perforation of Plaintiff's esophagus and/or any problems regarding Plaintiff's intubation during her October 12, 1999 hospitalization." After contending that the responsive documents were protected from production by the attorney-client privilege and the work product doctrine as set forth in Rule 26(b)(3) of the Rules of Civil Procedure, defendants submitted the documents to the trial judge for *in camera* review. After reviewing the documents, the trial court denied plaintiff's motion to compel with respect to request number 19.

On appeal, defendants filed with this Court a sealed copy of the documents reviewed by the trial court and included in their brief a general description of those documents. The record indicates that these documents were defendants' "Risk Management file." We have carefully examined the documents and the information provided by defendants regarding the nature of those documents.

Rule 26(b)(3) provides that documents prepared "in anticipation of litigation" are afforded a qualified immunity from discovery. The party asserting the work product privilege—in this case, defendants—bears the burden of showing that the documents were prepared "in anticipation of litigation." *Evans*, 142 N.C. App. at 29, 541 S.E.2d at 789. This Court has explained that "[t]he phrase 'in anticipation of litigation' is an elastic concept" and "North Carolina's definition of [the phrase] is unique in its phraseology." *Cook v. Wake County Hosp. Sys., Inc.*, 125 N.C. App. 618, 623, 482 S.E.2d 546, 550, *disc. review allowed*, 346 N.C. 277, 487 S.E.2d 543, *appeal withdrawn*, 347 N.C. 397, 494 S.E.2d 404 (1997). According to our Supreme Court, documents prepared "in anticipation of litigation" include "not only materials prepared after the other party has secured an attorney, but those prepared under circumstances in which a reasonable person might anticipate a possibility of litigation." *Willis v. Duke Power Co.*, 291 N.C. 19, 35, 229 S.E.2d 191, 201 (1976).

Nevertheless, "[m]aterials prepared in the ordinary course of business are not protected" under Rule 26(b)(3). *Id.* This Court, applying *Willis*, considered whether an accident report prepared by a hospital regarding a doctor's slip and fall constituted work product. After noting that risk management documents do not automatically constitute work product, the Court reviewed the hospital's "risk management policy." *Cook*, 125 N.C. App. at 624-25, 482 S.E.2d at 551. That policy set out mandatory reporting procedures for incidents and accidents as an administrative tool for identifying areas of risk and reporting occurrences not consistent with desired safe operation of the hospital or care of patients. *Id.* at 625, 482 S.E.2d at 551. The Court pointed out that the accident reports were not discretionary, but were required of all employees. *Id.* Once a report was made, the administration and Risk Management would make the final decision to report potential claims of liability. *Id.* A monthly summary of reports was prepared for administrative and medical staff review. *Id.*

Based on these policy provisions, the Court concluded that "defendant's accident reporting policy exists to serve a number of nonlitigation, business purposes" and imposes a "continuing duty on hospital employees to report any extraordinary occurrences within the hospital to risk management" regardless whether the hospital chose to consult its attorney in anticipation of litigation. *Id.* The Court concluded:

> Here, absent any other salient facts, it cannot be fairly said that the employee prepared the accident report because of the prospect of litigation. In short, the accident report would have been compiled, pursuant to the hospital's policy, regardless of whether Cook intimated a desire to sue the hospital or whether litigation was ever anticipated by the hospital.
>
> . . . We conclude that defendant's position is contrary to the discovery rules established by the *Willis* and [*Simon v. G.D. Searle & Co.*, 816 F.2d 397, 401 (8th Cir.), *cert. denied*, 484 U.S. 917, 98 L. Ed. 2d 225, 108 S. Ct. 268 (1987)] Courts, and therefore, the trial court erred in denying plaintiffs' motions to compel production of the accident report.

Id. at 625-26, 482 S.E.2d at 551-52.

In this case, plaintiff has submitted FMH's policy "for the reporting of all unexpected events." This policy appears materially indistinguishable from that in *Cook* and, therefore, under *Cook*, documents

generated pursuant to that policy would not be entitled to protection under Rule 26(b)(3). We are, however, unable to determine from the current record whether the documents at issue were generated pursuant to that policy. While none of the documents are entitled "Quality Assessment Report," as specified in the policy, certain documents appear to correspond to the reports and summaries required by the hospital's policy, including documents numbered 61-68 and 70-81.

We must therefore remand to the trial court for further review as to these documents. *See Willis*, 291 N.C. at 36, 229 S.E.2d at 201 (remanding because "[t]he record is insufficient for us to determine the extent to which" defendant's claims files "may be subject to the trial preparation immunity"). On remand, defendants bear the burden of demonstrating that the specified documents were not prepared pursuant to the hospital policy or were not otherwise documents "prepared in the ordinary course of business." *Id.* at 35, 229 S.E.2d at 201.

We are similarly unable to determine on this record whether documents 92-107 and 154 are entitled to protection under the work product doctrine or the attorney-client privilege. Because the record contains no indication who prepared the documents or for what purpose, we must remand for further review. On remand, defendants should submit affidavits specifying the author of each document, the date each document was prepared, the purpose for which the document was prepared, and the recipients—if any—of each document.

Document 168 is not addressed by defendants in their brief. This document is a letter by Dr. McConville apparently to his insurance agency dated 18 October 1999 relating to plaintiff. We do not know on what basis defendants contend this document is protected from disclosure or if the trial judge considered whether this document was subject to production apart from any risk management documents otherwise protected. Plaintiff has not had any opportunity to argue why she is entitled to have this document produced. Plaintiff may even have already received this document in other discovery. Without expressing any opinion on the issue, we leave for consideration on remand whether this document should be produced.

With respect to the remaining documents, we believe that the trial court did not abuse its discretion in determining that documents numbered 84-91, 108-53, 155-60, 164, 169-70, and 179-203 were protected either by the attorney-client privilege or the work prod-

uct doctrine. Defendants have represented that copies of documents 161-63 and 165-67 have already been produced to plaintiff; these are simply copies attached to documents protected from disclosure. As to the documents specified in this paragraph, we affirm the trial court's order.

B. Statistical Reports

[5] Defendant objected to plaintiff's request for "[a]ll Statistical Reports for Forsyth Medical Center for infection control for 1996-2000" on the grounds of relevance. Defendant points out that "[t]here is no dispute in this case that the 'infection' which the appellant had was an internal one which came from a leaking esophagus, not from infection of her incision or other source in the hospital environment." While plaintiff argues, without any citation to the record, that the reports deal with all infections at FMC (and not just infections from external sources) and that the documents "would be clearly admissible under Rule 404(b) of the North Carolina Rules of Evidence to prove a pattern, practice, plan and *modus operandi*," plaintiff does not explain to what issue in this case a pattern, practice, plan, or *modus operandi* would be relevant. In the absence of such a showing, we cannot conclude that the trial court's ruling denying this request was manifestly unreasonable.

Conclusion

For the foregoing reasons, we reverse the trial court's grant of summary judgment in favor of FMH and remand this action for further proceedings. We affirm the entry of summary judgment as to NHI and NHTR. We reverse the trial court's discovery order with respect to document numbers 61-68, 70-81, 92-107, 154, and 168 and remand for further review regarding whether they are entitled to protection under Rule 26(b)(3) or the attorney-client privilege. We affirm the remaining portion of the trial court's discovery order.

Affirmed in part, reversed in part, and remanded.

Chief Judge MARTIN and Judge BRYANT concur.

DEER CORPORATION, PLAINTIFF v. GUY W. CARTER, DEFENDANT

No. COA05-267

(Filed 2 May 2006)

1. Jurisdiction— evidentiary hearing—more than prima facie showing required—preponderance of evidence

The trial court did not err by requiring more than a prima facie showing of personal jurisdiction where the case had moved beyond the procedural standpoint of competing affidavits to an evidentiary hearing. The trial court was required to act as fact finder and decide the question of personal jurisdiction by the preponderance of the evidence.

2. Appeal and Error— hearing to determine jurisdiction—findings supported by competent evidence—binding on appeal

The trial court's findings were binding in a hearing to determine the existence of personal jurisdiction where those findings were supported by competent record evidence. The appellate court does not weigh the evidence or review questions of the credibility of witnesses.

3. Evidence— affidavits—personal knowledge

The trial court did not err in a hearing to determine personal jurisdiction by considering only the allegations in an affidavit that were based on personal knowledge.

4. Jurisdiction— personal—insufficient contacts—inconvenient for witnesses

Due process would not be satisfied by requiring defendant to litigate claims in North Carolina where defendant's telephone conversations from Europe and his infrequent visits to North Carolina were not continuous and systematic contacts such that general jurisdiction would apply, and the contacts were not sufficiently related to the allegations against defendant for specific jurisdiction. Moreover, a number of witnesses were residents of Europe; travel would be especially difficult for defendant because his wife suffered from depression and he was the father of three small children.

5. Jurisdiction— dismissal for lack of—Rule 60(b) motion to set aside denied

The trial court did not abuse its discretion by denying a Rule 60(b) motion to set aside an order granting a motion to dismiss for lack of jurisdiction.

Appeal by plaintiff from order entered 8 November 2004 by Judge Robert P. Johnston in Mecklenburg County Superior Court. Heard in the Court of Appeals 14 November 2005.

Poyner & Spruill LLP, by P. Marshall Yoder and Joshua B. Durham, for the plaintiff-appellant.

Bishop, Capitano & Moss, P.A., by A. Todd Capitano and Raizel Arnholt Kahn, for defendant-appellee.

MARTIN, Chief Judge.

Plaintiff appeals from the trial court's order dismissing its claim for lack of personal jurisdiction over defendant. For the reasons which follow, we affirm.

Plaintiff is a North Carolina corporation engaged in the business of selling wheel balancing equipment. The equipment is manufactured in Germany by a company called Haweka Auswuchttechnik Horst Warkotsch GmbH ("Haweka Germany"). In March 1999, plaintiff entered into an agreement with Haweka Germany giving plaintiff the exclusive right to distribute its products in North America for twenty years. In 2000, plaintiff hired Jerome Donahue as a sales representative. However, on 30 November 2001, Donahue quit his job with plaintiff without notice and went to work for Haweka Germany. Two weeks later, Haweka Germany sent a letter to plaintiff attempting to terminate their distribution agreement. Allegedly, Haweka Germany intended Donahue to take over its North American distributorship. Plaintiff therefore filed suit against Donahue and Haweka Germany in December, 2001. By January 2002, Haweka Germany had reinstated its distribution agreement with plaintiff.

Defendant worked as an export manager for Haweka Germany and later as a distributor for Haweka products in the United Kingdom. In the course of discovery in plaintiff's case against Donahue, plaintiff came to believe defendant had encouraged Donahue to take valuable business information from plaintiff with the intent of helping him start the new North American distributorship for Haweka's products.

Plaintiff therefore brought the current action against defendant, claiming misappropriation of trade secrets, tortious interference with contract and prospective economic advantage, civil conspiracy, punitive damages, and unfair and deceptive trade practices. Defendant, a resident of Great Britain, moved to dismiss for lack of personal jurisdiction pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(2), and the trial court ordered discovery on the question of jurisdiction.

A hearing on the matter of personal jurisdiction was held on 23 June 2004. At that time, the evidence before the trial court consisted of the depositions of defendant, Donahue, and Allan Hansen (president of plaintiff corporation during the time in question), and competing affidavits submitted by the parties. The evidence conflicted regarding the level of defendant's contacts with North Carolina.

Plaintiff alleged defendant played an active role in the decision to hire Donahue and terminate plaintiff's distribution agreement. Defendant denied any involvement in either decision. Donahue stated in his deposition that while he was working in North Carolina, defendant initiated telephone calls to him about employment possibilities with Haweka Germany. The trial court, however, found Donahue solicited defendant's help in contacting Haweka Germany. Donahue also claimed defendant called him in North Carolina to ask him to prepare a business plan for a new North American distributorship. Defendant denied these allegations. The trial court found there was "no evidence that Carter ever sought the North American distributorship."

Plaintiff contended defendant provided Donahue with a credit card number for him to travel to Haweka Germany's Christmas party in 2001, where the company announced Donahue was its new employee. Defendant denied this allegation and presented his credit card statements for that period of time. The trial court found these statements "appear[ed] to show that his card was never used for such purposes." Donahue first stated in his deposition he believed defendant had provided the credit card number for his travel expenses, but he later admitted he was not sure who had provided the number. The trial court found that "[t]o the extent that Deer's allegation concerning the provision of a credit card number matters for purposes of personal jurisdiction only, the Court finds that Carter did not provide a credit card number to Donahue."

Plaintiff also claimed defendant provided Donahue with a fax number so Donahue could send information removed from Deer's

computer system. Donahue stated in his deposition that during a conference call, Haweka Germany asked him to seek information that would be helpful in allowing it to terminate plaintiff's distribution agreement. Defendant was not a party to that call. Donahue later asked defendant for Haweka Germany's fax number, which defendant provided. However, the trial court found there was "simply no evidence to suggest Carter requested or knew that Donahue wanted [the fax number] to 'send information removed from Deer's computer system.' "

Defendant stated in his deposition that he visited North Carolina once or twice a year between 1996 and 1999. On these visits, he typically flew into Charlotte and traveled with Hansen outside of North Carolina to meet with plaintiff's customers. Defendant admitted that at the end of these visits, he often conducted wrap-up meetings in North Carolina to discuss how best to follow up with the customers he visited during the trip.

Defendant's last visit to North Carolina was in February, 1999. Defendant stated the purpose of this visit was to celebrate Hansen's wedding. He described the visit as a three-day wedding celebration during which there was a "pseudo meeting" for Haweka distributors from around the world, giving the distributors a way to write off their travel to the wedding as a business expense. Hansen, however, stated in his deposition that the three-day event was the annual meeting for Haweka distributors, and while there was a party to celebrate his recent marriage, they "always have a party" at the annual distributors' meeting.

Craig Plummer, an equipment representative and salesperson for Heafner Tire and Products in Mecklenburg County, stated in an affidavit that defendant came to North Carolina in late 1997 or early 1998 to demonstrate Haweka products to at least three Heafner customers. According to Plummer, defendant was in North Carolina from a Monday to a Friday, during which he trained the Griffin Brothers Tire Company's employees on the use of Haweka products. Defendant denied coming to North Carolina for a week to demonstrate products, although he admitted he may have been in North Carolina for a day or two to visit potential customers. Defendant admitted that on a different occasion, he came to North Carolina and trained ten people in the use of Haweka products one weekend, traveled outside of North Carolina during the week to visit other customers, then returned to North Carolina the following weekend to train eleven more people. Hansen also referred to this training visit in his deposition, stating

that defendant trained two classes of Heafner Tire salespeople in North Carolina, with each class lasting two days. He could not remember whether these classes took place on a weekend or during the week.

The trial court granted defendant's motion to dismiss and made, *inter alia*, the following findings of fact:

> 19. Carter committed no act or omission within North Carolina giving rise to the claims against him. Carter did not make a solicitation within North Carolina giving rise to the claims against him. The Court finds that Donahue initiated the series of telephone conversations between Donahue and Carter, and Carter's alleged return calls to Donahue were not essential elements of any claim asserted by Deer against Carter such that Carter could reasonably be expected to defend claims in North Carolina.
>
> 20. Carter's general contacts with the state, including an unspecified number of personal visits ending February, 1999, were not systematic and continuous such that Carter should be expected to defend claims filed nearly five years after his last visit that are factually unrelated to those prior contacts.
>
> 21. While Deer Corporation's offices, employees, and a number of its witnesses are located in North Carolina, the Court notes that other witnesses in this litigation are residents of European countries, making litigation in North Carolina highly inconvenient for Carter. Additionally, Carter is the father of three small children, including an infant. His wife suffers from severe post-natal depression making travel difficult for him.
>
> 22. After considering the quality, nature and quantity of contacts between Carter and North Carolina, the source and connection of the alleged causes of action to any contacts by Carter, the interest of the State of North Carolina with respect to the claims, and the convenience to the parties, the Court finds that any attempt by this Court to exercise personal jurisdiction over Carter with respect to plaintiff's claims would not comport with the due process rights provided for by the United States Constitution.

The trial court then concluded as a matter of law there was "no statutory basis contained in N.C.G.S. §1-75.4 or elsewhere in the General Statutes upon which the Court may base the exercise of personal jurisdiction over Carter as to the claims asserted against him," and

that "[a]ny attempt by this Court to exercise personal jurisdiction over Carter with respect to plaintiff's claims would not comport with the due process rights provided for by the United States Constitution." The trial court therefore granted defendant's motion to dismiss all claims against him for lack of personal jurisdiction. Plaintiff appealed.

Rule 60(b) Motion

During the pendency of its appeal to this Court, plaintiff moved the trial court to set aside its Order Granting Defendant's Motion to Dismiss for Lack of Personal Jurisdiction pursuant to Rule 60(b) of the North Carolina Rules of Civil Procedure. N.C. Gen. Stat. § 1A-1, Rule 60(b) (2005). Although an appeal divests the trial court of jurisdiction, a trial court "retains limited jurisdiction to hear a Rule 60(b) motion and to indicate its probable disposition after the notice of appeal has been entered." *Hagwood v. Odom*, 88 N.C. App. 513, 518, 364 S.E.2d 190, 193 (1988). "Where the trial court indicates . . . that the motion should be denied, this Court will review that action along with any other assignments of error raised by the appellant." *Id.*

Plaintiff argued in its motion that the trial court should set aside its previous order on the bases of newly discovered evidence, fraud, and "[a]ny other reason justifying relief." N.C. Gen. Stat. § 1A-1, Rule 60(b)(2),(3) and (6) (2005). Plaintiff contended "Carter misrepresented his involvement in the transactions complained of, and Carter's misrepresentations related to material jurisdictional facts and precluded Deer from establishing that personal jurisdiction existed." Plaintiff filed additional documents under seal in support of the motion and claimed those documents were "sufficient to establish personal jurisdiction." These documents consisted of (1) notes from a meeting at which defendant was present which discuss the possibility of ending Haweka Germany's relationship with plaintiff and opening a new U.S. office, (2) an email from defendant to Henning Flatt, another Haweka Germany employee, asking Flatt to email Donahue with a credit card number to pay for Donahue's flight to Germany and indicating that Donahue would be on the same flight as defendant into Hannover, Germany, (3) an email from Donahue to defendant in which Donahue lists his monthly expenses and asks for a fax number for Henning Flatt, (4) an email from defendant to Donahue in which defendant gives Donahue the fax number for Henning Flatt, arranges for money to be wired to Donahue, and

asks Donahue to prepare three different business plans, and (5) an email from defendant to a client in North America expressing regret that the reason the client was not buying Haweka products was "because of [defendant's] counterpart in the North American Outlet," which was plaintiff corporation, and seeking a way for the client to purchase Haweka products from another Haweka outlet, "but not from Allan Hansen."

On 27 February 2006, the trial court entered an order denying plaintiff's Rule 60(b) motion to set aside its Order Granting Defendant's Motion to Dismiss for Lack of Personal Jurisdiction. The court found Haweka Germany made these documents available to plaintiff on or about 19 June 2003; however, "[d]espite ample opportunity to do so, neither Deer nor its lawyers have ever indicated that they viewed or even made an effort to view the documents offered for inspection by Haweka Germany in 2003." The trial court made the following additional findings of fact:

> 13. Deer Corporation failed to exercise diligence in pursuing the newly submitted documents prior to the original hearing. Proper means available to it were not employed. Regardless, the contents of the four documents do not constitute new evidence, rather they tend to either corroborate or contradict evidence previously before the court.
>
> 14. Had these documents been available at the original hearing, a different result would not have been reached. The Court found in 2004 that the location of witnesses and particular familial circumstances made litigation in North Carolina highly inconvenient for Carter (Finding of Fact 21) and indicated that this was one of the factors considered in concluding that exercising personal jurisdiction over Carter would not comport with his due process rights. (Finding of Fact 22)
>
> 15. Nothing contained in the new documents compels a reversal of these findings. If anything, their essential correctness is confirmed. The parties submitted a total of seven affidavits in connection with this motion. Two of those affidavits were from the lawyers. The remaining five affidavits were from residents of Europe. These affidavits contain allegations reaching far beyond any purported contacts with North Carolina and striking at the heart of the dispute. They make clear that the majority of significant witnesses in this action reside in Europe.

Therefore, the trial court made the following conclusions of law:

> 2. Deer did not use reasonable diligence in seeking to obtain the documents submitted in connection with this motion.
>
> 3. Deer has not shown that Carter committed fraud in connection with the motion to dismiss.
>
> 4. Were the Court to reconsider its prior order of dismissal in light of the documents filed with this motion, its conclusions of law would not change.
>
> 5. Grounds for relief under Rule 60(b)(6) do not exist.

Plaintiff's Appeal

Plaintiff argues on appeal to this Court that the trial court erred by (1) requiring it to do more than make a *prima facie* showing of jurisdiction, (2) finding no evidence to suggest defendant requested or knew Donahue wanted to send information removed from plaintiff's computer system when such evidence existed in the record, (3) finding no evidence that defendant ever sought the North American distributorship when such evidence existed in the record, (4) failing to consider evidence that was properly in the record when ruling on defendant's motion to dismiss, and (5) dismissing its complaint when the undisputed evidence mandated the exercise of personal jurisdiction over defendant. Also before us on appeal is the trial court's denial of plaintiff's motion to set aside the order granting defendant's motion to dismiss. *See Hagwood*, 88 N.C. App. at 518, 364 S.E.2d at 193 (1988) ("Where the trial court indicates . . . that the [Rule 60(b)] motion should be denied, this Court will review that action along with any other assignments of error raised by the appellant.").

North Carolina General Statute section 1-277(b) provides a right of immediate appeal from an order denying a motion to dismiss for lack of personal jurisdiction. N.C. Gen. Stat. § 1-277(b) (2005). "When this Court reviews a decision as to personal jurisdiction, it considers only 'whether the findings of fact by the trial court are supported by competent evidence in the record;' . . . [w]e are not free to revisit questions of credibility or weight that have already been decided by the trial court." *Banc of Am. Secs. LLC v. Evergreen Int'l Aviation, Inc.*, 169 N.C. App. 690, 694-95, 611 S.E.2d 179, 183 (2005) (quoting *Replacements, Ltd. v. MidweSterling*, 133 N.C. App. 139, 140-41, 515 S.E.2d 46, 48 (1999)). If the findings of fact are supported by compe-

tent evidence, we conduct a *de novo* review of the trial court's conclusions of law and determine whether, given the facts found by the trial court, the exercise of personal jurisdiction would violate defendant's due process rights. *Id.* (stating that "[i]t is this Court's task to review the record to determine whether it contains any evidence that would support the trial judge's conclusion that the North Carolina courts may exercise jurisdiction over defendants without violating defendant's due process rights").

[1] We first address plaintiff's argument that the trial court erred by requiring it to do more than make a *prima facie* showing of jurisdiction. In *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), this Court stated:

> If the exercise of personal jurisdiction is challenged by a defendant, a trial court may hold an evidentiary hearing including oral testimony or depositions or may decide the matter based on affidavits. N.C. Gen. Stat. § 1A-1, Rule 43(e). If the court takes the latter option, the plaintiff has the initial burden of establishing *prima facie* that jurisdiction is proper. Of course, this does not alleviate the plaintiff's ultimate burden of proving personal jurisdiction at an evidentiary hearing or at trial by a preponderance of the evidence.

(internal citations omitted). Plaintiff contends the procedural posture of this case was such that the latter option applied because both parties had submitted competing affidavits; therefore, it was only required to make a *prima facie* showing of personal jurisdiction. However, both parties also submitted depositions to the trial court, and its findings are replete with facts taken from these depositions. Furthermore, the trial court held a hearing on the question of personal jurisdiction, and although no witnesses testified at the hearing, both parties argued facts based on the depositions. We therefore conclude this case had moved beyond the procedural standpoint of competing affidavits to an evidentiary hearing. As such, the trial court was required to act as a fact-finder, *Fungaroli v. Fungaroli*, 51 N.C. App. 363, 367, 276 S.E.2d 521, 524, *disc. review denied*, 303 N.C. 314, 281 S.E.2d 651 (1981), and decide the question of personal jurisdiction by a preponderance of the evidence. Plaintiff therefore had the "ultimate burden of proving jurisdiction" rather than "the initial burden of establishing *prima facie* that jurisdiction [was] proper." *Bruggeman*, 138 N.C. App. at 615, 532 S.E.2d at 217.

Plaintiff, however, contends a "clear conflict" exists between *Banc of America Securities* and *Bruggeman* in that "[n]owhere in the *Bruggeman* decision did this Court set forth any categories of motions to dismiss or standards to be applied to motions existing in different procedural postures." *Banc of America Securities* sets out the three following possible procedural postures for a court considering a motion to dismiss for lack of personal jurisdiction: "(1) the defendant makes a motion to dismiss without submitting any opposing evidence; (2) the defendant supports its motion to dismiss with affidavits, but the plaintiff does not file any opposing evidence; or (3) both the defendant and the plaintiff submit affidavits addressing the personal jurisdiction issues." *Banc of Am. Secs. LLC*, 169 N.C. App. at 693, 611 S.E.2d at 182. Both *Banc of America Securities* and *Bruggeman* agree that under the third posture, where parties submit competing affidavits on a defendant's motion to dismiss for lack of personal jurisdiction, the trial court "may hold an evidentiary hearing including oral testimony or depositions or may decide the matter based on affidavits." *Bruggeman*, 138 N.C. App. at 615, 532 S.E.2d at 217; *Banc of Am. Secs. LLC*, 169 N.C. App. at 694, 611 S.E.2d at 183. Simply because the Court in *Bruggeman* did not address each possible procedural standpoint does not create a conflict. This argument is without merit.

[2] Plaintiff next argues the trial court erred in finding no evidence to suggest that defendant requested or knew Donahue wanted to send information removed from plaintiff's computer system because such evidence existed in the record. Plaintiff contends the finding is "clearly erroneous" because Donahue testified defendant asked him to provide information that could be useful in terminating plaintiff's distribution agreement, and once Donahue copied such information from the computer system, he then asked defendant for a fax number.

The trial court found that "[i]n his deposition, Donahue testified simply that he requested Haweka Germany's fax number from Carter." Donahue's deposition testimony supports this finding. Donahue stated that "I asked for Henning Flatt's fax number to fax the document that I had." He did not claim defendant knew the reason he was requesting the fax number or what kind of information the document contained. Although Donahue requested the fax number following the conference call in which he was asked to take information from plaintiff's computer system, the trial court found defendant was not a party to that call. This finding is also supported by Donahue's deposition testimony, in which he stated the conference

call was between himself, Andy Hancock, Henning Flatt, and Dirk Warkotsch. The trial court concluded " '[t]here simply is no evidence to suggest that Carter requested or knew that Donahue wanted to 'send information removed from Deer's computer system.' "

We have already stated that for questions of personal jurisdiction, this Court considers only whether the trial court's findings of fact are supported by competent record evidence. *Banc of Am. Secs. LLC*, 169 N.C. App. at 694, 611 S.E.2d at 183. Plaintiff argues that because Donahue specifically said in his deposition that defendant asked him to take information from plaintiff, the trial court's finding that there was "*no evidence* . . . [defendant] wanted to 'send information removed from Deer's computer system' " was erroneous. (Emphasis added). However, it appears the trial court believed defendant rather than Donahue, and "[w]e are not free to revisit questions of credibility or weight that have already been decided by the trial court." *Banc of Am. Secs. LLC*, 169 N.C. App. at 695, 611 S.E.2d at 183. Because the trial court's findings of fact with respect to defendant's involvement in taking information from plaintiff are supported by the evidence in the record, we are bound by them, even if another possible interpretation of the evidence exists. *Fungaroli*, 51 N.C. App. at 367, 276 S.E.2d at 524 ("The trial judge's findings of fact when supported by competent evidence are conclusive upon this Court even when there is conflict in the evidence."). This argument is overruled.

Similarly, plaintiff argued the trial court erred by finding there was no evidence defendant ever sought the North American distributorship because such evidence existed in the record. Although such evidence can be inferred from the record, defendant denied these allegations, stating in his affidavit that neither he nor his company "ever sought the USA distribution rights from Haweka Germany." Because we do not weigh the evidence or review questions of witness's credibility, *Banc of Am. Secs. LLC*, 169 N.C. App. at 695, 611 S.E.2d at 183, this argument is overruled.

[3] Plaintiff also argued the trial court erred in failing to consider certain evidence when ruling on defendant's motion to dismiss. Specifically, the trial court did not consider allegations in Allan Hansen's affidavit that were not based on Hansen's personal knowledge, nor did it consider allegations in the complaint. With respect to allegations in an affidavit, our courts have required they be based upon personal knowledge. North Carolina Rule of Civil Procedure 56(e) states "affidavits shall be made on personal knowledge," and

this Court has held Rule 56(e) applies to motions to dismiss. *Lemon v. Combs*, 164 N.C. App. 615, 621-22, 596 S.E.2d 344, 348-49 (2004) (stating the "requirement that affidavits must be based on personal knowledge applies to Rule 43(e) [Evidence on motions]"); *see also Hankins v. Somers*, 39 N.C. App. 617, 620, 251 S.E.2d 640, 642, *disc. review denied*, 297 N.C. 300, 254 S.E.2d 920 (1979) (applying the "personal knowledge" requirement in Rule 56(e) to a motion to dismiss). The Court in *Lemon* also noted "affidavits purporting to establish personal jurisdiction should be based on personal knowledge" and "[s]tatements in affidavits as to opinion, belief, or conclusions of law are of no effect." *Lemon*, 164 N.C. App. at 621, 596 S.E.2d at 348-49. Therefore, the trial court did not err by considering only the allegations in Hansen's affidavit that were based on his own personal knowledge.

Plaintiff's complaint was verified by its current president Thomas Betts. However, the statement of verification averred "the matters stated [in the complaint] are not all within [Betts's] personal knowledge; that the facts therein have been assembled by authorized representatives and counsel for Plaintiff, and he is informed that the facts stated therein are true." The trial court therefore found "[b]ecause Mr. Betts failed to identify any single allegation based on his own, personal knowledge, the Court must disregard his testimony." Plaintiff argues the trial court erred in disregarding the allegations in the complaint when considering defendant's Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction.

Our Supreme Court has held that in considering a Rule 56 motion for summary judgment, a trial court may consider "material which would be admissible in evidence" at trial. *Kessing v. Mortgage Corp.*, 278 N.C. 523, 533, 180 S.E.2d 823, 829 (1971). In *Hankins*, this Court reasoned that, like a motion for summary judgment, a motion to dismiss can also result in the termination of a lawsuit. Therefore, in ruling on a motion to dismiss, a court "should rely only on material that would be admissible at trial." *Hankins*, 39 N.C. App. at 620, 251 S.E.2d at 642. In *Inspirational Network, Inc. v. Combs*, 131 N.C. App. 231, 238, 506 S.E.2d 754, 759 (1998), we also stated "the trial court in ruling on a Rule 12(b)(2) motion 'should rely only on material that would be admissible at trial.' The court thus should 'consider whether there were sufficient allegations based upon plaintiff's personal knowledge to support the exercise of personal jurisdiction over the . . . defendants.' " 131 N.C. App. at 238, 506 S.E.2d at 759 (1998) (quoting *Hankins*, 39 N.C. App. at 620, 251 S.E.2d at 642).

Because the allegations in the complaint were not based on Thomas Betts' personal knowledge, we conclude the trial court properly disregarded those allegations in considering the question of personal jurisdiction over defendant.

[4] We now turn to plaintiff's argument that the trial court erred in granting defendant's motion to dismiss "because the undisputed evidence of record mandates the exercise of personal jurisdiction over [defendant]." Having determined the trial court's findings of fact are supported by competent evidence, we must conduct a *de novo* review of the trial court's conclusions of law and determine whether, given the facts found by the trial court, the exercise of personal jurisdiction would violate defendant's due process rights. *Banc of Am. Secs. LLC*, 169 N.C. App. at 694-95, 611 S.E.2d at 183.

A two-step inquiry is used to determine whether our courts have personal jurisdiction over a non-resident defendant. First, we must determine if a basis for jurisdiction exists under the North Carolina "long-arm" statute, and second, whether the exercise of jurisdiction over the defendant will comport with the constitutional standards of due process. *Cameron-Brown Co. v. Daves*, 83 N.C. App. 281, 283, 350 S.E.2d 111, 113 (1986). Because we believe due process would not be met if jurisdiction were exercised over defendant, we need not address the question of whether jurisdiction exists under our "long-arm" statute. *See Globe, Inc. v. Spellman*, 45 N.C. App. 618, 623, 263 S.E.2d 859, 863, *disc. review denied*, 300 N.C. 373, 267 S.E.2d 677 (1980) (stating the Court need not determine whether the contract at issue was in accord with the long-arm statute because even if that statute were met, due process was not).

"To satisfy the requirements of the due process clause, there must exist 'certain minimum contacts [between the nonresident defendant and the forum state] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.' " *Banc of Am. Secs. LLC*, 169 N.C. App. at 695, 611 S.E.2d at 184 (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 90 L. Ed. 95, 102 (1945)). Our Supreme Court has stated a defendant must "purposefully avail[] himself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." *Tom Togs, Inc. v. Ben Elias Indus. Corp.*, 318 N.C. 361, 365, 348 S.E.2d 782, 786 (1986). The "relationship between the defendant and the forum must be 'such that he should reasonably anticipate being haled into court there.' " *Id.* (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 62 L. Ed. 2d 490, 501 (1980)).

The existence of adequate minimum contacts must be determined "by a careful scrutiny of the particular facts of each case." *Cameron-Brown Co.*, 83 N.C. App. at 284, 350 S.E.2d at 114. Factors to be considered include: "(1) [the] quantity of the contacts between defendant and the forum state, (2) [the] quality and nature 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) [the] convenience of the parties." *Id.* Additional factors are "the location of critical witnesses and material evidence, and the existence of a contract which has a substantial connection with the forum state." *Id.* "No single factor controls; rather, all factors must be weighed in light of fundamental fairness and the circumstances of the case." *Corbin Russwin, Inc. v. Alexander's Hardware, Inc.*, 147 N.C. App. 722, 725, 556 S.E.2d 592, 595 (2001) (internal citation omitted).

A court is said to exercise "specific jurisdiction" where a case arises from or is related to the defendant's contacts with the forum state. Where the defendant's contacts with the state, however, are not related to the suit, we may apply the doctrine of "general jurisdiction." "Under this doctrine, 'jurisdiction may be asserted even if the cause of action is unrelated to defendant's activities in the forum state as long as there are sufficient 'continuous and systematic' contacts between defendant and the forum state.' " *Bruggeman*, 138 N.C. App. at 617, 532 S.E.2d at 219 (citations omitted).

The parties in the present case submitted materially conflicting evidence regarding defendant's contacts with North Carolina. The trial court accepted the facts as set forth by defendant, and having found such findings to be supported by competent evidence, we must determine the question of jurisdiction based on those facts. These facts consist of the following findings: (1) Donahue initiated the series of telephone conversations between Donahue and defendant; (2) defendant's alleged return calls to Donahue were not essential elements of any claim asserted by plaintiff against him; (3) defendant had no role in Haweka Germany's hiring of Donahue, other than to inform Haweka Germany of Donahue's interest and later to relay an offer of employment; (4) defendant neither sought nor received any benefit for informing Haweka Germany of Donahue's interest in working there; (5) defendant had no role in Haweka Germany's attempt to replace plaintiff as its North American distributor, nor did defendant seek the North American distributorship for himself; (6) defendant did not provide Donahue a credit card number for his trip to Germany; (7) in providing Donahue with a fax number for Haweka

Germany, defendant did not know Donahue planned to fax information removed from plaintiff's computer system; (8) defendant made an unspecified number of personal visits to North Carolina, the last of which took place in February 1999; (9) a number of the witnesses are residents of European countries; and (10) defendant is the father of three small children, and his wife suffers from severe post-natal depression, making it difficult for him to travel.

Thus, it appears defendant's contacts with North Carolina include: returning telephone calls to Donahue in North Carolina, which the trial court found was not related to any essential element of plaintiff's claims; relaying an offer of employment to Donahue in North Carolina, which the trial court determined he received no benefit from; and visiting North Carolina for a number of unspecified personal visits ending in February 1999. Plaintiff contends defendant visited North Carolina between four and eight times from 1996 to 1999 and, during those visits, conducted two training sessions, several "wrap-up" meetings, and one international sales meeting near the time of Allan Hansen's wedding celebration. The trial court concluded such contacts were insufficient to incur general jurisdiction over defendant, stating that his "general contacts with the state . . . were not systematic and continuous such that Carter should be expected to defend claims filed nearly five years after his last visit that are factually unrelated to those prior contacts." We agree with the trial court that defendant's telephone conversations with Donahue from Europe and his infrequent visits to North Carolina were not "continuous and systematic" contacts such that general jurisdiction would apply. *Bruggeman*, 138 N.C. App. at 617, 532 S.E.2d at 219.

We now address whether these contacts were sufficiently related to the allegations against defendant to incur specific jurisdiction. Assuming, as we must, defendant did not seek the North American distributorship for himself, one cannot conclude he used the meetings and training sessions he attended in North Carolina as a means to appropriate trade secrets or interfere with contract or prospective economic advantage. Also, accepting as true the trial court's findings that Donahue initiated the series of phone calls between Donahue and defendant, defendant received no benefit from relaying an offer of employment from Haweka Germany to Donahue, defendant did not provide a credit card number for Donahue's travel to Germany, and defendant did not ask Donahue to prepare a business plan for a new North American distributorship, the evidence does not support a conclusion that defendant conspired with Donahue to commit any al-

leged act. We cannot conclude, given the facts found by the trial court, plaintiff's claims arise from or are related to defendant's contacts with North Carolina. *Bruggeman*, 138 N.C. App. at 617, 532 S.E.2d at 219.

In addition to the quality and quantity of defendant's contacts with North Carolina and the relationship of those contacts to plaintiff's claims, the trial court also considered the convenience to the parties and the location of witnesses. It found that a number of witnesses in this litigation were residents of European countries and that travel would be difficult for defendant since his wife suffered from severe post-natal depression and he was the father of three small children. Weighing the trial court's findings as a whole, we hold that due process would not be satisfied by requiring defendant to litigate these claims in North Carolina.

[5] Finally, we must review the trial court's 27 February 2006 order denying plaintiff's Rule 60(b) motion to set aside the court's Order Granting Defendant's Motion to Dismiss for Lack of Personal Jurisdiction. Appellate review of a trial court's ruling on a motion made pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(b) is limited to determining whether the trial court abused its discretion. *Gallbronner v. Mason*, 101 N.C. App. 362, 364, 399 S.E.2d 139, 140, *disc. review denied*, 329 N.C. 268, 407 S.E.2d 835 (1991). The trial court cited two reasons for denying plaintiff's motion. First, it determined the documents submitted under seal corroborated its previous findings and therefore would not have affected its prior conclusions of law. Second, the court found plaintiffs had the opportunity to obtain and present the evidence in these documents at the evidentiary hearing but failed to do so. *See McGinnis v. Robinson*, 43 N.C. App. 1, 10, 258 S.E.2d 84, 90 (1979) (stating that one factor a trial court should consider in ruling on a 60(b) motion is "the opportunity the movant had to present his claim or defense") (citation omitted). Upon careful review of the sealed documents and the trial court's order, we conclude the trial court did not abuse its discretion in denying plaintiff's Rule 60(b) motion.

Affirmed.

JUDGES McGEE and ELMORE concur.

WILLIAM THOMAS ALSTON, AS PERSONAL REPRESENTATIVE FOR THE ESTATE OF EDWARD BRADDOCK ALSTON, PLAINTIFF v. BRITTHAVEN, INC., D/B/A BRITTHAVEN OF LOUISBURG, DEFENDANT

No. COA05-385

(Filed 2 May 2006)

Negligence— wrongful death—survivorship claim for pre-death injuries

The trial court abused its discretion in a negligence case by concluding that plaintiff was not entitled to proceed on both claims for his father's wrongful death as well as his injury, pain and suffering, and medical expenses prior to his death, and plaintiff is entitled to a new trial on the survivorship claim for pre-death injuries, because: (1) plaintiff's complaint listed five distinct claims, only one of which was entitled wrongful death; (2) except for the punitive damages claim, each claim included a request for damages in excess of $10,000, and the damages were not lumped together and did not give the appearance of relating to a single claim, but rather separate claims for damages sustained by reason of the negligent actions of defendants during decedent's lifetime as well as their negligence allegedly causing his death; (3) several of the damages plaintiff pled in the complaint including loss of dignity, scars and disfigurement, mental anguish, inconvenience, loss of capacity for enjoyment of life, and discomfort, are not damages recoverable under N.C.G.S. § 28A-18-2; (4) plaintiff presented substantial evidence at trial, notwithstanding any evidence defendant may have presented to the contrary, to allow the jury to conclude defendant negligently failed to prevent decedent's pressure sores and those pressure sores caused him pain and suffering prior to death; (5) plaintiff's pretrial issues, in addition to his pleadings and evidence at trial, gave notice to defendant and the trial court he intended to present to the jury the issue of decedent's injuries separately from the issue of his death; (6) wrongful death and survivorship claims may be brought as alternative claims for the same negligent acts when they may have caused either or both decedent's pre-death injuries and wrongful death; and (7) where a viable alternate explanation, other than defendant's negligent or wrongful act, exists for the cause of decedent's death, but the evidence also indicates defendant's negligence or wrongful act caused the decedent pain and suffering and/or medical expenses prior to his

death, a plaintiff has the right to present those pre-death claims to a jury separately from the wrongful death claim.

Appeal by plaintiff from judgment entered 14 May 2004 and order denying a new trial entered 24 May 2004 by Judge Henry V. Barnette, Jr. in Franklin County Superior Court. Heard in the Court of Appeals 23 January 2006.

McLean & Cardillo, P.A., by F. Edward Kirby, Jr. and J. Brett Davis, for plaintiff-appellant.

Yates, McLamb & Weyher, L.L.P., by Michael C. Hurley, for defendant-appellee.

Ferguson, Stein, Chambers, Gresham & Sumter, P.A., by Adam Stein, and Bunn & Arnold, by Kevin Bunn, amicus curiae for the North Carolina Academy of Trial Lawyers.

Kenneth L. Burgess, amicus curiae for North Carolina Health Care Facilities Association, North Carolina Medical Society, and North Carolina Hospital Association.

MARTIN, Chief Judge.

Plaintiff, as personal representative for Edward Braddock Alston ("Mr. Alston"), deceased, brought this action alleging negligence on the part of defendant Britthaven, Inc., d/b/a Britthaven of Louisburg. Defendant answered, denying negligence and asserting affirmative defenses.

The evidence at trial, summarized briefly and only to the extent required to address the issue raised on appeal, showed that on 27 March 1996, Mr. Alston entered Britthaven of Louisburg ("Britthaven"), a nursing home in Louisburg, North Carolina. Britthaven is part of a chain of nursing homes run by defendant. At the time, Mr. Alston was seventy-eight years old and suffering from Alzheimer's disease. Over the next few years, his health deteriorated to the point where he could no longer walk. Eventually, Mr. Alston became so weak he could no longer re-position himself in bed. In early 1999, Mr. Alston was assessed as being at risk for developing pressure sores, or skin ulcers, from his inability to move. By 8 March 1999, he had developed an open pressure sore on his left hip which required daily cleaning and dressing. Mr. Alston continued to develop pressure sores, including sores on his feet, hips and sacrum. Some of these sores reached Stage Four, the most severe level, which involves

damage to the skin tissue, muscle, and bone. Mr. Alston's feet became gangrenous, ultimately requiring the amputation of his legs above the knees.

Mr. Alston died on 24 June 1999. Plaintiff presented expert medical testimony that the cause of Mr. Alston's death was septicemia, or an infection which entered into his bloodstream. Plaintiff argued the cause of the infection was the pressure sores which defendant negligently failed to prevent. Defendant presented conflicting expert medical testimony that the cause of death was Alzheimer's dementia, a terminal illness.

Plaintiff proposed the following issues for submission to the jury:

1. Was Edward Braddock Alston injured by the negligence of the Defendant?

2. What amount is the estate of Edward Braddock Alston entitled to recover from the Defendant for the injuries caused by Defendant's negligence?

3. Was Edward Braddock Alston's death caused by the negligence of Defendant?

4. What amount is the estate of Edward Braddock Alston entitled to recover for the death of Edward Braddock Alston?

The trial court denied plaintiff's request to submit the first two issues and submitted only the following:

1. Was the death of the decedent, Edward Braddock Alston, proximately caused by the negligence of the defendant, Britthaven, Inc., d/b/a Britthaven of Louisburg?

2. What amount of damages is the plaintiff, William Thomas Alston, personal representative of the estate of Edward Braddock Alston, entitled to recover by reason of the death of decedent, Edward Braddock Alston?

After the jury was instructed, plaintiff renewed his objection to the court's failure to submit the issues and instruct the jury regarding Mr. Alston's pre-death injuries, arguing

> The plaintiff believes that the Court has given a charge to the jury that does not conform to the evidence, that will mislead the jury, and that it was an abuse of discretion by the Court to grant and give a charge to the jury that does not allow the jury to consider

> whether or not the defendant's negligence resulted in injuries to the [decedent], absent a finding that the defendant's negligence resulted in death to the [decedent].

His objection was overruled.

The jury answered the first issues submitted to it in favor of defendants. Plaintiff moved for a new trial, arguing that (1) he was entitled to prosecute claims of the decedent for personal injuries other than death, (2) he presented the two issues regarding the decedent's injuries to the trial court before trial as "proposed jury issues," (3) he pled decedent's injuries as a claim for relief in his complaint, (4) he presented evidence during the trial that would allow the jury to determine defendant's negligence caused decedent's injuries while not causing his death, (5) he properly objected to the trial court's failure to submit the requested issues to the jury, and (6) the trial court's failure to present these issues was reversible error. The trial court denied plaintiff's motion for a new trial. Plaintiff then gave notice of appeal from both the judgment entered on the verdict and the order denying his motion for a new trial.

This case presents the issue of whether the pleadings and evidence were sufficient to support a claim for damages for injuries sustained by Mr. Alston prior to his death as an alternative to plaintiff's claim for Mr. Alston's wrongful death where (1) the same injuries are the basis for both the survivorship and wrongful death claims and (2) a jury might find the defendant's negligence did not result in the decedent's death but did result in his injuries prior to death. Under North Carolina's survivorship statute, claims in favor of or against a decedent at the time of his death "shall survive to and against the personal representative or collector of his estate." N.C. Gen. Stat. § 28A-18-1(a) (2005). This statute entitled plaintiff to bring a claim for relief against defendant for any claim his father had against defendant at the time of his death. *McIntyre v. Josey*, 239 N.C. 109, 111, 79 S.E.2d 202, 203 (1953) (stating that "all causes of action survive the death of the person in whose favor or against whom they have accrued," except those listed in subsection (b), including libel, slander, false imprisonment, and causes of action where the relief sought could not be enjoyed or granting it would be nugatory after death). Plaintiff argues defendant's negligence resulted not only in his father's death, but also in injury, pain and suffering, and medical expenses prior to his death. We conclude plaintiff was entitled to proceed on both claims and, therefore, we must remand for a new trial on the survivorship claim.

The standard of review on appeal from a trial court's refusal to submit requested issues to a jury is whether the refusal was an abuse of the court's discretion. "[T]he trial court has wide discretion in presenting the issues to the jury and no abuse of discretion will be found where the issues are 'sufficiently comprehensive to resolve all factual controversies.' " *Murrow v. Daniels*, 321 N.C. 494, 499-500, 364 S.E.2d 392, 396 (1988) (citation omitted). It is well-settled that a trial court must submit to a jury all issues that are "raised by the pleadings and supported by the evidence." *Johnson v. Massengill*, 280 N.C. 376, 384, 186 S.E.2d 168, 174 (1972); *Indiana Lumbermen's Mut. Ins. Co. v. Champion*, 80 N.C. App. 370, 379, 343 S.E.2d 15, 21 (1986). Therefore, we must examine plaintiff's complaint to determine whether a survivorship claim for Mr. Alston's pre-death injuries was sufficiently pled apart from the claim for his death, and we must examine the entire record to determine whether this claim was supported by the evidence presented at trial. We must also determine whether the two issues submitted to the jury were sufficient to "resolve all factual controversies." *Murrow*, 321 N.C. at 499-500, 364 S.E.2d at 396.

With respect to the jury charge, this Court reviews jury instructions contextually and in their entirety. *Jones v. Satterfield Dev. Co.*, 16 N.C. App. 80, 86, 191 S.E.2d 435, 439-40, *cert. denied*, 282 N.C. 304, 192 S.E.2d 194 (1972). If the instructions "present[] the law of the case in such a manner as to leave no reasonable cause to believe the jury was misled or misinformed," then they will be held to be sufficient. *Id.* at 86-87, 191 S.E.2d at 440. The appealing party must demonstrate that the error in the instructions was likely to mislead the jury. *Robinson v. Seaboard Sys. R.R., Inc.*, 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). As with a requested issue, "[w]hen a party aptly tenders a written request for a specific instruction which is correct in itself and supported by evidence, the failure of the court to give the instruction, at least in substance, is error." *Maglione v. Aegis Family Health Ctrs.*, 168 N.C. App. 49, 56, 607 S.E.2d 286, 291 (2005) (quoting *Faeber v. E.C.T. Corp.*, 16 N.C. App. 429, 430, 192 S.E.2d 1, 2 (1972)).

First we address whether plaintiff sufficiently pled a survivorship claim for decedent's pre-death injuries. Plaintiff's complaint lists five claims under "Counts" entitled "Medical Malpractice," "Negligence Per Se," "Ordinary Negligence," "Punitive Damages," and "Wrongful Death." Defendant argues the complaint stated different legal theories of recovery but only a single claim for relief, which defendant describes as "an allegation that medical malpractice by Appellee

caused pressure sores that proximately resulted in wrongful death." According to defendant, plaintiff is attempting to "recast his singular claim at trial as two independent causes of action" on appeal. We disagree.

The first three "Counts" in plaintiff's complaint contain allegations primarily directed to injuries sustained by, and damages caused to, Mr. Alston rather than allegations concerning the proximate cause of his death. Under the "Count" entitled "Medical Malpractice," plaintiff alleges defendant was negligent and deviated from the applicable standard of care by, *inter alia*, the following:

> (c) Failing to implement the nursing care plan focusing on the prevention of pressure sores on the resident's body;
>
> (d) Failing to prevent the development of multiple pressure sores and promote the healing of existing pressure ulcers;
>
> (e) Failing to properly measure, stage and document the description of pressure sores on the resident's body;
>
> (f) Failing to maintain adequate, complete and accurate wound care records;
>
> (g) Failing to relieve pressure from the resident's body by failing to provide him with pressure relieving devices for his bed and/or wheelchair and failing to adequately reposition him in his bed and/or wheelchair;
>
> (h) Failing to monitor and revise Mr. Alston's nutrition care plan based on his changing condition and accompanying needs;
>
> (i) Failing to prevent weight loss in Mr. Alston;
>
> (j) Allowing Mr. Alston to become dehydrated;
>
> . . .
>
> (o) Failing to prevent pain and suffering
>
> . . . [and]
>
> (q) Failing to protect the resident from life-threatening circumstances.

Plaintiff further alleged that as a result, Mr. Alston suffered "loss of dignity, medical expenses, bodily injury, pain and suffering, permanent injury, scars and disfigurement, mental anguish, inconvenience, loss of capacity for enjoyment of life, discomfort, death and other

damages in excess of $10,000.00." Incorporating those allegations under the headings of "Negligence Per Se" and "Ordinary Negligence," plaintiff alleged that defendants had breached duties imposed by various state statutes and state and federal regulations and that:

> 33. Defendants owed a duty of reasonable care to Edward Braddock Alston.
>
> 34. To the extent the breach of Defendants' duties as alleged . . . above constitutes simple negligence rather than medical malpractice, this negligence is hereby pleaded.
>
> 35. As a direct and proximate result of Defendant's negligence, Mr. Alston suffered personal injury as alleged above.
>
> 36. Plaintiff is entitled to recover damages in excess of $10,000.00 for **injuries** to Mr. Alston proximately resulting from Defendant's negligence.

(Emphasis added).

Only under plaintiff's fifth "count" entitled "Wrongful Death" does he explicitly request the damages listed in N.C. Gen. Stat. § 28A-18-2, "including, but not limited to, pain and suffering, reasonable funeral expenses, loss of society, companionship, love, and comfort of Mr. Alston to his family, and punitive damages, in an amount in excess of $10,000.00." *See* N.C. Gen. Stat. § 28A-18-2(b) (2005).

This Court has previously held that where, upon reading the complaint as a whole, the complaint appeared to allege only a single claim for wrongful death, a plaintiff had not stated a claim for a survivorship action. In *Locust v. Pitt County Memorial Hospital*, 154 N.C. App. 103, 107, 571 S.E.2d 668, 672 (2002), *rev'd on other grounds*, 358 N.C. 113, 591 S.E.2d 543 (2004), this Court undertook to "determine whether Plaintiff's complaint alleged damages solely under the Wrongful Death Act or included a survival action as well." The Court found that "[i]n her complaint, Plaintiff states a claim 'for the wrongful death of [Lester] Tyson' and then proceeds to plead all the damages listed in section 28A-18-2(b)." *Id.* at 108, 571 S.E.2d at 672. Similarly, in *In re Estate of Parrish*, 143 N.C. App. 244, 255, 547 S.E.2d 74, 81 (2001), proceeds from an action were held to be wrongful death proceeds rather than assets of the decedent's estate where the "damages pled by [plaintiff] are virtually identical to those available under the Wrongful Death Statute," and the prayer for relief requested "all damages recoverable for [Parrish's] wrongful death."

Id. The Court in *Locust* noted that damages were alleged only once without any indication as to what amount of damages was sought pursuant to the wrongful death act and what amount was related to the survivorship claim. The Court stated, "it appears the damages sought were lumped together because they related to a single claim: wrongful death." *Locust,* 154 N.C. App. at 108, 571 S.E.2d at 672.

The instant case is distinguishable from these cases in several ways. First, as previously noted, plaintiff's complaint listed five distinct claims, only one of which was entitled "Wrongful Death." Second, except for the punitive damages claim, each claim included a request for "damages in excess of $10,000.00." Because the damages were not "lumped together" as in *Locust*, they did not give the appearance of relating to "a single claim" but rather separate claims for damages sustained by Mr. Alston by reason of the negligent actions of defendants during his lifetime as well as their negligence allegedly causing his death. *Id.* Third, several of the damages plaintiff pled in the complaint, including "loss of dignity, . . . scars and disfigurement, mental anguish, inconvenience, loss of capacity for enjoyment of life, [and] discomfort," are not damages recoverable under N.C. Gen. Stat. § 28A-18-2. Unlike *Locust* and *Parrish*, then, not all the damages pled were "virtually identical to those available under the Wrongful Death Statute." *Parrish*, 143 N.C. App. at 255, 547 S.E.2d at 81. We therefore conclude, upon reading plaintiff's complaint as a whole, that it sufficiently stated a survivorship claim for decedent's pre-death injuries separate and distinct from the wrongful death claim.

We now address the question of whether plaintiff presented sufficient evidence at trial of decedent's pre-death injuries. Plaintiff argues that "[a]t trial, much of the expert testimony elicited by both parties related to the questions of preventability of Mr. Alston's pressure sores, the treatment of those wounds in the three months before his death, and whether and to what degree the wounds caused him pain." We agree, and defendant concedes that "[t]he existence and sufficiency of this evidence are not at issue."

Plaintiff presented two medical experts who testified that pressure sores are preventable and treatable. Edna Atwater, the director of Duke University Medical Center's Wound Management Clinic, testified her clinic had been able to prevent the development of pressure sores through turning and repositioning every two hours, nutrition, incontinent care, and skin care. Dr. Mary Rudyck, a geriatric expert, testified such prevention measures "helped prevent pressure ulcers from developing" and Britthaven could have prevented the ulcers if

"minimum standards of care had been met." Three of the decedent's family members testified that every time they visited Mr. Alston he was lying on his back for the length of the visit, and they never saw him positioned differently.

Dr. Rudyck also testified that pressure sores cause "much discomfort for the patient" and that "people certainly can experience pain from pressure ulcers." She stated Mr. Alston "started to pull his dressings out of his wound," which may have been "an indication that he was having pain from what they were using to clean the wound." Sandra Alston, decedent's daughter-in-law, testified that Mr. Alston would "moan . . . and pull on the bed" as if he were in pain.

"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). We conclude plaintiff presented substantial evidence at trial, notwithstanding any evidence defendant may have presented to the contrary, to allow the jury to conclude defendant negligently failed to prevent Mr. Alston's pressure sores and those pressure sores caused him pain and suffering prior to death. Therefore, because they were properly pled and supported by the evidence at trial, the trial court should have submitted to the jury the two additional issues requested by plaintiff.

We must also note plaintiff submitted these issues as "proposed jury issues" to the trial court prior to trial. Defendant and the trial court each executed the "Pre-trial Order" containing these proposed issues, labeled as "Defendant's Exhibit E." However, during the jury charge conference, the trial court stated it was not aware plaintiff had wanted the jury to consider the question of decedent's pre-death injuries outside the context of a wrongful death claim. Defendant claims on appeal that plaintiff's post-trial attempt "to invent new theories of damages and causation . . . [was] beyond the power of the defendant to anticipate, much less rebut." However, we have already determined that plaintiff pled and argued a survivorship claim in addition to a wrongful death claim. Plaintiff's pre-trial issues, in addition to his pleadings and evidence at trial, clearly gave notice to defendant and the trial court he intended to present to the jury the issue of Mr. Alston's injuries separately from the issue of Mr. Alston's death. Therefore, we believe neither defendant nor the trial court should have been surprised by plaintiff's request to submit these issues to the jury, nor do we believe the jury would have been confused by their submission. The jury heard ample evidence regarding Mr.

Alston's injuries, and it could have reasonably determined that Mr. Alston's injuries, though not his death, were caused by defendant's negligence.

We must also determine whether wrongful death and survivorship claims may be brought as alternative claims for the same negligent acts. We hold that they can. Defendant argues that in order to bring pure survivorship and wrongful death claims in the same suit, they must arise out of different injuries. Therefore, plaintiff should have delineated which pressure sores caused Mr. Alston's death and which sores caused him pain and suffering prior to death. We disagree. If the jury concluded Mr. Alston died of Alzheimer's disease rather than an infection from the pressure sores, it could still reasonably determine that defendant's negligence caused the pressure sores and that any or all of those sores caused Mr. Alston pain and suffering prior to death. Defendant's argument in this respect has no merit.

"The general rule in the law of damages is that all damage resulting from a single wrong or cause of action must be recovered in one suit." *Bruton v. Carolina Power and Light Co.*, 217 N.C. 1, 7, 6 S.E.2d 822, 826 (1940). Otherwise, the claim may be barred later by the doctrine of *res judicata*, if, in the exercise of "reasonable diligence," it "could and should have been brought forward" in the original suit. *Id.* In *Bowen v. Constructors Equipment Rental Co.*, 283 N.C. 395, 196 S.E.2d 789 (1973), our Supreme Court discussed the manner in which wrongful death and pre-death injuries should be submitted to the jury when brought in the same suit:

> Manifestly, a defendant may not be required to pay these elements of damage [medical costs, pain and suffering, and punitive damages] twice. If the two causes of action are joined in one complaint, each should be stated separately; if separate actions are instituted, they should be consolidated for trial. Unless rendered unnecessary by stipulation, separate issues should be submitted (1) as to whether the decedent was injured by the wrongful act of the defendant, and (2) as to whether the decedent's death was caused by the wrongful act of the defendant.

Bowen, 283 N.C. at 421, 196 S.E.2d at 807. Therefore, these claims can be "joined in one complaint," and when they are, the Supreme Court suggested precisely what plaintiff sought to do here: submit separate issues where the defendant's negligence or wrongful act may have caused either or both the decedent's pre-death injuries and wrongful death.

It is vital to distinguish this case from those where no alternate explanation exists as to the cause of death. In such cases, pursuant to the 1969 statutory changes, the survivorship claims included in the wrongful death statute, which are pain and suffering, medical costs, and punitive damages, may be pursued as part of a wrongful death action. *Locust*, 154 N.C. App. at 107, 571 S.E.2d at 671; *Parrish*, 143 N.C. App. at 254, 547 S.E.2d at 80. However, where a viable alternate explanation, other than defendant's negligence or wrongful act, exists for the cause of decedent's death, but the evidence also indicates defendant's negligence or wrongful act caused the decedent pain and suffering and/or medical expenses prior to his death, a plaintiff has the right to present those pre-death claims to a jury separately from the wrongful death claim. Otherwise, the plaintiff might be prevented from even a single recovery for those injuries as they would never reach the jury for consideration.

The *Bowen* Court raises the issue of the potential for double recovery when these two claims for relief are brought in the same suit. The wrongful death statute includes damages for pain and suffering and medical expenses, and if so instructed, a jury's award for wrongful death will provide for those injuries. N.C. Gen. Stat. § 28A-18-2(b) (2005) (stating that "[d]amages recoverable for death by wrongful act include: (1) [E]xpenses for care, treatment and hospitalization incident to the injury resulting in death; (2) [C]ompensation for pain and suffering of the decedent"); *see also Locust*, 154 N.C. App. at 107, 571 S.E.2d at 671 ("In 1969, the General Assembly modified the Wrongful Death Act to include recovery for the decedent's pain and suffering and hospital care"); *Parrish*, 143 N.C. App. at 254, 547 S.E.2d at 80 (the 1969 amendments to the wrongful death statute added "damages previously recoverable only in survival actions to the list of damages recoverable in a wrongful death action"). During oral argument before this Court, defendant argued that submitting separate issues for pre-death injuries and wrongful death could result in a double recovery because the jury might find defendant liable for both claims and award damages separately for each.

The submission of separate issues, as suggested by *Bowen*, does not alone avert the problem of double recovery. The first issue submitted to the jury should be whether the defendant's negligence or wrongful act caused the decedent's death. If the jury answers this question in the affirmative, it can then determine the amount of damages to which plaintiff is entitled for that death, including, where appropriate, those listed in the wrongful death statute for medical costs, pain and suffering, and punitive damages. The pattern jury

instructions for wrongful death address each of these damage issues. If the jury answers the first question in the negative, however, only then should it turn to the question of whether the defendant's negligence or wrongful act caused the decedent's pre-death injuries. If it answers this second question in the affirmative, it can then consider the issue of damages for these injuries, and the trial court should instruct the jury accordingly. Because the jury instructions in this case only related to the two issues regarding Mr. Alston's death, the jury was told it could not find defendant's negligence caused Mr. Alston's injuries if it did not also determine such negligence caused his death. *Robinson*, 87 N.C. App. at 524, 526, 361 S.E.2d at 917 (stating that a party must demonstrate on appeal that the error in the jury instructions "was likely, in light of the entire charge, to mislead the jury" and "[t]he trial court is required to give a party's requested instructions when they are correct and supported by the evidence").

For the foregoing reasons, we cannot conclude the two issues submitted to the jury in this case "resolve[d] all factual controversies." *Murrow v. Daniels*, 321 N.C. 494, 500, 364 S.E.2d 392, 396 (1988). The jury never determined whether defendant's negligence caused Mr. Alston's pre-death injuries, although our case law, the pleadings, and the evidence presented at trial would have allowed it to do so. We must, therefore, grant plaintiff a new trial on its survivorship claim.

New Trial.

Judges McGEE and STEELMAN concur.

STATE OF NORTH CAROLINA v. LACY DOUGLAS HOCUTT, DEFENDANT

No. COA05-473

(Filed 2 May 2006)

1. Appeal and Error— incriminating statement—properly admitted—not harmless, but not error

A first-degree murder defendant's recorded jailhouse telephone statement that he was "getting back" at the victim when he shot him would not have been harmless (although there was no error) where defense counsel was arguing for second-degree murder based on a lack of premeditation.

2. Arrest— defendant initially detained as intoxicated—unable to provide shelter for himself—no Fourth Amendment violations

The initial seizure and incarceration of a first-degree murder defendant, which led to a recorded inculpatory telephone conversation, did not violate defendant's Fourth Amendment rights where defendant (who had consumed much alcohol during the day) was observed staggering, barefoot, dirty and very scratched up on the shoulder of a highway in an isolated area late at night. He was apparently in need of and unable to provide for himself clothing and shelter, and N.C.G.S. § 122C-303 allows an officer to take an intoxicated person to jail under these circumstances.

3. Arrest— defendant initially detained as intoxicated—unable to provide shelter for himself—no deprivation of counsel

Defendant's initial confinement for detoxification under N.C.G.S. § 122C-303, which led to an incriminating recorded telephone statement, did not deprive him of his right to counsel. Defendant was charged the next morning, advised of his rights, requested counsel, and counsel was appointed at his first appearance (but after the incriminating conversation). Defendant does not dispute that he received a timely first appearance or that counsel was then appointed.

4. Confessions and Incriminating Statements— statement after right to counsel invoked—recorded jailhouse telephone call to girlfriend

The police did not impermissibly elicit statements from defendant after he invoked his right to counsel where defendant made incriminating statements to his girlfriend in a recorded jailhouse telephone call. Although a detective told the girlfriend some facts which she discussed with defendant, she was not acting as an agent of the State.

5. Bail and Pretrial Release— first-degree murder—no bond—no abuse of discretion

There was no refusal to exercise discretion in the court's setting of "no bond" in a first-degree murder case, as the court had the discretion to do.

6. Constitutional Law— right of confrontation—DNA report—testimony from agent who did not perform tests

The trial court did not err by permitting an SBI agent to testify about the results of DNA tests performed by another agent who did not testify. It has been held that such testimony is nontestimonial under *Crawford v. Washington*, 541 U.S. 36, and thus does not violate the Confrontation Clause.

7. Homicide— first-degree murder—evidence sufficient

There was sufficient evidence for a charge of first-degree murder where there was a history of violence and hostility between the parties, there was an incident on the night of the shooting, defendant twice said that he ought to shoot the victim, he told his girlfriend to stop the car and got a beer and a gun from the trunk, a beer can with defendant's DNA and sunglasses with his fingerprint were found near the victim, and defendant later said that he shot the victim because of an earlier incident in which the victim shot him.

8. Discovery— violation—mistrial denied—no abuse of discretion

The trial court did not abuse its discretion by denying defendant's motions to dismiss and for a mistrial for discovery violations by the State, given the court's attention to the violation and its willingness to allow defendant time to contact experts.

Appeal by defendant from judgment entered 3 September 2004 by Judge Jack W. Jenkins in the Superior Court in Johnston County. Heard in the Court of Appeals 2 November 2005.

Attorney General Roy Cooper, by Special Deputy Attorney General Edwin W. Welch, for the State.

Cheshire, Parker, Schneider, Bryan & Vitale, by John Keating Wiles, for defendant-appellant.

HUDSON, Judge.

In May 2003, defendant was charged with first-degree murder. The defendant's trial began on 16 August 2004 and on 3 September 2004, the jury convicted defendant of first-degree murder. Following a sentencing hearing, the court sentenced defendant to life imprisonment without parole. Defendant appeals. For the reasons discussed below, we conclude that there was no error.

The evidence tends to show the following facts. In 1991 or 1992, Brent Turner and a friend went to defendant's home and began harassing defendant's ex-wife's brother. When defendant went outside to see what was happening, Turner ran over defendant with his car and after defendant got up and chased the car, Turner's companion shot defendant twice, causing serious injury. Although defendant won a $120,000 civil judgment against Turner, he had never been able to collect anything on it. Thereafter, defendant felt that when he saw Turner, that Turner would "always smile at [defendant] and stuff, like, well, I got away with it or whatever."

On the morning of 8 May 2003, defendant drank three or four beers before leaving for work at 6:00 a.m. He took to work eight or nine beers in a cooler, which was empty when he returned home. He also stopped and drank some "white liquor" with a friend on his way home. Once home, he had another four or five beers. Around 6:00 p.m., defendant's live-in girlfriend, Barbara Langston, drove defendant, defendant's brother, and her children to Popeye's Gas and Grill, a local gas station and convenience store. As they were leaving Popeye's, Turner was pulling in on his red moped, and as he passed Langston's car, he "flipped [defendant] the bird" and yelled "f—- you" at him. Defendant yelled "f—- you" back at Turner. Langston began driving to her father's house for a cookout and defendant twice stated that he "ought to shoot the motherf——." Langston testified that after she turned onto Branch Chapel Church Road, defendant demanded that she stop the car and let him out; he threatened to "beat [her] ass" if she did not. Langston complied and defendant got out, got his gun from the trunk, and Langston handed him a Busch beer at his request. She left him standing on the side of Branch Chapel Church Road with the gun in his hand. Langston later told a detective that she thought defendant was going to shoot Turner. The State presented evidence that the most direct route from Popeye's to Turner's house was via Branch Chapel Church Road and that defendant was aware of this.

At trial, a resident of Branch Chapel Church Road testified that on 8 May 2003, around 6:15 or 6:30 p.m., she was in her yard and just after she saw a man drive by on a moped, she heard two gunshots. The moped was later found 25 to 50 feet from her driveway. At about 6:30 p.m., a citizen saw a moped on the road and Turner on the side of the road. Turner's face from "his nose down to his chin, was gone." The citizen called 911 and rescue workers arrived shortly before 7:00 p.m. and transported Turner to the hospital. Turner died several days later.

Detectives and a crime scene investigator from the Johnston County Sheriff's office arrived at the crime scene beginning around 7:15 p.m. They found a Busch beer can, a pair of sunglasses, and an empty 12-gauge shotgun shell casing in the woods near where Turner was found. They also saw muddy footprints made by bare feet. Forensic testing revealed defendant's fingerprint on the sunglasses and his DNA on the beer can. About two weeks later, a logger found a shotgun in the wooded area near the crime scene. Forensic examination could not determine that the casing found by the side of the road or the pellets removed from Turner came from this gun, but did reveal that the gun had been fired.

When Detectives Scott Richardson and Bengie Gaddis of the Johnston County Sheriff's office left the crime scene at around 11:30 p.m. to return to Selma, they saw the defendant walking down the road barefooted. He had scratches all over his body, was very dirty, and was staggering. The officers recognized defendant and observed that he was very intoxicated. They placed him in handcuffs and took him to jail for "detox purposes," "to sober up." The next morning defendant was charged with assault with a deadly weapon with intent to kill inflicting serious injury, and attempted murder. Defendant remained in custody and on 12 May 2003 after Turner died, he was charged with first-degree murder. While at the Johnston County Detention Center, defendant made incriminating statements over the phone to Langston and to his brother which were recorded, pursuant to jail policy. Inmates receive an informational handbook regarding this policy, notices are posted in the cell blocks notifying defendants that their telephone calls are monitored, and before being connected, both the caller and the person being called hear a recorded warning that "all calls are subject to monitoring and recording," except for "attorney calls." Defendant's recorded statements that he shot Turner were introduced by the State at trial.

At trial, defendant did not testify and presented only one witness: Dr. Katayoun Tabrizi, a psychiatrist. She testified that in her opinion, defendant suffered from alcohol dependence and personality changes after a previous head trauma. She opined that these conditions caused loss of impulse control and that on 8 May 2003 defendant "would have been severely impaired in knowing what he was doing, what he was doing would result in . . . . some consequences." Tabrizi also testified that defendant told her that he shot Turner and that "I just wanted to shoot him just as they shot me." He also told her that he did not intend to kill Turner.

[1] Defendant first argues that the trial court committed constitutional error when it permitted his recorded telephone conversations to be used against him. Defendant argues that his initial seizure and incarceration violated his Fourth, Fourteenth, and Sixth Amendment rights under the United States Constitution. We disagree. We note at the outset that

> [a] violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless.

N.C. Gen. Stat. § 15A-1443(b) (2005). The State asserts that any error was harmless beyond a reasonable doubt, in light of the other evidence against defendant and his own concession at trial, through counsel, that he shot Mr. Turner. However, defendant was charged with first-degree murder by premeditation, deliberation, and lying in wait, and defense counsel was arguing for the lesser-included offense of second-degree murder, based on lack of evidence of specific intent to kill, premeditation or deliberation, and lying in wait. Thus, we cannot conclude that the court's admitting defendant's recorded statement, "Why'd I do it? The mother f—— shot me didn't he . . . I shot his God damn ass back," was harmless beyond a reasonable doubt. We do conclude, though, that the trial court did not err, as the statement was not obtained in violation of defendant's constitutional rights.

[2] The Fourth Amendment to the United States Constitution and Article 22 of the North Carolina Constitution grant persons the right to be free from unreasonable search and seizure. Here, defendant was initially seized pursuant to a public intoxication statute and defendant argues that because the statutory requirements were not met, that the seizure violated his constitutional rights. N.C. Gen. Stat. § 122C-303 (2002) provides, in pertinent part, that

> an officer may assist an individual found intoxicated in a public place by directing or transporting that individual to a city or county jail. That action may be taken only if the intoxicated individual is apparently in need of and apparently unable to provide for himself food, clothing, or shelter but is not apparently in need of immediate medical care and if no other facility is readily available to receive him.

Id. Because the evidence shows that defendant was observed staggering, barefoot, dirty, and very scratched up on the shoulder of a

highway in an isolated area late at night, we conclude that he was "apparently in need of and apparently unable to provide for himself" clothing and possibly shelter. Defendant has not argued that there was no other facility available to receive him.

Defendant cites *Davis v. Town of Southern Pines*, 116 N.C. App. 663, 449 S.E.2d 240 (1994), *disc. review denied*, 339 N.C. 737, 454 S.E.2d 648 (1995), in support of his argument that the statutory requirements were not met. In addition to being a civil rather than a criminal case, we conclude that the facts of *Davis* make it readily distinguishable. In *Davis*, the Court concluded that N.C. Gen. Stat. § 122C-303 did not allow police to take a woman to jail after police saw her stumble on the sidewalk, approached her, and offered assistance which she refused. *Id.* at 672, 449 S.E.2d at 245-46. However, when approached by the police, Davis stated she was going to call a cab to take her home and her sister, who was with her, offered to call a cab and take care of her. *Id.* Defendant suggests that Officer Gaddis was required to transport defendant to his and Langston's home because he allegedly knew where they lived. But the statute plainly states that an officer may take an intoxicated person home, just as an officer may take an intoxicated person to jail if the conditions described above are met. N.C. Gen. Stat. § 122C-303. We overrule this assignment of error.

[3] Defendant also argues that his detention deprived him of his "liberty interest in seeking counsel," in violation of his Fourteenth Amendment rights. Defendant cites no case law in support of his contention that the Fourteenth Amendment confers such a right and we conclude that this argument lacks merit.

Defendant correctly asserts that under the Sixth Amendment, a person charged with a crime is entitled to counsel. *See Powell v. Alabama*, 287 U.S. 45, 66, 77 L. Ed. 158, 169 (1932). Defendant also correctly notes that this right to counsel attaches before the commencement of trial, as the accused "requires the guiding hand of counsel at every step in the proceedings against him." *Id.* at 69, 77 L. Ed. at 170. Defendant contends that his Sixth Amendment right to counsel was violated by the delay in the appointment of counsel and because he made incriminating statements over the jail phone before he was afforded the "guiding hand of counsel." We disagree.

Police initially detained defendant for detoxification in the late evening of 8 May 2003. The next morning, on 9 May 2003, defendant was charged with assault with a deadly weapon with intent to kill

inflicting serious injury and attempted murder, and he requested counsel after police advised of his *Miranda* rights. At his first appearance on those charges, on 12 May 2003, the court appointed Indigent Defense Services ("IDS") as counsel. Later in the day on 12 May 2003, defendant was charged with first-degree murder. Defendant made his first appearance on the murder charge on 13 May 2003, at which time the court again noted that counsel was to be appointed. Defendant met with appointed counsel on 14 May 2003. On 10 May 2003, defendant made incriminating statements on the jail phone, which were recorded and introduced by the State at trial. Defendant asserts that the State deliberately denied him the "guiding hand of counsel" during this time so that it could exploit a situation "likely to induce [defendant] to make incriminating statements without the assistance of counsel." *United States v. Henry*, 447 U.S. 264, 65 L. Ed. 2d 115 (1980).

Defendant cites *Powell v. Alabama* in support of his argument that he was entitled to appointed counsel at an earlier time. 287 U.S. 45, 77 L. Ed. 158. However, *Powell* involved a defendant who did not have counsel at trial as the court at the arraignment had merely charged "all the members of the bar" to represent defendant. *Id.* at 69, 77 L. Ed. at 160-61. Defendant does not dispute that he received a timely first appearance or that at that appearance the court appointed IDS to represent him. The IDS attorney met with defendant two days after his first appearance on the initial charges and one day after he was charged with murder. These facts bear no meaningful resemblance to *Powell* and as defendant cites no other authority, we overrule this assignment of error.

[4] Defendant also argues that the police impermissibly elicited statements from him after he invoked his right to counsel. The government may not deliberately elicit incriminating statements from a defendant after he has invoked his Sixth Amendment right to counsel. *Maine v. Moulton*, 474 U.S. 159, 88 L. Ed. 2d 481 (1985); *United States v. Henry*, 447 U.S. 264, 65 L. Ed. 2d 115. In *United States v. Henry*, a defendant awaiting trial made incriminating statements to a fellow inmate, who was acting as a paid government informant and who testified against the defendant at trial. *Id.* The Court held that the informant's statements were inadmissible because the Government violated Henry's Sixth Amendment right to counsel "[b]y intentionally creating a situation likely to induce Henry to make incriminating statements without the assistance of counsel." *Id.* at 274, 65 L. Ed. 2d at 125. Similarly, in *Maine v. Moulton*, the defendant made incrimi-

nating post-indictment statements to a co-defendant who, unbeknownst to defendant, had made a deal with the State to testify against the defendant and was wearing a recorder during a meeting with defendant. 474 U.S. 159, 88 L. Ed. 2d 481. The Court held that the government violated the defendant's Sixth Amendment rights by violating its "affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by counsel." *Id.* at 171, 88 L. Ed. at 493. The primary concern of this line of decisions is "secret interrogation by investigatory techniques that are the equivalent of direct police interrogation." *Kuhlmann v. Wilson*, 477 U.S. 436, 459, 91 L. Ed. 2d 364, 384 (1986). Thus,

> the Sixth Amendment is not violated whenever—by luck or happenstance—the State obtains incriminating statements from the accused after the right to counsel has attached . . . . [T] he defendant must demonstrate that the police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks.

Id. (internal quotation marks and citation omitted).

Here, defendant has made no showing that the State deliberately elicited incriminating statements from him. Our careful review of the record indicates that although Detective Gaddis told Barbara Langston some facts about the crime which she later discussed with defendant over the jail phone, Langston was not acting as an agent of, or informant for, the State. Indeed, defendant does not allege that Langston acted at the request of the State, and Detective Gaddis denied that he gave Langston information about the case in order to deliberately elicit incriminating statements from defendant. We overrule this assignment of error.

[5] Defendant also argues that the court violated his constitutional and statutory rights to have a reasonable bail set. U.S. Const., Amend VIII, XIV; N.C. Const., Art. I., 27; N.C. Gen. Stat. §§ 15A-511, 533 (2002). We disagree. Defendant concedes that the determination of what a "reasonable" bond is rests within the trial court's discretion. However, he argues that when the court set the bond as "no bond" and "zero", it failed to exercise its discretion. As defendant was charged with first-degree murder, a capital offense, the trial court had the discretion not to set bail. N.C. Gen. Stat. § 15A-533(c); *State v. Sparks*, 297 N.C. 314, 320, 255 S.E.2d 373, 378 (1979). Accordingly, we conclude that this assignment of error lacks merit.

Defendant next argues that the trial court committed constitutional error when it denied his motion to suppress evidence seized from his person. Defendant contends that his clothing and gunshot residue hand-wipings were seized incident to his unlawful and unconstitutional seizure and incarceration and thus should have been suppressed. Because we have concluded that defendant's initial seizure and incarceration were not unconstitutional, we overrule this assignment of error.

[6] Defendant also contends that the court erred when it permitted an SBI agent to testify about the results of DNA tests performed by a different agent who did not testify. Defendant argues that this violated his constitutional rights under the Confrontation Clause of the Sixth Amendment, as interpreted by the United States Supreme Court in *Crawford v. Washington*. 541 U.S. 36, 158 L. Ed. 2d 177 (2004). In *Crawford*, the Court held that for testimonial evidence to be admitted against a defendant, the Confrontation Clause requires witness unavailability and a prior opportunity for cross-examination by the defendant. *Id.* at 68, 158 L. Ed. 2d at 203. However, *Crawford* left it to the States to determine how to address non-testimonial hearsay. *Id.* This Court has previously held that one SBI agent's testimony about the results of analysis conducted by another agent is non-testimonial under *Crawford*, and thus does not violate the Confrontation Clause. *State v. Walker*, 170 N.C. App. 632, 635, 613 S.E.2d 330, 333, *disc. review denied*, 359 N.C. 856, 620 S.E.2d 196 (2005); *State v. Delaney*, 171 N.C. App. 141, 144, 613 S.E.2d 699, 701 (2005); *State v. Watts*, 172 N.C. App. 58 , 67-68 , 616 S.E.2d 290, 297 (2005). Accordingly, we overrule this assignment of error.

[7] In his next argument, defendant asserts that the trial court erred in failing to dismiss the charge of first-degree murder for insufficiency of the evidence. The State relied on two theories of first-degree murder: murder with specific intent formed after premeditation and deliberation, and murder by lying in wait. Defendant contends that there was insufficient evidence to support a conviction under either theory. We disagree.

In reviewing the trial court's ruling on a defendant's motion to dismiss, this Court evaluates the evidence presented at trial in the light most favorable to the State. *State v. Davis*, 130 N.C. App. 675, 679, 505 S.E.2d 138, 141 (1998). We consider whether the State presented "substantial evidence" in support of each element of the charged offense and of defendant's identity as the perpetrator of the offense. *State v. Lynch*, 327 N.C. 210, 215, 393 S.E.2d 811, 814 (1990). "Substantial evi-

dence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Franklin*, 327 N.C. 162, 171, 393 S.E.2d 781, 787 (1990). Ultimately, we must decide "whether a reasonable inference of defendant's guilt may be drawn from the circumstances." *State v. Lee*, 348 N.C. 474, 488, 501 S.E.2d 334, 343 (1998).

In order to prove first-degree murder by premeditation, the State was required to show the unlawful killing of another with malice and a specific intent to kill, committed after premeditation and deliberation. *See* N.C. Gen. Stat. § 14-17 (2003)*; State v. Cozart*, 131 N.C. App. 199, 202, 505 S.E.2d 906, 909 (1998), *disc. review denied*, 350 N.C. 311, 534 S.E.2d 600 (1999). "Premeditation means that the act was thought out beforehand for some length of time, however short, but no particular amount of time is necessary for the mental process of premeditation." *State v. Conner*, 335 N.C. 618, 635, 440 S.E.2d 826, 835-36 (1994). "Deliberation means an intent to kill, carried out in a cool state of blood, in furtherance of a fixed design for revenge or to accomplish an unlawful purpose and not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation." *Id*. at 635, 440 S.E.2d at 836. "Since a specific intent to kill is a necessary constituent of the elements of premeditation and deliberation, proof of premeditation and deliberation is also proof of intent to kill." *State v. Lowery*, 309 N.C. 763, 768, 309 S.E.2d 232, 237 (1983). First-degree murder by lying in wait "refers to a killing where the assassin has stationed himself or is lying in ambush for a private attack upon his victim." *State v. Leroux*, 326 N.C. 368, 375, 390 S.E.2d 314, 320 (1990) (internal quotation marks omitted).

Defendant argues that the evidence only supports second-degree murder, that it shows no more than a "shooting of opportunity," and that only mere speculation supports theories of premeditation or lying in wait. However, the evidence tends to show that there was a history of violence and hostility between the parties. The evidence also shows that on the night of the shooting, the victim, Turner, saw defendant as he was leaving a convenience store. As Turner left, he "flipped [defendant] the bird" and shouted "f—- you," at him. Defendant then yelled "f—- you" at Turner. After defendant and his girlfriend, Langston, left the store, defendant twice told Langston that "he ought to shoot the motherf———-." He then told her to stop the car and let him out, whereupon he got a beer and a "big gun" from the trunk. She left him on the side of the Branch Chapel Church Road with the gun in his hands at shortly after 6:00 p.m. She told Detective

Gaddis that at that time she thought defendant was going to shoot Turner. Turner was shot on Branch Chapel Church Road at around 6:15 or 6:30 p.m. A shotgun shell casing, a beer can with defendant's DNA on it, and a pair of sunglasses with defendant's fingerprint on them were found in a bush nearby. Also, as discussed, defendant stated that he shot Turner because Turner had shot him. The State's medical examiner testified that Turner died as a result of shotgun wounds that were fired from a distance of more than two, but less than four or five feet distance. We conclude that, viewed in the light most favorable to the State, there was sufficient evidence of premeditation and deliberation, or lying in wait, and the trial court properly denied the defendant's motion to dismiss.

[8] Defendant next argues that the trial court committed constitutional error when it denied his motions to dismiss and for a mistrial for discovery violations by the State. We disagree. Although N.C. Gen. Stat. § 15A-910 (2003) allows the trial court to impose sanctions for discovery violations, it is well-established that "the determination of whether to impose sanctions rests solely within the discretion of the trial court." *State v. Jones*, 151 N.C. App. 317, 325, 566 S.E.2d 112, 117 (2002), *disc. review denied*, 356 N.C. 687, 578 S.E.2d 320 (2003). "Therefore, the trial court's decision will only be reversed for an abuse of discretion . . . upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision." *Id.* (internal quotation marks and citation omitted).

Here, on 4 May 2004, the court ordered the State to produce test results and other testing information, but the State did not do so until 20 August 2004, after trial had begun. "[I]t's apparent that the defendant may need some additional time to consider the information and the evidence that has been delivered to defendant . . . The Court is going to allow the defendant some additional time to review that evidence and to determine if experts are needed and, if so, to make contact with those experts." The court then suggested to defendant's trial counsel that he use the afternoon to determine the availability of experts. Counsel and the trial court then discussed the anticipated dates of the State's expert witnesses. Given the trial court's attention to the State's discovery violation, and its willingness to allow the defendant time to contact experts, we cannot conclude that the trial court abused its discretion. We overrule this assignment of error.

No error.

Judges BRYANT and CALABRIA concur.

STATE OF NORTH CAROLINA v. CHAD EVRIST HERNDON

No. COA05-724

(Filed 2 May 2006)

1. Evidence— cross-examination—right to remain silent

The prosecution was not improperly permitted to cross-examine defendant in a voluntary manslaughter case even though defendant contends it violated his right to remain silent, because: (1) assuming defendant's objection properly preserved for review a challenge to the pertinent questions and answers, it is not apparent that the State was commenting on post-Miranda silence when the testimony is reviewed in context; (2) if the questioning related to defendant's conversation with a deputy on the day of the shooting, post-Miranda silence was not implicated; and (3) defense counsel failed to object to the initial questions and any later objection regarding the State's initial questions was not preserved for appellate review.

2. Criminal Law— prosecutor's argument—defendant's right to remain silent

The trial court did not err in a voluntary manslaughter case by failing to intervene ex mero motu during certain portions of the State's closing argument where defendant contends the State improperly referred to defendant's exercise of the right to remain silent and asked the jury to discount defendant's testimony, because: (1) contrary to defendant's assertion, the State was referring to the testimony of his brother and his girlfriend's failure to support defendant's version of the facts; (2) taken in context, the pertinent portion of the closing argument does not necessarily refer to any post-Miranda silence by defendant, but to the refusal of some eyewitnesses and the willingness of another to give statements to the investigators on the day of the shooting; and (3) the other pertinent portion of the closing argument was supported by the cross-examination of defendant's brother, the direct examination of the investigating detective, and the earlier argument regarding defendant's brother and his girlfriend.

3. Homicide— instruction—voluntary manslaughter

The trial court did not commit plain error by instructing the jury on voluntary manslaughter in addition to first-degree murder, second-degree murder, self-defense, and defense of others, be-

cause: (1) defendant's own evidence tends to show the elements of imperfect self-defense; and (2) substantial evidence was presented from which a rational trier of fact could find defendant employed excessive force in shooting the victim five times with three shots striking the victim in the back and buttocks while acting in self-defense.

4. Criminal Law— instruction—aggressor—collateral estoppel—double jeopardy

The trial court did not commit plain error in a voluntary manslaughter case by giving the jury an aggressor instruction where an earlier jury in defendant's first trial allegedly previously determined he was not the aggressor, because: (1) the doctrine of collateral estoppel did not apply, nor did jeopardy attach, when no unanimous verdict was reached by the earlier jury about whether defendant was the aggressor; and (2) the note from the prior jury stating it had determined that defendant was not the aggressor merely demonstrated a moment in time during the jury deliberations.

Appeal by defendant from judgment entered 23 August 2004 by Judge Robert F. Floyd, Jr., in Robeson County Superior Court. Heard in the Court of Appeals 26 January 2006.

Attorney General Roy Cooper, by Special Deputy Attorney General Karen E. Long, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Anne M. Gomez, for defendant-appellant.

TYSON, Judge.

Chad Evrist Herndon ("defendant") appeals from judgment entered after a jury found him to be guilty of voluntary manslaughter. We find no error.

I. Background

In late July 2001, defendant's girlfriend, Sherri Dail ("Dail") told defendant she was having an affair with Darren Locklear ("the victim"), a married man. Defendant called the victim's wife, Yolanda Locklear, who told him she was also aware of her husband's affair with Dail.

In the early morning hours of 3 September 2001, Michael Shane Herndon ("defendant's brother") was present at a party at the home of Shmora Locklear ("Shmora"). The victim also attended the party and was sitting at a table with a gun by his feet. Conflicting evidence was presented to show the victim had blocked defendant's brother's car and prevented him from leaving the party. Defendant's brother telephoned defendant, who drove to the party.

Conflicting evidence was also presented at trial regarding whether defendant was armed. Shmora testified defendant exited his vehicle with two guns and gave one gun to defendant's brother, but did not bring a gun into her residence. India Lowery, was present at Shmora's residence, and testified defendant exited the vehicle with a gun.

Defendant's brother testified he never saw defendant with a gun. Defendant testified a gun was present in his vehicle, but he did not remove it. Guests at the party intervened and prevented a confrontation between defendant and the victim. Defendant and his brother left Shmora's residence. Defendant testified he received a threatening telephone call at his home from the victim later that morning.

Defendant and Dail left and drove toward Fayetteville to purchase birthday party supplies for their two-year-old child. While en route, defendant's brother telephoned defendant and told him the victim had called again and said "he was on his way over and he was going to shoot the house up and kill everybody back there." Defendant's brother informed defendant that the victim had called from a Pembroke telephone number. Defendant turned around his vehicle, returned to his residence, picked up his brother, and drove toward Pembroke. Defendant testified "that means he was halfway from his house to mine. And he was actually coming over."

Three witnesses testified to the events that occurred next: defendant, defendant's brother, and Shane Hunt ("Hunt"), who was a passenger in the victim's vehicle that morning. As defendant drove towards Pembroke on Union Chapel Road, he saw a white Ford Expedition belonging to the victim driving toward him. Defendant drove into a vacant parking lot. The victim drove his vehicle off of the highway and parked in front of defendant's vehicle. Both defendant and the victim exited their vehicles. Defendant was unarmed.

Defendant and defendant's brother testified that the victim pointed a gun at defendant's face and pulled the trigger, but the gun

misfired. Hunt testified the victim did not point the gun at defendant. Lumberton police officer Lewis Woodard testified he found a spent casing in the chamber of the victim's gun. Undisputed evidence shows the victim struck defendant on his head with the gun. Defendant returned to his vehicle after being struck by the victim's gun. Defendant and his brother testified they saw the victim pulling the slide of his gun. Defendant entered his vehicle to leave the scene.

Defendant and his brother's testimonies conflict with Hunt's testimony regarding the shooting. Hunt testified the victim said something similar to "I knew you wasn't going to do nothing." Hunt also testified the victim turned around to return to his vehicle and defendant began shooting at the victim from the window of defendant's vehicle.

Defendant and his brother testified that after defendant entered his vehicle, defendant's brother saw the victim walking towards defendant's vehicle and raise his gun. Defendant's brother told defendant, "He's getting ready to shoot." Defendant testified he grabbed his gun and observed the victim coming towards his vehicle and pointing a gun at him. At that point, defendant "just started shooting" at the victim from the window of his vehicle. Defendant testified he did not know where he hit the victim and did not see the victim after he stopped shooting. As defendant left the scene, Hunt emerged from the victim's vehicle holding a gun.

Defendant stopped a black truck driving in the opposite direction. The truck was driven by Andy Scott ("Scott"). Defendant told Scott that "he had just shot a boy and wanted [him] to call the ambulance." Defendant returned to his vehicle and told his girlfriend, Dail, to call the police and inform them that he was en route to the police station. Dail did not testify at trial.

Pembroke Police Officer John Veneziano ("Officer Veneziano") was off duty and driving down Union Chapel Road when he observed a white sport utility vehicle parked on the side of the road with a male lying on the ground on the driver's side. Officer Veneziano observed a gun located about five inches from the victim's right hand and a pool of blood gathering around his mid-section.

Robeson County Sheriff's Deputy Hubert Brian Graham ("Deputy Graham") testified he was dispatched to the scene of the shooting. While Deputy Graham was en route to the scene in a marked patrol car, he noticed defendant's vehicle pass him with flashing lights.

Deputy Graham turned his vehicle around and defendant's vehicle came to a stop. Defendant told Deputy Graham that he "shot the person in Union Chapel." Deputy Graham put defendant into the back of his patrol car and removed two firearms from defendant's vehicle. Deputy Graham's First Sergeant told him to turn defendant over to Pembroke police officers and proceed to the scene. Deputy Graham arrived on the scene shortly after the ambulance. Deputy Graham testified the victim was alive upon his arrival and that he heard the victim speak to EMS personnel.

Dr. Richard Johnson ("Dr. Johnson") appeared as a witness for the State as an expert pathologist and testified that the autopsy he performed revealed five gunshot wounds on the victim's body. The victim received three shots to the back, one shot to the upper left buttocks, and one shot to the front of the right leg.

Defendant was charged, and later indicted by a grand jury, for first-degree murder. Defendant was initially tried in March 2003 in Robeson County Superior Court. The trial court declared a mistrial on 11 March 2003 after the jury announced their inability to reach a unanimous verdict. Defendant was retried in August 2004 in Robeson County Superior Court. The jury found defendant to be guilty of voluntary manslaughter. The trial court sentenced defendant to a minimum term of fifty-seven months and a maximum term of seventy-eight months imprisonment. Defendant appeals.

II. Issues

Defendant argues: (1) the State's cross-examination and closing argument violated his right to remain silent; (2) insufficient evidence was presented to support the voluntary manslaughter verdict; and (3) the trial court erred in giving the jury an aggressor instruction after an earlier jury had determined him not to be the aggressor.

III. Defendant's Right to Remain Silent

Defendant argues a new trial is required because the State's cross-examination of him and its closing argument violated his right to remain silent. We disagree.

A criminal defendant has a right to remain silent under the Fifth Amendment to the United States Constitution, as incorporated and binding upon the states by the Fourteenth Amendment, and under Article I, Section 23 of the North Carolina Constitution. U.S. Const. amend. V; U.S. Const. amend. XIV; N.C. Const. art. I, sec. 23. "A

defendant's silence after receiving *Miranda* warnings cannot be used against him as evidence of guilt." *State v. Best*, 342 N.C. 502, 519, 467 S.E.2d 45, 55-56 (1996) (citing *Doyle v. Ohio*, 426 U.S. 610, 49 L. Ed. 2d 91 (1976) (holding that when *Miranda* warnings are given, "it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial.")).

A. Cross-Examination

[1] Defendant asserts the State improperly questioned him about invoking his right to silence. The transcript shows the following exchange occurred during the State's cross-examination of defendant:

> Q: You have had plenty of time to get this story straight with your brother, have you not?
>
> A: It's the same thing I testified to last time.
>
> Q: Have you had a lot of time to get your story straight with your brother?
>
> A: If we had to get the story straight.
>
> DEFENSE COUNSEL: Object. Object.
>
> THE COURT: Well, Mr. Herndon, answer the question if you can, and then you may explain your answer within the context and the boundaries of the question.
>
> DEFENSE COUNSEL: Well, I object to the form of the question, your Honor.
>
> THE COURT: Overruled.
>
> THE WITNESS: Could you repeat your question again, sir?
>
> Q: When was the first time that you ever told the story that you told in the last proceedings?
>
> A: To my attorney, Angus Thompson, the next day.
>
> Q: Not the police?
>
> A: Excuse me?
>
> Q: Not the police?
>
> A: I was already charged with murder.

Q: So you didn't want to tell them that you had acted in self-defense?

A: I was already charged with murder.

When the State repeated the last question, defense counsel objected. After the trial court overruled defendant's objection, defense counsel requested a bench conference at which he argued that the question violated defendant's Fifth and Sixth Amendment rights. During the course of the bench conference, the prosecutor withdrew his question.

Presuming defendant's objection properly preserved for review a challenge to the prior questions and answers, it is not apparent that the State was commenting on post-*Miranda* silence when the testimony is reviewed in context. Defendant testified on direct examination he told Officer Graham prior to being taken into custody someone had tried to kill him and that he had to shoot. On cross-examination, the State pointed out that Officer Graham had testified that defendant had never mentioned anyone was trying to kill him. The State asked why Deputy Graham would lie on the stand. Defendant claimed that Graham was lying at the request of a third party. In following up on this contention, the State then asked "[w]hen was the first time that you ever told the story that you told in the last proceedings," referring to the claim of self-defense. Defendant did not claim he had first asserted self defense to Deputy Graham, but rather testified he had first told "the story" to his attorney the day after the shooting. As his counsel was objecting, defendant apparently realized what question was being asked and attempted to testify, first "I did tell," and then again, "I did."

Defendant has failed to show any error occurred. If the questioning related to defendant's conversation with Deputy Graham on the day of the shooting, post-*Miranda* silence was not implicated. Defense counsel failed to object to the initial questions and any later objection regarding the State's initial questions was not preserved for appellate review. Regarding the final question asked by the State since that question was withdrawn and defendant made no further objections or motions to these questions, there is no error to review. This assignment of error is dismissed.

B. Closing Argument

[2] Defendant argues the trial court erred by failing to intervene during certain portions of the State's closing argument *ex mero motu*.

Defendant asserts the State improperly referred "to [defendant's] exercise of the right to remain silent" and was "asking the jury to discount [defendant's] testimony." Our review of the transcript does not support this assertion. To the contrary, the State was plainly referring to defendant's brother's, testimony and defendant's girlfriend's failure to support defendant's version of the facts.

The State stressed in its cross-examination of defendant's brother that he did not tell the police that defendant had acted in self-defense:

> Q. Did you ever tell the police officers the story that you've told in here today?
>
> A. No, sir, nobody never asked me either.
>
> Q. Your brother was in jail after he was charged, is that right?
>
> A. Yes, sir.
>
> Q. Was it because that you had to have time in order to get your story straight and that's the reason that you told no police officer within that 30 days or any time thereafter the story that you've told in here today?
>
> A. It was just nobody never asked, sir.
>
> . . . .
>
> Q. But you were asked, sir, to tell us what you saw.
>
> A. You asked me, sir, if I wanted to say anything.
>
> Q. And you said no.
>
> A. I said no, sir.
>
> Q. That was your opportunity. Someone did ask you to tell what you saw.
>
> A. Well—
>
> Q. And you refused?
>
> A. There was another opportunity, too, sir.

The State later called the detective in charge of the investigation who testified that he went to see Michael Shane Herndon and defendant's girlfriend and unsuccessfully attempted to obtain a statement from either of them on the day of defendant's arrest.

During its closing argument, the State first pointed out that defendant's girlfriend, Dail, "was an eye witness to this killing; and yet, [she] hasn't said a word. . . . Why is that?" Then, the State argued:

> Prior to testifying, Michael Shane Herndon says not one word to the police about self-defense. Why not? Do you really think that if they thought this was a self-defense case, you couldn't have shut them up. They'd been down at the police station, "I want to give a statement, I want to give a statement." But they didn't do it. They didn't say, "Hey, look, you know, my brother's not guilty, or "My boyfriend's not guilty. It was self-defense." When was it that Shane Hunt gave his statement telling what he saw? The very day. That afternoon. Because he didn't have to have time to make up a defense or make up evidence.

Defendant's challenge to the State's closing argument immediately follows this commentary on defendant's brother's and Dail's failure to tell the police that defendant acted in self-defense:

> Now, the defendant gets the evidence that the State has. Have to give them everything we've got. He waits and tailors his testimony to what the evidence is. And it comes down to whether you believe Shane Hunt, or whether you now believe the defendant.

In context, this portion of the closing argument does not necessarily refer to any post-*Miranda* silence by defendant, but to the refusal of some eyewitnesses and the willingness of another to give statements to the investigators on the day of the shooting.

The subsequent portion challenged by defendant the State asked the jury to:

> consider, when you're considering that evidence, when these stories of what happened, when those came out, the timing of when they came out, and that should play a large role in you deciding what weight that you're going to give someone's testimony. Decide when it was the people said "Oh, this is what happened" because that, ladies and gentlemen, says a lot about who's telling you the truth.

This closing argument is supported by the cross-examination of defendant's brother, the direct examination of the investigating detective, and the earlier argument regarding defendant's brother and Dail. In the context of the closing arguments, these statements do not necessarily refer to defendant's post-*Miranda* silence. The trial court did

not err in failing to intervene in the closing argument *ex mero motu*. This assignment of error is overruled.

IV. Sufficiency of the Evidence: Voluntary Manslaughter

[3] Defendant argues the trial court erred in instructing the jury on voluntary manslaughter because the evidence supported only one of two verdicts: guilty of first-degree murder or not guilty of any crime. We disagree.

The trial court instructed the jury on first-degree murder, second degree murder, voluntary manslaughter, self-defense, and defense of others. The verdict sheet gave the jury the choice of finding defendant guilty of first-degree murder, second degree murder, voluntary manslaughter, or not guilty.

Defense counsel failed to object to the submission of the voluntary manslaughter instruction. Our review is limited to plain error. *State v. Odom*, 307 N.C. 655, 659, 300 S.E.2d 375, 378 (1983). "In deciding whether a defect in the jury instruction constitutes 'plain error,' the appellate court must examine the entire record and determine if the instructional error had a probable impact on the jury's finding of guilt." *Id.* at 661, 300 S.E.2d at 378-79.

Defendant argues the submission of a voluntary manslaughter instruction to the jury had a probable impact on the jury's finding of guilt because "the submission of a lesser included offense in the absence of substantial evidence to support the lesser verdict, invites jurors to disregard their oaths and to reach verdicts by compromise." *State v. Arnold*, 98 N.C. App. 518, 530, 392 S.E.2d 140, 148 (1990). We disagree.

"Voluntary manslaughter is the unlawful killing of a human being without malice, premeditation or deliberation." *State v. Rummage*, 280 N.C. 51, 55, 185 S.E.2d 221, 224 (1971) (citations omitted).

> Generally voluntary manslaughter occurs when one kills intentionally but does so in the heat of passion suddenly aroused by adequate provocation *or in the exercise of self-defense where excessive force under the circumstances is employed* or where the defendant is the aggressor bringing on the affray. Although a killing under these circumstances is both unlawful and intentional, the circumstances themselves are said to displace malice and to reduce the offense from murder to manslaughter.

State v. Wilkerson, 295 N.C. 559, 579, 247 S.E.2d 905, 916 (1978) (emphasis supplied) (citations omitted).

Here, defendant's own evidence tends to show the elements of imperfect self-defense. Defendant and defendant's brother testified the victim pointed a gun at defendant and attempted to fire. The victim then struck defendant on the head with the gun. After defendant retreated to his vehicle, defendant and defendant's brother testified the victim walked towards defendant's vehicle and raised his gun. Defendant's brother remarked, "He's getting ready to shoot."

Dr. Johnson testified the victim received five gunshot wounds, three to the back, one to the buttocks, and one to the front of his right leg. Defendant testified he did not know where he shot the victim and did not see the victim after he shot. Substantial evidence was presented from which a rational trier of fact could find defendant employed excessive force in shooting the victim five times with three shots striking the victim in the back and buttocks while acting in self-defense. *Id.*

Based upon the evidence presented, the trial court's submission of a voluntary manslaughter instruction to the jury was not plain or prejudicial error. *See State v. Walker*, 22 N.C. App. 22, 23, 205 S.E.2d 328, 329-30 (1974) (evidence sufficient to support a verdict of voluntary manslaughter where the victim called the defendant a "name" and reached for a gun and the defendant grabbed the gun first and shot the victim). This assignment of error is overruled.

V. Aggressor Instruction

[4] Defendant argues the trial court also committed plain error in giving the jury an aggressor instruction where an earlier jury previously determined defendant not to be the aggressor. We disagree.

During jury deliberations at defendant's first trial, the jury sent a note to the judge that stated, "We came to the agreement that he was not the aggressor. Chad did not go there to kill Locklear. We have 9 not guilty [and] 3 manslauter (sic) . . . ." The jury at defendant's first trial failed to reach a unanimous verdict and the trial court declared a mistrial.

Defendant contends that, "once a jury has conclusively determined the existence or nonexistence of a fact, the [S]tate is collaterally estopped under the Double Jeopardy Clause from relitigating that same issue in a second criminal proceeding." *State v. Carter*, 357 N.C.

345, 355, 584 S.E.2d 792, 800 (2003) (citation omitted). In *State v. Warren*, our Supreme Court stated, " 'Collateral estoppel' means that once an issue of ultimate fact has been determined by a *valid and final judgment*, that issue may not be relitigated by the same parties in a subsequent action." 313 N.C. 254, 264, 328 S.E.2d 256, 263 (1985). "Defendant has the burden of demonstrating that the issue he seeks to foreclose from relitigation was actually decided in the previous proceeding." *Carter*, 357 N.C. at 355-56, 584 S.E.2d at 800.

In *State v. Booker*, the foreman of the jury during the defendant's first trial sent a note to the trial judge which stated that the jury was deadlocked seven to five in favor of a verdict of guilty of second degree murder. 306 N.C. 302, 304, 293 S.E.2d 78, 79 (1982). Our Supreme Court held that the jury did not return a final verdict. *Id.* at 307, 293 S.E.2d at 81; *see* N.C. Gen. Stat. § 15A-1237(a) ("The verdict must be in writing, signed by the foreman, and made a part of the record of the case."); *see also State v. Mays*, 158 N.C. App. 563, 575-76, 582 S.E.2d 360, 368 (2003) (A jury's note in the first trial stating "we can unanimously agree that *minimally* the defendant is guilty of 2nd degree murder" was not binding on the second trial.)

Here, the doctrine of collateral estoppel does not apply. No unanimous verdict was reached by the jury whether or not defendant was the aggressor. *Id.* The note from the prior jury demonstrated a moment in time during the jury deliberations and was not a final verdict for collateral estoppel to apply or jeopardy to attach. This assignment of error is overruled.

VI. Conclusion

Defendant failed to show the State's cross-examination and closing argument improperly commented upon and violated his right to remain silent under the Fifth Amendment. Defendant failed to show the State's cross-examination and closing argument violated his right to remain silent.

Sufficient evidence was presented to support the jury instruction on voluntary manslaughter. The trial court did not commit plain error in submitting voluntary manslaughter or an aggressor instruction to the jury to warrant a new trial. Defendant received a fair trial free from prejudicial or plain errors he assigned and argued.

NO ERROR.

Judges HUDSON and GEER concur.

IN RE K.T.L.

[177 N.C. App. 365 (2006)]

IN THE MATTER OF K.T.L.

No. COA05-667

(Filed 2 May 2006)

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

The six assignments of error that respondent juvenile failed to argue in his brief are deemed abandoned under N.C. R. App. P. 28(b)(6).

2. Appeal and Error— preservation of issues—challenge to sufficiency of evidence—failure to make motion to dismiss at close of all evidence

Although respondent juvenile contends the trial court erred by finding him to be delinquent based upon his contention that the State failed to present sufficient evidence that he committed the offense of involuntary manslaughter, this assignment of error is dismissed because the juvenile failed to make a motion to dismiss the petition at the close of all evidence, thus waiving his right to challenge the sufficiency of the evidence against him.

3. Juveniles— delinquency—denial of motion to close hearing to public—no showing of good cause

The trial court did not abuse its discretion by denying respondent juvenile's motion to close his delinquency hearing to the public, because: (1) the court made detailed findings of fact concerning the facts of the case, the media coverage of it, and the fact that the general public in the community was not only aware of the case, but also that the then eight-year-old juvenile had been charged with killing a three-year-old child; (2) the court conducted a thorough hearing on the issue as to whether to close the juvenile's hearing when it heard arguments from both parties and testimony from a detective and the juvenile's mother; and (3) the court's ruling is not one that is manifestly unsupported or arbitrary.

4. Appeal and Error— preservation of issues—failure to assign error

Although respondent juvenile contends that he was subjected to three separate instances of unlawful confinement, the juvenile failed to preserve his appeal on the two prior instances of confinement because his assignment of error only addresses the third

instance of confinement from the entry of the 21 December 2004 disposition order until 28 February 2005.

5. Juveniles— delinquency—lawfulness of confinement

The trial court did not err in a juvenile delinquency case arising out of the charge of involuntary manslaughter by concluding that respondent juvenile was not unlawfully confined pending appeal and/or other placement based on a 21 December 2004 dispositional order, because: (1) the trial court was authorized to grant custody of the juvenile to DSS for purposes of obtaining necessary evaluation and treatment pursuant to N.C.G.S. § 7B-2506(1)(c), and further, the trial court complied with the requirements of N.C.G.S. § 7B-906 by ordering that a review hearing take place within ninety days of the 30 November 2004 dispositional hearing; (2) the juvenile's placement in a Level III or IV residential treatment facility was authorized by N.C.G.S. § 7B-2506(14), and the court was permitted to order this type of dispositional alternative when the court found the juvenile had a history of aggressive behavior directed at younger children and that a facility that offered twenty-four-hour monitoring would ensure that he did not cause any further harm to other children; (3) although the juvenile contends the court was not permitted to order his confinement for a period longer than fourteen days, N.C.G.S. § 7B-2506(20) does not apply since he was not ordered to be confined in a juvenile detention facility but instead was ordered to be placed in a residential treatment facility; and (4) the temporary order entered on the same day as the 21 December 2004 disposition order which also ordered the juvenile to remain in custody of DSS and to be placed in a residential treatment facility for ninety days for evaluation purposes was authorized under N.C.G.S. § 7B-2605 when the juvenile's parents were unwilling to consent to the level of evaluation and treatment necessary.

Appeal by juvenile respondent from orders entered 3 November 2004 and 21 December 2004 by Judge Alfred W. Kwasikpui in Bertie County District Court. Heard in the Court of Appeals 7 December 2005.

Attorney General Roy A. Cooper, III, by Assistant Attorney General M. Lynne Weaver, for the State.

Sofie W. Hosford, for juvenile-appellant.

JACKSON, Judge.

Malik Beverly ("Malik"), age three, was reported missing by his babysitter on 2 September 2004 shortly after 7:30 p.m. Malik, who was being cared for while his mother was at work, had been outside playing much of the afternoon with his older sister. The two had been seen playing around various homes in the trailer park, and at one point were seen pouring water from a bucket into an open septic tank in the yard of one of the trailers. This particular septic tank was damaged and did not have a proper cover. It usually was covered with a large piece of plywood with a rock on top of the plywood. K.T.L. ("juvenile"), who was then eight years old, lived in the same trailer park in which Malik and his sister were playing, and he was seen playing with the two children at about 6:50 p.m. that evening.

After a search of the trailer park, police and residents found Malik's body floating in the septic tank into which he previously had been seen pouring water with his sister. The septic tank had been covered by an eighteen pound piece of plywood, which had a thirty pound rock and bucket, containing about an inch of water, sitting atop the plywood. An autopsy determined that the cause of Malik's death was drowning. The autopsy revealed a bruise on the top of Malik's head which appeared to have resulted from a blunt force injury, and would not have been consistent with a fall. Malik's body also showed a scrape about two and one half inches long on the front of his stomach, which was indicative of his having been moved over a slightly rough surface, such as pavement or concrete.

On 3 September 2004, Dayquan Bazemore, a fifth grader at juvenile's school, was on juvenile's school bus when juvenile asked Dayquan if he had heard what happened the night before. Dayquan testified that juvenile stated that he and a little boy had been playing, and that after beginning to fight juvenile "slammed him in the road." Dayquan stated that juvenile then told him that juvenile "thought he was dead so I drug him over to the septic tank and threw him in." Dayquan testified that juvenile had a smile on his face while he was talking.

Monisha Holley, also a fifth grader, was on the same bus as Dayquan and juvenile on the morning of 3 September 2004. When she boarded the bus, she asked Dayquan and juvenile if they had heard what happened the night before. Juvenile responded "Yes," to which Dayquan asked juvenile why he had done that to him, referring to the

little boy. Juvenile told the two fifth graders that "I didn't do nothing to him, I was just beating him up." Dayquan asked juvenile "Well how did he die then?," to which juvenile replied, "Because I threw him in the septic tank." Monisha testified that shortly thereafter, she heard juvenile and Dayquan talking and that juvenile stated that it was funny when he threw him, referring to the little boy, into the septic tank. Monisha also stated that juvenile sometimes liked to brag to the other children, and that in the past he had threatened children on the school bus.

On 20 September 2004, the State issued a juvenile petition against juvenile, charging him with involuntary manslaughter in violation of North Carolina General Statutes, section 14-18. On 22 September 2004, the State called juvenile's case for a hearing, at which time juvenile and the State jointly moved that the hearing be closed. Following testimony from a detective and juvenile's mother, the trial court denied the parties' motions and ordered juvenile's hearing to be open to the public.

After three days of evidence, the trial court adjudicated juvenile delinquent on 3 November 2004, finding that he had committed the offense of involuntary manslaughter. Juvenile was ordered to remain in custody pending his dispositional hearing, so that he could receive a comprehensive evaluation of his needs. On 30 November 2004 the trial court heard evidence from both parties regarding disposition, and announced that it would issue its decision by written order to be entered on 21 December 2004. Juvenile was ordered to remain in secure custody pending the entry of the disposition order.

On 21 December 2004, the court entered its disposition order, and ordered that juvenile be placed in the custody of Bertie County Department of Social Services ("DSS") so that he could be placed in a Level III or IV residential treatment facility that provided 24-hour monitoring for a period not to exceed 90 days. The purpose of this placement was so that juvenile's emotional needs could be evaluated throughly, and so that the court could make a well-informed decision regarding juvenile's final disposition. Juvenile also was placed on intensive probation for one year. The court ordered the matter to be reviewed on 28 February 2005, at which time the court would be presented with the results of juvenile's evaluation, including recommendations as to treatment and placement necessary to meet juvenile's emotional needs. Juvenile appeals from both the adjudication and dispositional orders.

[1] We begin by noting that juvenile asserts ten assignments of error in the record on appeal, however he presents arguments as to only four of the assignments of error in his brief. The remaining six assignments of error, for which no argument was presented, are therefore deemed abandoned. N.C. R. App. P. 28(b)(6) (2005).

[2] In his first assignment of error, juvenile asserts the trial court erred in finding he was delinquent, based on the State's failure to present sufficient evidence that he committed the offense of involuntary manslaughter. In order to challenge the sufficiency of the evidence, a juvenile may make a motion to dismiss the petition at the close of the State's evidence during the adjudicatory hearing. *In re Clapp*, 137 N.C. App. 14, 19, 526 S.E.2d 689, 693 (2000); *In re Davis*, 126 N.C. App. 64, 65-66, 483 S.E.2d 440, 441 (1997). "However, if a defendant [or juvenile] fails to move to dismiss the action . . . at the close of all the evidence, he may not challenge on appeal the sufficiency of the evidence to prove the crime charged." N.C. R. App. 10(b)(3) (2005); *see also*, *In re Hartsock*, 158 N.C. App. 287, 291, 580 S.E.2d 395, 398 (2003); *In re Lineberry*, 154 N.C. App. 246, 249, 572 S.E.2d 229, 232 (2002), *cert. denied*, 356 N.C. 672, 577 S.E.2d 624 (2003). In the instant case, juvenile failed to make a motion to dismiss the petition at the close of all evidence, thus waiving his right to challenge the sufficiency of the evidence against him. As juvenile has failed to preserve his right to appeal on this issue, this assignment of error is dismissed.

[3] Juvenile next contends the trial court abused its discretion in denying his motion to close juvenile's delinquency hearing to the public. At juvenile's first appearance on 22 September 2004, both juvenile and the State moved for the hearings to be closed to the public. After hearing testimony from juvenile's mother and a detective who investigated the death of Malik Beverly, the trial court denied the parties' motions and ruled that juvenile's hearing would be open pursuant to North Carolina General Statutes, section 7B-2402.

North Carolina General Statutes, section 7B-2402 provides that all juvenile hearings will "be open to the public unless the court closes the hearing or part of the hearing for good cause, upon motion of a party or its own motion." N.C. Gen. Stat. § 7B-2402 (2004). The trial court must consider a number of factors in determining whether good cause exists for the hearing to be closed. Factors to be considered by the court include, but are not limited to:

(1) The nature of the allegations against the juvenile;

(2) The age and maturity of the juvenile;

(3) The benefit to the juvenile of confidentiality;

(4) The benefit to the public of an open hearing; and

(5) The extent to which the confidentiality of the juvenile's file will be compromised by an open hearing.

Id. The decision to close a juvenile hearing to the public is one that lies within the discretion of the trial court. *In re Potts*, 14 N.C. App. 387, 391-92, 188 S.E.2d 643, 646, *cert. denied*, 281 N.C. 622, 190 S.E.2d 471 (1972). An abuse of discretion will be found only " '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. Campbell*, 359 N.C. 644, 673, 617 S.E.2d 1, 19 (2005) (quoting *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988)).

During the hearing on juvenile's motion to close the hearings to the public, the detective, who investigated and handled the case involving the death of Malik Beverly, stated that there were approximately seventy-five people who lived in the trailer park where Malik's body was found. He stated that the circumstances surrounding Malik's death had become known within the community, and that the death and details surrounding it had been reported by both the local television and print media. After the petition had been drawn charging juvenile with the offense, the detective received numerous calls from citizens in the community asking about the case and saying that they had heard about it on the news. The detective also stated that juvenile lives in the trailer park where Malik's body was found. Juvenile's mother, who presented brief testimony during the hearing, stated that she likely would not return juvenile to the public school once he is released.

Following the testimony, the trial court made detailed findings of fact concerning the facts of the case, the media coverage of it, and the fact that the general public in the community is not only aware of the case, but also that juvenile has been charged with killing Malik. The court went on to conclude as a matter of law, that it had considered each of the factors listed in North Carolina General Statutes, section 7B-2402, and that after weighing the factors, there was insufficient cause to close juvenile's hearing and good cause existed to keep the hearing open to the public. We hold the trial court conducted

a thorough hearing on the issue as to whether or not to close juvenile's hearing, in that the court heard arguments from both parties and testimony from the detective and juvenile's mother. After reviewing the evidence, the trial court exercised its discretion and denied the parties' motions. We hold that the trial court's ruling is not one that is manifestly unsupported or arbitrary, and as such, we hold the trial court did not abuse its discretion in denying parties' motions to close juvenile's hearings to the public.

[4] Finally, juvenile argues he was confined unlawfully and that the trial court's 21 December 2004 dispositional order should be vacated. Juvenile's assignment of error on this issue states that "[t]he trial court erred when it ordered the juvenile detained pending appeal and/or other placement." The assignment of error specifically references only the 21 December 2004 dispositional order, in which the trial court ordered juvenile to be placed in the custody of DSS, with placement in a residential treatment facility for no more than ninety days, and that pending this placement, juvenile was to remain in secure custody.

On appeal, juvenile address three separate instances of confinement in his brief, and presents arguments that each of them was unlawful. Specifically, juvenile contends that he was subjected to three separate instances of unlawful confinement: (1) from the trial court's 3 November 2004 adjudication order until the 30 November 2004 dispositional hearing; (2) from the 30 November 2004 dispositional hearing until the entry of the court's 21 December 2004 dispositional order; and (3) from the entry of 21 December 2004 dispositional order until the 28 February 2005 review hearing. As juvenile's assignment of error only addresses the third instance of confinement, the confinement from the entry of the 21 December 2004 disposition order until the 28 February 2005 review hearing, the issues of juvenile's confinement post-adjudication and leading up to the entry of the dispositional order are beyond the scope of juvenile's assignment of error. Therefore, we hold juvenile has failed to preserve his appeal on the prior instances of confinement, and the issues of juvenile's confinement prior to the entry of the dispositional order are not properly before this Court. N.C. R. App. P. 10(a) (2005) ("the scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal"); *State v. Wiggins*, 161 N.C. App. 583, 591, 589 S.E.2d 402, 408 (2003) ("To the extent defendant raised arguments in his brief beyond the scope of this assignment of error, they are not properly before this Court."). Thus, we need only

address juvenile's confinement following the entry of the dispositional order.

[5] On 21 December 2004, the trial court entered a "Level I and Level II Delinquency Disposition Order" stating, *inter alia*, that: (1) juvenile was to be placed on intensive probation for one year, terminating on 21 December 2005; (2) juvenile was to be placed in the custody of DSS; (3) juvenile was to be placed in a Level III or IV residential treatment facility that provides twenty-four-hour monitoring for a period not to exceed ninety days, in order for his emotional needs to be evaluated; (4) pending placement in the residential treatment facility, juvenile was to be retained in secure custody pursuant to section 7B-1903(c); (5) at a review hearing to be held 28 February 2005, the court was to be provided with the results of juvenile's evaluation and recommendations as to placement necessary to meet juvenile's emotional needs; and (6) juvenile was ordered to complete fifty hours of community service, remain on good behavior and not violate any laws, not possess any firearms, and submit to warrantless searches for firearms at reasonable times.

The offense for which juvenile was adjudicated delinquent was involuntary manslaughter, a Class F offense, which is considered a "serious" offense pursuant to our Juvenile Code. N.C. Gen. Stat. § 7B-2508(a)(2) (2004). The trial court found that juvenile had no prior history of delinquency, and that based on the provisions of section 7B-2507, juvenile's delinquency history level was determined to be low. Therefore, pursuant to section 7B-2508(f), juvenile could be sentenced under either a Level 1 or Level 2 disposition. N.C. Gen. Stat. § 7B-2508(f) (2004).

Level 2 dispositions, as provided for by section 7B-2508(d), allow a trial court, with jurisdiction over a juvenile who has been adjudicated delinquent and found to be subject to a Level 2 disposition, to

> provide for evaluation and treatment under [N.C. Gen. Stat. §] 7B-2502 and for any of the dispositional alternatives contained in subdivisions (1) through (23) of [N.C. Gen. Stat. §] 7B-2506, but shall provide for at least one of the intermediate dispositions authorized in subdivisions (13) through (23) of [N.C. Gen. Stat. §] 7B-2506.

N.C. Gen. Stat. § 7B-2508(d) (2004). North Carolina General Statutes, section 7B-2506 provides numerous dispositional alternatives from which a court may choose once a juvenile has been adjudicated delin-

quent. *See*, N.C. Gen. Stat. § 7B-2506 (2004). Specifically, section 7B-2506(1)(c) provides as one dispositional alternative available to the trial court:

> In the case of any juvenile who needs more adequate care or supervision or who needs placement, the judge may:
>
> . . .
>
> c. Place the juvenile in the custody of the department of social services in the county of his residence . . . . An order placing a juvenile in the custody or placement responsibility of a county department of social services shall contain a finding that the juvenile's continuation in the juvenile's own home would be contrary to the juvenile's best interest. This placement shall be reviewed in accordance with [N.C. Gen. Stat. §] 7B-906.

N.C. Gen. Stat. § 7B-2506(1)(c) (2004). Section 7B-906 provides that in all cases "where custody is removed from a parent . . . the court shall conduct a review hearing within 90 days from the date of the dispositional hearing . . . ." N.C. Gen. Stat. § 7B-906(a) (2004).

In the present case, the trial court's detailed dispositional order removed custody of juvenile from his parents, and placed him in the custody of DSS. The trial court did so based on its finding that it was contrary to juvenile's best interest for him to return home at the time, and the fact that his parents were not willing to authorize his placement in a facility that provided twenty-four-hour monitoring so that he could obtain further evaluation. The trial court found that when placed in the custody of DSS, DSS would then have the authority to authorize and consent to juvenile's placement for further evaluation of his emotional needs. Upon removing juvenile from the custody of his parents and granting custody to DSS, the trial court ordered a review hearing to be held on 28 February 2005, at which time juvenile's emotional needs would be assessed and the court would determine if further treatment was needed. We hold the trial court was authorized to grant custody of juvenile to DSS for purposes of obtaining necessary evaluation and treatment pursuant to section 7B-2506(1)(c), and further, the trial court complied with the requirements of section 7B-906 by ordering that a review hearing take place within ninety days of the 30 November 2004 dispositional hearing.

Similarly, juvenile's placement in a Level III or IV residential treatment facility also was authorized by statute, and the court was permitted to order this type of dispositional alternative. North Carolina

General Statutes, section 7B-2506(14) provides that when a juvenile has been adjudicated delinquent, a trial court may "[o]rder the juvenile to cooperate with placement in a residential treatment facility, an intensive nonresidential treatment program, an intensive substance abuse program, or in a group home other than a multipurpose group home operated by a State agency." N.C. Gen. Stat. § 7B-2506(14) (2004). In the instant case, the court found that juvenile had a history of aggressive behavior directed at younger children, and that a facility that offered twenty-four-hour monitoring would ensure that juvenile did not cause any further harm to other children. Thus, upon finding that juvenile posed a high risk to re-offend, and that he needed an extensive emotional evaluation to determine if he required a clinical diagnosis, the trial court had valid reason to order juvenile placed in a residential treatment facility that would provide the evaluation and treatment that he needed. As section 7B-2506(14) permitted this type of dispositional alternative, we hold the trial court did not commit error in ordering juvenile's placement in a residential treatment facility.

Juvenile argues that the trial court was not permitted to order his confinement for a period longer than fourteen days. Juvenile's argument is misplaced. North Carolina General Statutes, section 7B-2506(20) provides that a juvenile may "be confined in an approved juvenile detention facility for a term of up to 14 24-hour periods." N.C. Gen. Stat. § 7B-2506(20) (2004). This section of the statute is inapplicable to juvenile's case, as juvenile was not ordered to be confined in a juvenile detention facility, and was instead ordered to be placed in a residential treatment facility. As such, juvenile's argument on this basis fails.

On 21 December 2004, the same day the trial court entered the dispositional order, the court also entered a "Temporary Order Affecting Custody and Placement," which provided for juvenile's custody and placement pending the appeal of his disposition order. This temporary order, in all material aspects, was identical to the court's dispositional order. We hold the temporary order, which also ordered juvenile to remain in custody of DSS and to be placed in a residential treatment facility for ninety days for evaluation purposes, was authorized pursuant to North Carolina General Statutes, section 7B-2605. Section 7B-2605 provides that:

> 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.

N.C. Gen. Stat. § 7B-2605 (2004). In the instant case, the trial court made, in writing, specific findings of fact and conclusions of law, stating that it was not in juvenile's best interest to return home at the present time, and that it was in his best interest to be placed in a residential treatment facility where he would receive the evaluation and treatment he needed. The court stated that juvenile's parents were unwilling to consent to the level of evaluation juvenile needed, and that it therefore was necessary that DSS be granted custody of juvenile. We hold the trial court acted properly in entering its temporary order which stated compelling reasons authorizing, pending appeal of his disposition order, DSS to be granted custody of juvenile and his placement in a residential treatment facility.

Affirmed.

Judges BRYANT and CALABRIA concurs.

IN THE MATTER OF: J.G.B., MINOR CHILD

No. COA05-918

(Filed 2 May 2006)

1. Termination of Parental Rights— neglect—mother herself in foster care

The trial court erred concluding that a mother neglected her child. Respondent lost custody before the termination of parental rights hearing, and evidence of failures after she lost custody while she was in foster care was not evidence of neglect when she had custody. There was no prior adjudication of neglect and no evidence before the court of neglect while the child was in respondent's custody.

2. Termination of Parental Rights— willfully leaving child in foster care—minor mother and her child in same foster care home

A seventeen-year-old termination of parental rights respondent who was herself in foster care and who lived in the same foster home as her child did not, on the facts of the present case, willfully leave her child in foster care. The court on remand must make findings regarding respondent's ability to overcome the factors resulting in the foster placement, or the capacity to acquire such abilities, considering her age.

3. Termination of Parental Rights— respondent's progress—considered up to time of hearing

Although a termination of parental rights case was remanded on other grounds, the trial court properly considered evidence of respondent's progress up until the time of the termination hearing, and respondent's emphasis on the two-month period between her eighteenth birthday and the filing of the termination petition is misplaced.

4. Termination of Parental Rights— minor mother in foster care—responsible for caring for child

DSS was not responsible for a seventeen-year-old mother's lack of compliance with her case plans, even though she was a minor and in foster care. Minor parents may be held responsible for caring for their children, and the failure to do so may result in the termination of their parental rights.

Appeal by respondent from an order terminating respondent's parental rights dated 10 March 2005 by Judge Regan A. Miller in District Court, Mecklenburg County. Heard in the Court of Appeals 21 February 2006.

J. Edward Yeager, Jr. for petitioner-appellee, Mecklenburg County Department of Social Services.

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

McGEE, Judge.

Respondent was a dependent juvenile in foster care when she gave birth to J.G.B. on 9 May 2003. Paternity of J.G.B. was never established. J.G.B. was considered "medically fragile" because of a

seizure disorder. The seizure disorder resulted in seventeen hospital visits and at least one extended hospitalization before J.G.B. was two years old. The Mecklenburg County Department of Social Services (DSS) obtained non-secure custody of J.G.B. by order entered on 13 May 2003. The petition filed by DSS does not appear in the record on appeal, so we are unable to discern the precise basis for the custody request. In its non-secure custody order, the trial court found there was a reasonable factual basis to believe that J.G.B was "exposed to a substantial risk of physical injury or sexual abuse because the parent, guardian, or custodian . . . failed to provide, or is unable to provide, adequate supervision or protection[.]" Although removed from respondent's custody, J.G.B. was placed in the same foster home with respondent. J.G.B. has continued in the custody of DSS since his removal from respondent and has not at any time been returned to respondent's custody.

From the time of J.G.B.'s removal in May 2003 until respondent reached the age of eighteen years in February 2004, respondent entered into three case plans with DSS. The goal of the first case plan, dated 22 May 2003, was reunification. In this case plan, the objectives for respondent were to: (1) provide appropriate supervision and a safe environment for J.G.B., (2) learn additional parenting skills, and (3) ensure J.G.B.'s medical needs were appropriately met. The case plan noted that parenting classes for respondent were not necessary at that time, and that respondent was attending all of J.G.B.'s medical appointments.

J.G.B. was adjudicated dependent on 12 June 2003. Neither the dependency petition nor the order of adjudication appears in the record, so we cannot discern the particular allegations underlying the adjudication or whether respondent was represented by a guardian ad litem at the dependency proceeding. After the adjudication of dependency, a second DSS case plan was developed for respondent on 23 October 2003 with the continued goal of reunification. The objectives for respondent under the second case plan were to: (1) provide and maintain appropriate medical care for J.G.B. and (2) be able to support herself and J.G.B. financially. The DSS social worker noted on the case plan that while respondent attended all of J.G.B.'s medical appointments, respondent had not demonstrated an ability to save or budget her money.

At the request of respondent and her foster mother, respondent was removed from her foster home and placed into another foster home on 2 February 2004. J.G.B. remained at the original foster home.

DSS and respondent entered into a Voluntary Placement Agreement (VPA) to allow respondent to stay in the second foster home past her eighteenth birthday. Respondent was approved for public housing on 5 February 2004. However, because respondent could not maintain employment, she was unable to obtain the housing for which she had been approved.

Respondent turned eighteen on 8 February 2004, and a third case plan was developed for respondent on 16 February 2004. The objectives for respondent were to: (1) maintain stable employment in order to financially care for J.G.B., (2) maintain all medical appointments for J.G.B., (3) obtain and maintain appropriate and safe housing, (4) maintain consistent, weekly visitation, and (5) learn and demonstrate appropriate parenting skills. In order to fulfill these objectives, respondent was to obtain her GED by the target date of 16 May 2004, maintain her employment at McDonald's until she found another job, and attend and participate in parenting classes, among other things.

Between March and April of 2004, respondent quit her job at McDonald's. She sold magazines door-to-door for approximately two weeks. At this time, respondent's VPA was "falling apart" because respondent was not seeking employment, going to school, attending parenting classes, or staying at the foster home, as required by the VPA. As a result, respondent's VPA was terminated on 2 April 2004, and respondent moved out of the foster home. After moving out of foster care, respondent lived with various people, including respondent's aunt, the mother of respondent's boyfriend, and respondent's mother, from whose custody respondent had previously been removed.

DSS filed a petition to terminate respondent's parental rights dated 2 June 2004. DSS alleged that grounds for terminating respondent's rights existed under two subsections of N.C. Gen. Stat. § 7B-1111(a): (1) neglect and (2) willfully leaving J.G.B. in foster care for more than twelve months without showing reasonable progress in correcting those conditions which led to the removal of J.G.B. After a hearing on 24 February 2005, the trial court determined that termination of parental rights was warranted pursuant to the two grounds alleged by DSS. The trial court then concluded that it was in J.G.B.'s best interest that respondent's parental rights be terminated. Respondent appeals.

A termination of parental rights proceeding is conducted in two phases: (1) adjudication and (2) disposition. *In re Blackburn*, 142 N.C. App. 607, 610, 543 S.E.2d 906, 908 (2001). During the adjudication phase, the petitioner has the burden of proving by clear, cogent, and convincing evidence that one or more of the statutory grounds for termination under N.C. Gen. Stat. § 7B-1111(a) exists. *Id.* If a petitioner meets its burden of proving that one or more statutory grounds for termination exists, the trial court then moves to the disposition phase where it must consider if termination is in the child's best interests. *Id.* The standard of review of a termination of parental rights is whether the trial court's findings of fact are supported by clear, cogent, and convincing evidence and whether the findings of fact support its conclusions of law. *In re Huff*, 140 N.C. App. 288, 291, 536 S.E.2d 838, 840 (2000), *disc. review denied*, 353 N.C. 374, 547 S.E.2d 9 (2001).

The petition filed by DSS in this case alleged that termination of respondent's parental rights was warranted pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) and (a)(2). The pertinent portion of this statute provides:

> (a) The court may terminate the parental rights upon a finding of one or more of the following:
>
> > (1) The parent has . . . neglected the juvenile. The juvenile shall be deemed to be . . . neglected if the court finds the juvenile to be . . . a neglected juvenile within the meaning of G.S. 7B-101.
> >
> > (2) The parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile.

N.C. Gen. Stat. § 7B-1111(a)(1)(2) (2005).

The trial court made the following findings of fact to support its conclusion that grounds for termination of parental rights existed under N.C.G.S. § 7B-1111(a)(1) and (a)(2):

> 3. [J.G.B.] was placed in [DSS] custody on May 13, 2003. [J.G.B.] was placed in [DSS] custody because his mother . . . was, at the time of his birth, a minor also in [DSS] custody. . . .

4. When [J.G.B.] was placed in [DSS] custody, he was placed in a foster home with the respondent mother. She moved on February 2, 2004 after she asked for a new foster home.

. . .

6. [DSS] entered into a case plan with the respondent mother in which the respondent mother agreed to: obtain and maintain stable employment; complete her GED; work with her independent living social worker; attend Well Baby and other medical appointments for [J.G.B.]; obtain and maintain appropriate housing such that she could care for [J.G.B.]; visit with [J.G.B.] on a regular basis; and also complete parenting classes.

7. The respondent mother was employed when [J.G.B.] was born. She quit that job and began selling magazines, but she maintained that employment for only about two weeks. After she quit the job selling magazines, she has not maintained additional employment.

. . .

10. Since leaving her foster care placement, the respondent mother has resided with the mothers of two different boyfriends. She also lived with her mother and stepfather for a period of time. It was from her mother's home that she was removed as a juvenile.

11. At the hearing of this matter, the [respondent] mother presented a lease that she had signed to obtain an apartment beginning February 24, 2005. She has not yet moved into that apartment.

12. The respondent mother also, while working with [DSS], never completed her GED.

. . .

14. The [respondent] mother attended many but not all of her visits and some but not all [J.G.B.]'s medical appointments. The respondent mother gave birth to another child in early February, 2005 and in fact, has missed two visits with [J.G.B.] because of having to care for her new baby.

15. Although the [respondent] mother has made some progress toward her case plan goals, the amount of progress she has made

is not reasonable under the circumstances and in fact, she has not completed any of her case plan goals.

16. Even the respondent mother has acknowledged at this hearing that she is not currently ready to have custody of [J.G.B.] and cannot currently care for [J.G.B.].

17. [J.G.B.] currently has special needs in the form of a seizure disorder and needs intense medical supervision on an ongoing basis.

From these findings, the trial court concluded as a matter of law that respondent: (1) neglected J.G.B. in that respondent failed to provide proper care, supervision, and discipline for J.G.B. and (2) willfully left J.G.B. in foster care for more than twelve months without showing to the satisfaction of the trial court that reasonable progress had been made in correcting those conditions that led to the removal of J.G.B.

On appeal, respondent assigns error to the trial court's determination that grounds existed to terminate her parental rights. Respondent does not except to any of the trial court's findings of fact, and they are therefore conclusive on appeal. *In re Caldwell*, 75 N.C. App. 299, 301, 330 S.E.2d 513, 515 (1985). We must determine solely whether the trial court's findings support its conclusions of law. *In re Huff*, 140 N.C. Ap. 288, 291, 536 S.E.2d 838, 840 (2000), *disc. review denied*, 353 N.C. 374, 547 S.E.2d 9 (2001).

I.

[1] An adjudication of neglect warranting termination of parental rights must be proved by clear, cogent, and convincing evidence that the child is a neglected juvenile as defined by N.C. Gen. Stat. § 7B-101(15). *See* N.C.G.S. § 1111(a)(1); *Blackburn*, 142 N.C. App. at 610, 543 S.E.2d at 908. N.C. Gen. Stat. § 7B-101(15) (2005) defines a neglected juvenile as one who, *inter alia*, has not received proper care, supervision, or discipline from the juvenile's parent, or who has not been provided necessary medical care. A determination of neglect must be based on evidence showing neglect *at the time of the termination proceeding*. *In re Young*, 346 N.C. 244, 248, 485 S.E.2d 612, 615 (1997) (citing *In re Ballard*, 311 N.C. 708, 716, 319 S.E.2d 227, 232 (1984)) (emphasis added).

Where, as in the present case, "a child has not been in the custody of a parent for a significant period of time prior to the termination

hearing, the trial court must employ a different kind of analysis to determine whether the evidence supports a finding of neglect." *In re Pierce*, 146 N.C. App. 641, 651, 554 S.E.2d 25, 31 (2001), *aff'd*, 356 N.C. 68, 565 S.E.2d 81 (2002). "This is because requiring the petitioner in such circumstances to show that the child is currently neglected by the parent would make termination of parental rights impossible." *Id.* (citing *Ballard*, 311 N.C. at 714, 319 S.E.2d at 231); *see In re Shermer*, 156 N.C. App. 281, 286, 576 S.E.2d 403, 407 (2003). "[E]vidence of neglect by a parent prior to losing custody of a child—including an adjudication of such neglect—is admissible in subsequent proceedings to terminate parental rights." *Ballard*, 311 N.C. at 715, 391 S.E.2d at 232. Where evidence of prior neglect is considered, a trial court must also consider evidence of changed circumstances and the probability of a repetition of neglect. *Id.*

In the present case, the trial court erred in concluding J.G.B. was neglected by respondent at the time of the hearing. There was no prior adjudication of neglect while J.G.B. was in respondent's custody. There was a prior adjudication of dependency, but respondent had already lost custody of J.G.B. prior to the dependency adjudication. Therefore, there was no evidence before the trial court that respondent had neglected J.G.B. while J.G.B. was in her custody. While the trial court found that respondent failed to attend all of J.G.B.'s medical visits, respondent did not have custody of J.G.B. at that time. Without evidence of any prior neglect while respondent had custody of J.G.B., petitioner has failed to show neglect at the time of the hearing. For this reason, in view of *Ballard* and its progeny, we hold that the trial court erred in concluding grounds existed under N.C.G.S. § 7B-1111(a)(1) to terminate respondent's parental rights.

II.

[2] Our Court recently clarified that, to find grounds to terminate parental rights under N.C.G.S. § 1111(a)(2), a trial court must perform a two-part analysis. *In re O.C. & O.B.*, 171 N.C. App. 457, 464, 615 S.E.2d 391, 396, *disc. review denied*, 360 N.C. 64, 623 S.E.2d 587 (2005).

> The trial court must determine by clear, cogent and convincing evidence that a child has been willfully left by the parent in foster care or placement outside the home for over twelve months, and, *further*, that as of the time of the hearing, as demonstrated by clear, cogent and convincing evidence, the parent has not made reasonable progress under the circumstances to correct the conditions which led to the removal of the child.

Id. at 464-65, 615 S.E.2d at 396 (emphasis added). In this two-part analysis, "[e]vidence and findings which support a determination of 'reasonable progress' may parallel or differ from that which supports the determination of 'willfulness' in leaving the child in placement outside the home" for the statutory twelve-month period. *Id.* at 465, 615 S.E.2d at 396. Under N.C.G.S. § 7B-1111(a)(2), the twelve-month period begins when a child is left in foster care or placement outside the home pursuant to a court order, and ends when the motion or petition for termination of parental rights is filed. *In re A.C.F.*, 176 N.C. App. 520, 527, 626 S.E.2d 729, 734 (2006). Where the twelve-month threshold does not expire before the motion or petition is filed, a termination on the basis of N.C.G.S. § 7B-1111(a)(2) cannot be sustained. *Id.* at 527, 626 S.E.2d at 735.

Respondent contends that since she was a minor for eight of the twelve months prior to the filing of the termination petition, she lacked the necessary capacity to have willfully left J.G.B. in foster care for the statutory twelve-month period. Citing *In re Matherly*, 149 N.C. App. 452, 562 S.E.2d 15 (2002), respondent argues that evidence showing respondent's "ability, or capacity to acquire the ability, to overcome factors which resulted in [J.G.B.] being placed in foster care must be apparent for willfulness to attach." *Matherly*, 149 N.C. App. at 455, 562 S.E.2d at 18.

In *Matherly*, the trial court's order terminating parental rights did not adequately address the minor parent's willfulness under N.C.G.S. § 7B-1111(a)(2), and our Court remanded. *Id.* The facts of *Matherly* were that a child was removed from the mother's custody when the mother was fifteen years old. *Id.* at 452, 562 S.E.2d at 16. When the mother turned sixteen, she began working with DSS in an effort to reunify with the child. *Id.* at 453, 562 S.E.2d at 16. The mother's objectives for reunification included establishing her own residence. *Id.* at 455, 562 S.E.2d at 18. A petition to terminate the mother's parental rights was filed when the mother was seventeen years old. *Id.* at 454-55, 562 S.E.2d at 17. On appeal, this Court found the trial court's findings inadequate as to the mother's willful leaving of the child in foster care, in part because there was no finding that the mother was legally competent to establish her own residence. *Id.* at 455, 562 S.E.2d at 18. On remand, the trial court was instructed to "make specific findings of fact showing that a minor parent's age-related limitations as to willfulness have been adequately considered." *Id.*

In the present case, respondent was a seventeen-year-old unemancipated minor when J.G.B. was placed in DSS custody. Respondent was herself in DSS custody, living in foster care, and J.G.B. was placed in the same foster home as respondent. J.G.B. lived in the same foster home with respondent until 2 February 2004, when respondent moved to another foster home. Four months later, on 2 June 2004, DSS filed a petition to terminate respondent's parental rights. On the date the petition was filed, respondent had been eighteen years old for just under four months, and had been physically separated from J.G.B. for just under four months.

In light of *Matherly*, we find that the trial court failed to adequately address respondent's age, in terms of whether respondent willfully left J.G.B. in foster care for twelve months prior to the filing of the petition. Where, as here, the parent is an unemancipated minor, herself in the custody of DSS, the trial court must make specific findings of the parent's "ability, or capacity to acquire the ability, to overcome factors which resulted in [the child] being placed in foster care[.]" *Id.* We cannot agree with the trial court's determination that, under the facts of the present case, respondent's living in the same foster home as her child necessarily constituted willfully leaving the child in foster care. Accordingly, we remand to the trial court for sufficient findings as to respondent's willful leaving of J.G.B. in foster care for the statutory twelve-month period, given respondent's age.

[3] Although we remand to the trial court for findings as to respondent's willful leaving of J.G.B. in foster care, we will address respondent's next argument, which deals with the second step of the N.C.G.S. § 7B-1111(a)(2) analysis, whether respondent has shown reasonable progress. Respondent argues the trial court erred in terminating her parental rights because DSS failed to provide respondent with adequate services upon respondent's reaching the age of majority. Respondent argues the two-month period DSS worked with respondent between her eighteenth birthday and DSS's filing of the petition for termination was a "woefully inadequate amount of time." Respondent's argument is without merit.

Respondent's argument mistakenly relies only on the two-month period between her eighteenth birthday and the date of the filing of the petition for termination. Evidence supporting a determination of reasonable progress under N.C.G.S. § 7B-1111(a)(2) "is not limited to that which falls during the twelve month period next preceding the

filing of the motion or petition to terminate parental rights." *In re O.C. & O.B.*, 171 N.C. App. at 465, 615 S.E.2d at 396. Rather, a trial court may consider evidence of reasonable progress made by a respondent until the date of the termination hearing. *See In re Pierce*, 356 N.C. 68, 75 n.1, 565 S.E.2d 81, 86 n.1 (2002) (noting that, given a 2001 amendment to our juvenile code, "[t]here is no specified time frame that limits the admission of relevant evidence pertaining to a parent's 'reasonable progress' or lack thereof."). In this case, respondent reached the age of majority more than a year before the termination hearing. The trial court properly considered evidence of respondent's progress up until the time of the hearing. Therefore, respondent's emphasis on the period between her eighteenth birthday and the date DSS filed the termination petition is misplaced. We find the trial court did not err in concluding that respondent failed to make reasonable progress under the circumstances.

[4] Respondent further argues that because she was a minor when she entered into the first two case plans with DSS, and DSS was standing *in loco parentis* of respondent, DSS was responsible for respondent's lack of compliance with her case plans. We do not agree. Minor parents may be held responsible for caring for their children, and the failure to do so may result in a termination of their parental rights. *See* N.C. Gen. Stat. § 7B-1101.1 (2005) (providing for the appointment of a guardian ad litem when a parent is under eighteen years old). The intent of the General Assembly to provide for the termination of parental rights of minor parents is evidenced by the 2005 amendment of N.C. Gen. Stat. § 7B-1101 to provide that "[t]he court shall have jurisdiction to terminate the parental rights of any parent *irrespective of the age of the parent*." N.C. Gen. Stat. § 7B-1101 (2005). Moreover, as discussed above, the trial court was permitted to consider evidence of respondent's reasonable progress since her eighteenth birthday, when DSS no longer stood *in loco parentis* of respondent.

Reversed in part; remanded in part.

Judges CALABRIA and GEER concur.

KROGER LIMITED PARTNERSHIP PARTNERSHIP I AND RALPH URBAN DEVELOPMENT II, LLC, PLAINTIFFS v. THOMAS GUASTELLO, DEFENDANT

No. COA05-661

(Filed 2 May 2006)

1. Landlord and Tenant— lease—construction—garden shop not a part of building

The trial court did not err by construing a lease to decide that a garden shop with a roof but no walls was not a part of the leased "building" under the terms of the lease so that defendant landlord's consent was not required for plaintiff tenant's demolition of the garden shop and erection of a post office building in its place.

2. Landlord and Tenant— lease—practice of successors in interest—no bearing on intent of lease

The trial court did not construe a lease contrary to the parties' course of conduct, as defendant contended, by deciding that a garden shop with a roof but no walls was not part of a building under the lease. Both of the parties here were successors in interest, so that their conduct has no bearing on the intent of the original parties when they signed the lease, and defendant offered no examples of compelling behavior that would overcome the plain language of the lease.

3. Landlord and Tenant— demolition of garden shop—no impact on structural integrity of building

There was no error in the trial court's finding and conclusion that the demolition of a garden shop did not have an impact on the structural integrity of a leased building where there was testimony to that effect from the project supervisor whose company removed the shop area. The contention that the garden shop was part of the "building" under the lease was rejected elsewhere in this opinion.

4. Civil Procedure— findings on ultimate issues—other findings not required

The trial court did not err in a case about a disputed lease by not making certain findings and conclusions. The court made detailed findings of ultimate fact and conclusions supporting its decision.

5. Trials— reliance on affidavit from earlier hearing—different subject matter

The trial court did not improperly take notice of an affidavit from an earlier hearing where the finding did not mention the subject of the affidavit.

6. Trials— findings from earlier hearing—procedural history recited—substance not adopted

The trial court did not improperly adopt findings from an earlier preliminary injunction hearing where the court merely recited the procedural history of the case, but did not adopt the substance of the findings from the earlier hearing.

Appeal by defendant from an order entered 1 June 2004 by Judge Robert H. Hobgood in Wake County Superior Court. Heard in the Court of Appeals 7 February 2006.

Womble Carlyle Sandridge & Rice, PLLC, by Christopher T. Graebe and Sean E. Andrussier; Pendergrass Law Firm, PLLC, by James K. Pendergrass, for plaintiff-appellee Kroger Limited Partnership I.

Herring McBennett Mills & Finkelstein, PLLC, by Mark A. Finkelstein, for plaintiff-appellee Ralph Urban Development II, LLC.

Nicholls & Crampton, P.A., by W. Sidney Aldridge; Touma, Watson, Whaling, Coury & Castello, P.C., by S. Douglas Touma, for defendant-appellant.

HUNTER, Judge.

Thomas Guastello ("defendant") appeals from an order of the trial court concluding that his commercial tenant, Kroger Limited Partnership I ("Kroger"), did not default on its lease when it demolished a garden shop on the site of the leased premises in order to erect a post office building. The trial court concluded defendant's consent to demolition of the garden shop was not required under the terms of the lease, and defendant was therefore not entitled to damages. Defendant contends the trial court erred in its construction of the lease. For the reasons stated herein, we affirm the order of the trial court.

The central dispute in this case arises over the interpretation of the term "building" as used in the lease between tenant Kroger and

landlord defendant for commercial premises located at 350 Six Forks Road in Raleigh, North Carolina. Both Kroger and defendant are successors in interest to the lease dated 26 April 1988. In the lease, the parties agreed to lease

> the following property: (i) Tenant's completed building (designated Builders Square), (ii) site improvements, to be constructed as hereinafter specified by Landlord, at its expense, and (iii) land comprising not less than Seven (7) acres, said land described in Exhibit "A", attached hereto and made a part hereof, and situated in the City of Raleigh . . . ; said building to be in the location and of the dimensions as depicted on Exhibit "B", attached hereto and made a part hereof.
>
> Said land, Tenant's completed building and the site improvements, together with all licenses, rights, privileges and easements, appurtenant thereto, shall be herein collectively referred to as the "demised premises".

Exhibit B, referenced by and incorporated into the lease, is a site plan of the demised premises. It shows an enclosed building with stated dimensions of 80,160 square feet and designated "Builders Square." These 80,160 square feet represent the entire dimensions of the enclosed building. The site plan also depicts two areas adjacent to the enclosed building labeled "garden shop" and "lumber staging." These two areas are not included in the 80,160 square-foot enclosed building designated "Builders Square."

Paragraph 15 of the lease provides in pertinent part as follows:

> Tenant may, at its own expense, from time to time, make such alterations, additions or changes, structural or otherwise, in and to its building as it may deem necessary or suitable; provided, however, Tenant shall obtain Landlord's prior written consent to drawings and specifications for structural alterations, additions or changes; provided, further, Landlord shall not withhold its consent thereto if the structural integrity of the building will not be impaired by such work. The term "structural changes", as used herein, shall not include moving of non-load bearing partitions, relocation of building entry doors, minor plumbing and electrical work, modification and rearrangement of fixtures or other minor changes. Landlord, at Tenant's cost, shall cooperate with Tenant in securing building and other permits or authorizations required from time to time for any work permitted hereunder or for installations by Tenant.

> Tenant may, at its own expense, at any time, erect or construct additional buildings or structures on any portion of the demised premises. In such event, gross sales made in or from said additions shall be excluded from gross sales, as defined in Article 4 of this lease. Said additional buildings or structures shall be excluded from the taxable premises and all ad valorem taxes and assessments levied thereon shall not be deductible from additional rents payable under the terms of Article 4, hereof. Tenant shall also be solely responsible for exterior and interior repairs thereto, except those necessitated by fire, the elements or other casualty. In the event Tenant constructs any such additions or new construction, Landlord shall not be obligated to furnish additional parking areas in substitution of areas thereby built over and the number of parking spaces required under Article 10, hereof, shall be reduced by the number of spaces covered by such additional buildings or structures.

In December of 2001, Kroger demolished the area labeled "garden shop," which was vacant and not utilized at the time, in order to construct a post office facility. Demolition of the garden shop area necessitated the following: removal of the sheet-metal roof and roof-decking steel; destruction and removal of the electrical system and fixtures, plumbing system and fixtures, and roof drainage system; cutting of the masonry wall from the front wall of the building; and destruction and removal of the concrete slab. Defendant did not consent to demolition of the garden shop area and, in fact, vigorously objected to Kroger's actions.

Upon consideration of the matter, the trial court determined that the areas designated "garden shop" and "lumber staging" in Exhibit B were not part of the "building" under the terms of the lease, and that, pursuant to Paragraph 15 of the lease, demolition of the garden shop area did not impair or otherwise affect the structural integrity of the building. As such, the trial court ruled that defendant's consent to demolition of the garden shop area and erection of the post office building in its stead was not required, and that Kroger had not thereby defaulted on the lease. The trial court entered an order denying defendant's claim for money damages accordingly. Defendant appeals.

[1] Defendant contends the trial court erred in its interpretation of the term "building" as used in the lease. According to defendant, the plain and ordinary meaning of the term "building" as used in the lease

includes the garden shop area, and the trial court erred in determining otherwise.

"The terms of a lease, like the terms of any contract, are construed to achieve the intent of the parties at the time the lease was entered into." *Lexington Ins. Co. v. Tires Into Recycled Energy and Supplies, Inc.*, 136 N.C. App. 223, 225, 522 S.E.2d 798, 800 (1999). "Where the language of a contract is clear, the contract must be interpreted as written." *Southpark Mall Ltd. Part. v. CLT Food Mgmt., Inc.*, 142 N.C. App. 675, 678, 544 S.E.2d 14, 16 (2001); *see also Hemric v. Groce*, 169 N.C. App. 69, 76, 609 S.E.2d 276, 282 (noting that where the plain language of a contract is clear, the intention of the parties is inferred from the words of the contract), *disc. review dismissed*, *cert. denied*, 359 N.C. 631, 616 S.E.2d 234 (2005). "[W]here a non-technical word is not defined in a lease, we must interpret the word consistent with its plain dictionary meaning[.]" *Southpark*, 142 N.C. App. at 678, 544 S.E.2d at 16; *see also Charlotte Housing Authority v. Fleming*, 123 N.C. App. 511, 514, 473 S.E.2d 373, 375 (1996) (noting that, as with contracts, a word in a lease should be given its ordinary meaning and significance).

In the present case, the lease requires defendant's consent to any changes which impair the "structural integrity of the building[.]" The word "building" is not expressly defined in the lease. However, the lease specifies that the building to be leased is "in the location and of the dimensions as depicted on Exhibit 'B[.]' " Exhibit B is incorporated into the lease and shows a building with stated dimensions of 80,160 square feet and designated "Builders Square." The 80,160 square-foot enclosed building does not include the garden shop area.

We agree with the trial court that under the plain language of the lease, the garden shop area is not included under the term "building." The lease specifies that the "building" leased by Kroger refers to Exhibit B, which in turn depicts an enclosed building with dimensions of 80,160 square feet and labeled "Builders Square." The garden shop area is not part of the enclosed building as depicted in Exhibit B.

Our interpretation of the lease is supported by the plain meaning of the term "building." According to the dictionary, the definition of "building" is

> a constructed edifice designed to stand more or less permanently, covering a space of land, usu[ally] covered by a roof *and more or*

> *less completely enclosed by walls*, and serving as a dwelling, storehouse, factory, shelter for animals, or other useful structure—distinguished from structures not designed for occupancy (as fences or monuments) and from structures not intended for use in one place (as boats or trailers) even though subject to occupancy[.]

Webster's Third New Int'l Dictionary 292 (1968) (emphasis added); *see also* Black's Law Dictionary 207 (8th ed. 2004) (defining "building" as "[a] structure with walls and a roof, esp. a permanent structure"); *Nash-Rocky Mount Bd. of Educ. v. Rocky Mount Bd. of Adjust.*, 169 N.C. App. 587, 590-91, 610 S.E.2d 255, 258 (2005) (reciting the above-listed definitions of "building"). The garden shop area, although covered by a sheet-metal roof, was not enclosed by walls, but rather by chain-link fencing only. This Court has noted that a building "in its ordinary sense, is defined as a '[s]tructure designed for habitation, shelter, storage, trade, manufacture, religion, business, education, and the like. A structure or edifice *inclosing a space within its walls*, and usually, but not necessarily, covered with a roof.' " *Davidson County v. City of High Point*, 85 N.C. App. 26, 38, 354 S.E.2d 280, 287 (quoting Black's Law Dictionary 176 (5th ed. 1979)) (emphasis added), *modified on other grounds*, 321 N.C. 252, 362 S.E.2d 553 (1987).

In support of his position, defendant cites several cases in which the term "building" is more expansively defined. *See*, *e.g.*, *State v. Cuthrell*, 235 N.C. 173, 175, 69 S.E.2d 233, 234 (1952) (in the context of the crime of arson, "[t]he word 'building' embraces any edifice, structure, or other erection set up by the hand of man, designed to stand more or less permanently, and which is capable of affording shelter for human beings, or usable for some useful purpose"); *State v. McNeil*, 28 N.C. App. 125, 126, 220 S.E.2d 401, 402 (1975) (citation omitted) (noting that North Carolina's arson statute defines the term "building" as " 'dwelling, dwelling house, uninhabited house . . . and any other structure designed to house or secure within it any activity or property' "). These cases focus on the crime of arson, however, in which context the term "building" is defined as broadly as possible in order to prevent the burning of lesser structures. *See* Black's Law Dictionary at 207 (noting that, "[f]or purposes of some criminal statutes, such as burglary and arson, the term *building* may include such things as motor vehicles and watercraft"). As such, they are not persuasive precedent for interpretation of the term "building" as found in a commercial lease. Nor do we find compelling defendant's

citation to *Cardwell v. Town of Madison Bd. of Adjustment*, 102 N.C. App. 546, 548, 402 S.E.2d 866, 867 (1991). In that case, the Court referenced a town zoning ordinance which specifically defined the term "building" as " '[a]ny structure having a roof supported by columns or by walls, and intended for shelter, housing or enclosure of persons, animals, or chattel.' " *Id.* (citation omitted). The Court did not, however, embrace or adopt this definition of the term "building." Mere recital of a particular definition under one town's zoning ordinance does not support defendant's assertion that the plain, ordinary meaning of "building" would include the open-air garden center at issue here. Indeed, the *Cardwell* Court noted that the definition of building found in the town zoning ordinance was not compatible with the state building code's definition of "building," inasmuch as the "building code concerns construction while the zoning ordinance is directed to land use." *Id.* at 551, 402 S.E.2d at 869.

Defendant also purports to cite to Black's Law Dictionary as defining the term "building" simply as "an edifice." Defendant provides no citation to the particular edition of Black's Law Dictionary providing this definition, however, nor have we discovered such. As previously noted, the current edition of Black's Law Dictionary defines the term "building" as "[a] structure with walls and a roof, esp. a permanent structure." Black's Law Dictionary, *supra*. The fifth edition of Black's Law Dictionary, as noted *supra*, defines a building as "[a] structure or edifice inclosing a space within its walls, and usually, but not necessarily, covered with a roof." Black's Law Dictionary 176 (5th ed. 1979).

Defendant further contends the North Carolina Building Code supports his position. Defendant cites to the 1991 North Carolina Building Code's definition of "building *area*" as "the maximum horizontally projected area of the building at or above grade, exclusive of areas open and unobstructed to the sky." Defendant argues the garden shop area meets this definition. Plaintiff notes that this definition was not in effect at the time the lease was drafted. Even if the definitions contained in the 1991 Building Code were persuasive authority, however, a building "area" is not the same as a "building." Notably, defendant makes no mention of the 1991 Building Code's definition of "building" which is "any structure that *encloses* a space used for sheltering any occupancy. Each portion of a building separated from other portions by a fire wall shall be considered as a separate building." North Carolina State Building Code § 2, 8.1 (1991) (emphasis added). The garden shop area was not enclosed and it was separated

from the building designated "Builders Square" by a fire wall. Thus, contrary to defendant's argument, the 1991 North Carolina Building Code supports the trial court's interpretation of the lease. We overrule defendant's argument that the plain and ordinary meaning of the term "building" as found in the lease includes the garden shop area.

Defendant argues that other provisions of the lease agreement make clear that the garden shop area was to be included within the term "building." For example, defendant cites to Paragraph 30 in the lease regarding condition of the demised premises upon termination of the lease. Defendant argues that Paragraph 30 "requires the Tenant to turn over the 'demised premises' in the same condition it was received by Tenant, ordinary wear and tear excepted." Defendant contends that demolition of the garden shop area prevents Kroger from turning over the demised premises in the same condition it was received. Defendant's interpretation of Paragraph 30 is flawed. Paragraph 30 states that upon termination, "Tenant shall surrender the demised premises, together with alterations, additions and improvements then a part thereof, in good order and condition[.]" Rather than the *same* condition, as asserted by defendant, Paragraph 30 only requires the demised premises to be surrendered in *good* condition. Moreover, Paragraph 30 specifically contemplates the possibility of "alterations, additions and improvements" to the demised premises.

Defendant also cites Paragraph 4 of the lease, which allows the landlord to annually collect from the tenant one percent of all gross sales exceeding sixteen million dollars. Defendant argues that this provision "treat[s] the Garden Shop as part of the sales area," and therefore the garden shop area should be "treat[ed] . . . as part of the building" (emphasis omitted). This argument has no merit. Paragraph 4 makes no specific mention of the garden shop area. According to Paragraph 4, "gross sales" include "the total sales of merchandise or services made by Tenant . . . on any part of the land[.]" Thus, the landlord is entitled to one percent of gross sales over sixteen million dollars occurring anywhere on the demised premises, and is not tied to any specific location. In other words, as noted by Kroger, the "rent is tied to the value of the tenant's sales and not to the location of those sales[.]" As such, Paragraph 4 provides no guidance as to whether the garden shop area is to be included in the term "building." We overrule defendant's first assignment of error.

[2] By his second assignment of error, defendant contends the trial court erred in failing to construe the lease in harmony with the par-

ties' course of conduct with regard to the lease. Citing *Patterson v. Taylor*, 140 N.C. App. 91, 535 S.E.2d 374 (2000), defendant argues the parties treated the garden shop area as a part of the building. While it is true that "extrinsic evidence of the parties' behavior implementing the agreement is probative of the parties' intent at the time of the execution of the agreement," it is also true that, as successors in interest, neither party here drafted the lease at issue. *Id.* at 97, 535 S.E.2d at 378. The present parties' conduct therefore has no bearing on the original drafters' intent when forming the lease. Moreover, defendant has proffered no compelling examples of behavior by the parties that would overcome the plain language of the lease. We overrule this assignment of error.

[3] Defendant contends the trial court erred in concluding that the structural integrity of the building was not impaired by demolition of the garden shop area. Defendant's argument relies entirely upon his contention that the garden shop area was a part of the "building" as set forth in the lease. We have determined, however, that the trial court properly concluded that the garden shop area was not a part of the Builders Square building. Further, Charles Wolfe, the project supervisor whose company removed the garden shop area and built the post office, testified that demolition of the garden shop area and erection of the post office did not impact the structural integrity of the Builders Square building. The trial court therefore did not err in finding and concluding that demolition of the garden shop area did not impact the structural integrity of the building. We overrule this assignment of error.

[4] Defendant next argues the trial court violated Rule 52(a)(1) by failing to make certain findings of fact and conclusions of law. However:

> Rule 52(a)(1) does not require the trial court to recite all of the evidentiary facts; it is required only to find the ultimate facts, i.e., those specific material facts which are determinative of the questions involved in the action and from which an appellate court can determine whether the findings are supported by the evidence and, in turn, support the conclusions of law reached by the trial court.

Mann Contr'rs, Inc. v. Flair with Goldsmith Consultants-II, Inc., 135 N.C. App. 772, 774, 522 S.E.2d 118, 120-21 (1999). The trial court here made detailed findings of ultimate fact and conclusions of law supporting its decision, and we overrule this assignment of error.

[5] As further assignment of error, defendant contends the trial court improperly took judicial notice of an affidavit submitted during an earlier preliminary injunction hearing. Defendant concedes that a court must take judicial notice of its own prior proceedings involving the same cause if requested to do so by a party. *Georgia-Pacific Corp. v. Bondurant*, 81 N.C. App. 362, 367, 344 S.E.2d 302, 306 (1986). Defendant nevertheless argues that the affidavit in question addressed the disputed issue of whether the demolition of the garden shop area affected the structural integrity of the building, and that the trial court improperly relied upon the affidavit in making its Finding of Fact No. 28. Contrary to defendant's assertions, however, Finding of Fact No. 28 addresses only whether or not the new post office is an "additional building" under the terms of the lease. It makes no mention of the garden shop area and whether its removal affected the structural integrity of the building. We overrule this assignment of error.

Defendant argues the trial court erred in concluding that defendant's consent to demolition of the garden shop area was not required under the lease. Again, this argument is dependent upon defendant's earlier assertions that the garden shop area was a part of the building, which we have rejected. We likewise overrule this assignment of error.

[6] By his final assignment of error, defendant contends the trial court was improperly influenced by the earlier preliminary injunction proceedings. Specifically, defendant argues the trial court improperly adopted findings made during the earlier hearing regarding defendant's behavior and incorporated them into Finding of Fact No. 24. Finding of Fact No. 24, however, merely recites the procedural history of the case, and does not adopt as fact the substance of the findings made during the earlier hearing. We overrule defendant's final assignment of error.

In conclusion, we hold the trial court did not err in its construction of the lease. We therefore affirm the order of the trial court denying defendant's claim for damages for breach of contract.

Affirmed.

Judges WYNN and JACKSON concur.

KOHLER COMPANY, INC., Plaintiff v. THOMAS H. McIVOR, Defendant

No. COA05-339-2

(Filed 2 May 2006)

1. Pleadings— sanctions—Rule 11—pleadings well-grounded in fact

A de novo review revealed that the trial court did not err in a breach of a noncompetition agreement case by denying defendant former employee's motion for sanctions under N.C.G.S. § 1A-1, Rule 11, because: (1) there was no clear definition of the term "Mid-Atlantic" to support the allegation that plaintiff knowingly misstated these factual matters for Rule 11 purposes; (2) plaintiff employer never made an admission that the employee had not violated the agreement as alleged in the complaint; and (3) defendant did not challenge findings supporting the trial court's denial of Rule 11 sanctions including that he was the local contact for local divisions of national builders, that he had access to proprietary information or that when reminded of the agreement's terms, he responded that he believed it was unenforceable and that he welcomed any attempts to stop him from competing.

2. Pleadings— sanctions—Rule 11—legal sufficiency of complaint and memorandum—improper purpose prong

The trial court did not err by concluding that defendant employer's complaint and memorandum in support of the motion for a temporary restraining order were legally sufficient and did not require N.C.G.S. § 1A-1, Rule 11 sanctions, because: (1) plaintiff employer's verified complaint is facially plausible; and (2) plaintiff dismissed its claim within a reasonable time after defendant resigned his employment with the other pertinent company thereby providing the primary relief sought in this litigation.

3. Costs— attorney fees—abuse of discretion standard

The trial court did not abuse its discretion in a breach of a noncompetition agreement case by failing to grant defendant employee's motion for attorney fees under N.C.G.S. § 6-21.5, because the appellate court has already denied defendant's argument that the case lacked any justiciable issues of law and fact.

Appeal by defendant from order entered 13 October 2004, and amended 15 October 2004, by Judge Albert Diaz in Mecklenburg County Superior Court. Heard in the Court of Appeals 19 October 2005.

Ogletree, Deakins, Nash, Smoak & Stewart, P.C., by John D. Cole and Kelly S. Hughes, for plaintiff-appellee.

Ferguson, Stein, Chambers, Adkins, Gresham & Sumter, P.A., by John W. Gresham, for defendant-appellant.

HUDSON, Judge.

Defendant Thomas H. McIvor appeals an order denying sanctions and fees pursuant to Rule 11. N.C. Gen. Stat. § 1A-1, Rule 11(a) (2003). In an opinion filed 20 December 2005, we affirmed. *See Kohler Company, Inc. v. McIvor*, 175 N.C. App. 247, —— S.E.2d —— (2005). Defendant filed a petition for rehearing on 24 January 2006, which we allowed. We also note that, after the case was calendared, defendant filed an amendment to the record which is now before the panel for review. Having now reheard the matter, we issue this decision modifying and superseding the previous opinion.

On 14 October 2003, plaintiff Kohler Company, Inc., ("Kohler") filed a complaint and moved for a temporary restraining order ("TRO"), alleging that defendant was in breach of a non-competition agreement ("the agreement"). The court issued the TRO *ex parte*, enjoining defendant from working in violation of the agreement. Following another *ex parte* hearing on 21 October 2003, the court entered a preliminary injunction against defendant. Defendant moved for relief from the preliminary injunction, which motion the court denied. On 21 November 2003, defendant moved to stay the injunction, which motion the court also denied. Defendant appealed the preliminary injunction order and the order denying relief, and moved this Court for a temporary stay, which we allowed. One week after defendant filed his brief with this Court, Kohler voluntarily dismissed its action with prejudice, rendering the appeal moot.

Defendant then moved for sanctions pursuant to Rule 11 and for attorney fees. After a hearing, the trial court denied defendant's motion for sanctions and fees. Defendant appeals. As explained below, we affirm.

In November 2000, defendant began working for Kohler, a plumbing manufacturer, as a sales representative and signed a non-compete

agreement. The agreement precluded defendant from selling products that compete with Kohler in all of North America for one year after defendant's separation from the company. Defendant's sales territory included South Carolina, part of western North Carolina, the Charlotte region, and Augusta, Georgia. On 18 September 2003, defendant notified his manager that he planned to resign, move to southern California, and join another plumbing manufacturer. After returning materials and equipment to Kohler, defendant began working in southern California, but ultimately resigned his position there due to Kohler's lawsuit.

On 22 September 2003, before he left for California, defendant gave his attorney's business card to his manager at Kohler. Kohler did not serve the pleadings on defendant's counsel, and gave no notice to defendant or his counsel of the TRO hearing. At the hearing, Kohler's counsel stated that defendant was served in North Carolina, although defendant had actually been served in California only four days prior to the hearing. Kohler's counsel also stated that

> [o]n Friday (October 17, 2003), you called his house and his voice mail answers the phone. Today (October 21, 2003), if you call that number's been cancelled. So he's [defendant] been scurrying to erase any sign of residence here as quick as he can. I suppose to support this motion to dismiss . . . .

In fact, defendant's phone bill showed that his Charlotte phone number was disconnected on 22 September 2003. During the hearing, the court misread the agreement's geographic restriction as "nationwide," when it actually extended to all of North America. Kohler's counsel did not correct the court's error.

Neither defendant nor his counsel attended the preliminary injunction hearing, which actually took place several hours prior to its scheduled time. At the hearing, Kohler's counsel stated incorrectly that defendant was involved in national deals and worked with national contractors. Plaintiff's manager, who was present at the hearing, did not correct the misstatements.

Defendant assigns error to the following conclusions:

> 6. Plaintiff's Verified Complaint and supporting Affidavits satisfy the certification requirements of Rule 11. On their face, these papers set out facts alleging that [defendant] (a) accepted employment with one of Plaintiff's direct competitors in violation of the non-compete provision of the Agreement; and (b) improp-

erly retained a variety of confidential information that should have been returned to Kohler, in violation of the Agreement and North Carolina statutory law.

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9. North Carolina law on this issue is simple enough: "In deciding which law should govern interpretation of a contract, North Carolina follows the principle of *lex loci contractus*, which provides that the law of the state where the last act occurred to form a binding contract should apply." *NAS Surety Group v. Precision Wood Products*, 271 F. Supp. 776, 780 (M.D.N.C. 2003). *Accord Walden v. Vaughn*, 157 N.C. App. 507, 510, 579 S.E.2d 475, 477 (2003). Applying it to the muddled facts of this case, however, would test the most seasoned of choice of law practitioners, given that three jurisdictions (Virginia, North Carolina, and Wisconsin) arguably fit the bill.

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11. While the Court is tempted to tackle this bar exam puzzler, the critical question, for purposes of Rule 11, is whether Plaintiff and its counsel made a "reasonable inquiry" before settling on their choice of North Carolina law. The Court concludes that they did. In particular, on the date Plaintiff filed its Verified Complaint, Kohler and its counsel had adequate grounds for believing, based on the documents available to them, that McIvor had accepted Plaintiff's offer of employment in North Carolina on November 6, 2000, and that this acceptance was the last act necessary to make the Agreement binding.

12. Defendant complains that he included the North Carolina address of his girlfriend (now wife) at Plaintiff's behest so as not to confuse Plaintiff's Human Resources Department, presumably because Defendant was being hired to work in North Carolina. Nevertheless, there is no evidence that Plaintiff knowingly kept this information from its attorneys, or that it even maintained records from which it could cull this obscure fact almost three years later.

13. In short, neither a reasonable client nor its attorneys would be expected to discern the choice of law machinations resulting from the bizarre execution of an employment agreement by a mid-level sales executive and a multinational conglomerate, which occurred nearly three years before the filing of the Verified

Complaint. As a result, Kohler's decision to advocate for the application of North Carolina law was reasonable.

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15. Plaintiff's legal argument was facially plausible. Specifically, while Defendant's arguments to the contrary are compelling, North Carolina law lends some support for the enforcement of a one-year non-compete provision throughout North America, where (a) the former employer is itself engaged in business throughout the world; (b) the former employee takes a position in the same line of business with a company that is one of the former employer's principal competitors; and (c) the former employee makes clear his intent to solicit business from the former employer's customers. *See e.g. Harwell Enterprises, Inc. v. Heim*, 276 N.C. 475, 173 S.E.2d 316 (1970) (enforcing a two-year restrictive covenant prohibiting employee from competing anywhere in the United States where former employer specifically alleged that its business activities extended throughout the United States and former employee was engaged in active solicitation of former employer's customers); *Market America, Inc. v. Christman-Orth*, 135 N.C. App. 143, 520 S.E.2d 570 (1999) (approving six-month non-competition agreement containing no link to actual customer base and no territorial restriction, where court assumed covenant was intended to reach the entire U.S.)

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16. Defendant spends much time disputing Plaintiff's recitation of Defendant's duties and geographic areas of responsibilities while a Kohler and TOTO employee. Since Plaintiff's claims were not resolved on the merits, however, the Court is left with dueling affidavits and deposition testimony on these and many other factual issues. Rule 11, however, is not an end-around the crucible of a trial to conclusively determine the facts, nor does it authorize the award of sanctions where the evidence is in conflict.

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19. Given its breadth and scope, the Court finds that the Agreement toes the line of facial plausibility under North Carolina law. Nevertheless, three prior judges of this Court preliminarily determined that the Agreement was enforceable. North Carolina cases provide facially plausible support for this view, just as other cases compellingly support the contrary conclusion.

> Such a reasonable difference of opinion, however, necessarily defeats Defendant's claim for Rule 11 sanctions. Simply put, Defendant has not shown that Plaintiff's legal argument had "absolutely no chance of success under the existing precedent." *Brubaker*, 943 F.2d at 1373.
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> ***
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> 22. Nor did Plaintiff violate the "improper purpose" prong of Rule 11. While Plaintiff is perhaps guilty of using the legal equivalent of a sledgehammer to swat a fly, Plaintiff instituted this suit for a proper purpose—to vindicate its rights under the Agreement. The Court also concludes that Plaintiff acted in good faith by dismissing its claims within a reasonable period after Defendant resigned his employment with TOTO (in effect providing Plaintiff the primary relief sought in this litigation).

[1] Defendant first argues that the court erred in denying his motion for sanctions pursuant to Rule 11. We disagree.

> Rule 11 provides, in pertinent part:
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> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record. . . . A party who is not represented by an attorney shall sign his pleading, motion, or other paper. . . . The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

N.C. Gen. Stat. § 1A-1, Rule 11(a) (2003). Pursuant to Rule 11, a signer must certify "that the pleadings are: (1) well grounded in fact, (2) warranted by existing law, 'or a good faith argument for the extension, modification, or reversal of existing law,' and (3) not interposed for any improper purpose." *Grover v. Norris*, 137 N.C. App. 487, 491, 529 S.E.2d 231, 233 (2000) (quoting N.C. Gen. Stat. § 1A-1, Rule 11(a)). "A breach of the certification as to any one of these three prongs is a violation of the Rule." *Bryson v. Sullivan*, 330 N.C. 644, 655, 412 S.E.2d 327, 332 (1992). This Court reviews a trial court's denial or imposition of Rule 11 sanctions *de novo* and

> must determine (1) whether the trial court's conclusions of law support its judgment or determination; (2) whether the trial court's conclusions of law are supported by its findings of fact; and (3) whether the findings of fact are supported by a sufficiency of the evidence.

Renner v. Hawk, 125 N.C. App. 483, 491, 481 S.E.2d 370, 375, *disc. review denied*, 346 N.C. 283, 487 S.E.2d 553 (1997).

In analyzing whether a complaint meets the first certification requirement, we must determine: "(1) whether the plaintiff undertook a reasonable inquiry into the facts and (2) whether the plaintiff, after reviewing the results of his inquiry, reasonably believed that his position was well grounded in fact." *McClerin v. R-M Industries, Inc.*, 118 N.C. App. 640, 644, 456 S.E.2d 352, 355 (1995). "[I]n determining compliance with Rule 11, courts should avoid hindsight and resolve all doubts in favor of the signer." *Twaddell v. Anderson*, 136 N.C. App. 56, 70, 523 S.E.2d 710, 720 (1999), *disc. review denied*, 351 N.C. 480, 543 S.E.2d 510 (2000) (internal quotation marks and citations omitted).

Here, defendant contends that discovery materials demonstrate that Kohler and its counsel knew their filings contained incorrect factual allegations and unsupported legal assertions and were aware that pleadings were filed for an improper purpose. Specifically, he contends that the complaint misstates his job duties and territory by alleging that he was the primary contact to Kohler's most important Mid-Atlantic region. Defendant acknowledges that he had responsibility for parts of North and South Carolina, and Georgia, but contends that plaintiff knew he was not in fact the contact for the "Mid-Atlantic" region.

Although plaintiff does not address this issue in its brief, we conclude that the term "Mid-Atlantic" is imprecise and defined quite differently by different entities. We do not find in this record a clear definition of the term "Mid-Atlantic," to support the allegation that plaintiff knowingly misstated these factual matters for Rule 11 purposes. Defendant does not present any definition in his brief of the term "Mid-Atlantic" which would support his contention that it clearly did not include North Carolina.

Defendant also contends that the complaint makes false allegations without qualification regarding the misappropriation of trade secrets and confidential information. However, Kohler responds

that the allegations in question were made upon information and belief. Defendant cites *Static Control Components, Inc., v. Vogler* as supporting sanctions in this case. 152 N.C. App. 599, 568 S.E.2d 305 (2002). We find *Static Control* distinguishable because the employer in that case "admitted that [the employee] had not violated the agreement, as was alleged in the complaint, and that there was no evidence that [the employee] was unwilling to abide by the agreement." *Id.* at 606, 568 S.E.2d at 310. Here, in contrast, Kohler never made such an admission.

In addition, "[t]he trial court's findings of fact are conclusive on appeal if supported by competent evidence, even when the record includes other evidence that might support contrary findings . . . . [and] findings of fact to which plaintiff has not assigned error and argued in his brief are conclusively established on appeal." *Id.* at 603, 568 S.E.2d at 308. Defendant here has not challenged findings that he was the local contact for local divisions of national builders, that he had access to proprietary information or that when reminded of the agreement's terms, he responded that he believed it was unenforceable and that he welcomed any attempts to stop him from competing. These findings, which are conclusive before this Court, support the trial court's denial of Rule 11 sanctions. We overrule this assignment of error.

[2] Defendant next argues that Kohler's complaint and memorandum in support of the motion for TRO were legally insufficient and require Rule 11 sanctions. We disagree.

In analyzing whether a complaint meets the second certification requirement, we consider the legal sufficiency of the complaint.

> The two-step analysis required under the legal sufficiency prong of the rule requires the following:
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> "[T]he court must first determine the facial plausibility of the paper. If the paper is facially plausible, then the inquiry is complete, and sanctions are not proper. If the paper is not facially plausible, then the second issue is (1) whether the alleged offender undertook a reasonable inquiry into the law, and (2) whether, based upon the results of the inquiry, formed a reasonable belief that the paper was warranted by existing law, judged as of the time the paper was signed. If the court answers either prong of this second issue negatively, then Rule 11 sanctions are appropriate."

McClerin, 118 N.C. App. at 643-44, 456 S.E.2d at 355 (quoting *Mack v. Moore*, 107 N.C. App. 87, 91, 418 S.E.2d 685, 688 (1992)). "[R]eference should be made to the document itself, and the reasonableness of the belief that it is warranted by existing law should be judged as of the time the document was signed." *Adams v. Bank United of Tex. F.S.B.*, 167 N.C. App. 395, 403, 606 S.E.2d 149, 155 (2004) (quoting *Bryson v. Sullivan*, 330 N.C. 644, 656, 412 S.E.2d 327, 333 (1992)). We begin by considering whether plaintiff's verified complaint is facially plausible.

Plaintiff claimed that defendant misappropriated trade secrets or confidential information after leaving his employment. Specifically, plaintiff alleged that defendant had access to price lists, pricing methods and customer lists. Defendant asserts that the memorandum plaintiff filed contemporaneously with its complaint disclosed the alleged trade secrets and confidential information thereby defeating its own claims. However, the complaint sufficiently states causes of action for the claims alleged. Because the complaint is facially plausible, the inquiry is complete, and sanctions are properly denied.

Defendant also argues that Kohler's complaint and memorandum were interposed for an improper purpose, requiring Rule 11 sanctions. We disagree.

Our Courts "have held that '[t]he improper purpose prong of Rule 11 is separate and distinct from the factual and legal sufficiency requirements.' " *Brooks v. Giesey*, 334 N.C. 303, 315, 432 S.E.2d 339, 345 (1993) (quoting *Bryson*, 330 N.C. at 663, 412 S.E.2d at 337). "[E]ven if a paper is well grounded in fact and law, it may still violate Rule 11 if it is served or filed for an improper purpose." *Id.* at 315, 432 S.E.2d at 345-46. Under Rule 11,

> an objective standard is used to determine whether a paper has been interposed for an improper purpose, with the burden on the movant to prove such improper purpose. In this regard, the relevant inquiry is whether the existence of an improper purpose may be inferred from the alleged offender's objective behavior. An improper purpose is any purpose other than one to vindicate rights . . . or to put claims of right to a proper test.

Mack v. Moore, 107 N.C. App. 87, 93, 418 S.E.2d 685, 689 (1992) (internal quotation marks and citations omitted). "There must be a strong inference of improper purpose to support imposition of sanctions." *Bass v. Sides*, 120 N.C. App. 485, 488, 462 S.E.2d 838, 840 (1995). "[T]he Rule 11 movant's subjective belief that a paper has been filed

for an improper purpose is immaterial in determining whether an alleged offender's conduct is sanctionable." *Mack*, 107 N.C. App. at 93, 418 S.E.2d at 689.

Defendant contends that plaintiff's counsel provided information that they knew was inaccurate to the court at the preliminary injunction hearing. Specifically, plaintiff's counsel stated that defendant had been served with process in North Carolina, rather than in California, and that a phone call was made to defendant's voicemail on 17 October 2003, when defendant's phone had actually been disconnected prior to that date. Defendant further states that plaintiff's counsel further showed "absolute intransigence" by stating that no evidence could convince them that defendant's phone was disconnected prior to the alleged call to his voicemail. Finally, defendant contends that plaintiff's counsel failed to correct the court's apparent misunderstanding of the geographic scope of the agreement at the preliminary injunction hearing. Defendant asserts that this silence and the phone call comments were calculated to discourage the court from considering the evidence regarding defendant's California residence in his Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction. However, as the trial court noted in conclusion 22, plaintiff dismissed its claims within a reasonable time after defendant resigned his employment with TOTO, thereby providing "the primary relief sought in this litigation." The trial court properly concluded that the circumstances failed to show an improper purpose. We overrule this assignment of error.

[3] Finally, defendant argues that the trial court abused its discretion in failing to grant his motion for attorney fees pursuant to N.C. Gen. Stat. § 6-21.5. We disagree.

> The statute provides, in pertinent part:
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> In any civil action or special proceeding the court, upon motion of the prevailing party, may award a reasonable attorney's fee to the prevailing party if the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party in any pleading.

N.C. Gen. Stat. 6-21.5 (2003). "The decision to award or deny the award of attorney fees [pursuant to N.C. Gen. Stat. § 6-21.5] will not be disturbed on appeal unless the trial court has abused its discretion." *Area Landscaping, L.L.C. v. Glaxo-Wellcome, Inc.*, 160 N.C. App. 520, 528, 586 S.E.2d 507, 513 (2003). Defendant relies on the

arguments discussed and rejected *supra* to establish the lack of any justiciable issues of law and fact. Having previously determined that those arguments lack merit, we likewise overrule this assignment of error.

Affirmed.

Judges BRYANT and CALABRIA concur.

KATHY L. ISOM, PLAINTIFF v. BANK OF AMERICA, N.A., DEFENDANT

No. COA05-946

(Filed 2 May 2006)

1. Appeal and Error— appealability—discovery order—some documents protected, some not—immediately appealable

The immediate appeal of a trial court discovery order protecting some but not all of the documents in question affected a substantial right that would otherwise be lost, and the order was reviewed. However, the order will be upset only by a showing that the trial court abused its discretion.

2. Discovery— emails—attorney-client privilege—inapplicability

Emails exchanged between bank officials were not protected from discovery by the attorney-client privilege where they suggested a purely business matter, were not for legal advice, and the attorneys were copied merely for information. A document without privilege in the hands of the client does not become privileged merely because it is handed to the attorney.

3. Discovery— emails—attorney-client privilege—applicability

The trial court did not abuse its discretion by finding that certain emails were protected from discovery by the attorney-client privilege where the attorney-client relationship was firmly established at the time the emails were sent; the emails were apparently exchanged in confidence; they related to discovery matters about which the attorneys were being consulted; and they were exchanged in the course of litigation and arbitration.

4. Discovery— attorney-client privilege—applicability

The trial court did not abuse its discretion by ruling that an email from counsel discussing revisions to a draft resolution and an email from in-house counsel were protected from discovery by the attorney-client privilege and that an email from attorneys requesting a meeting and an email from defendant shared with attorneys and nonattorneys were not so protected.

5. Evidence— attorney-client privilege—draft document—pending litigation

A draft document prepared in relation to pending litigation but not as a confidential communication between attorney and client was not protected by attorney-client privilege.

6. Evidence— emails—discovery—work product doctrine

The trial court did not abuse its discretion by determining that certain emails were not shielded from discovery by the work product doctrine. A review of the text of the emails yields a wholly reasonable determination that the intent of the exchange was not in anticipation of litigation. Business emails which are copied to an attorney are not protected by the work product doctrine solely due to the fact that they were sent while the business was contemplating litigation.

7. Discovery— emails—work product doctrine

The trial court did not abuse its discretion in its determination of whether certain emails were protected by the work product doctrine and were discoverable. Plaintiff's email stating her inclination not to sign a document was not drafted by an attorney, nor was it necessarily prepared in anticipation of litigation. However, the draft declaration defendant was asked to sign was prepared by defendant's attorneys in anticipation of litigation, falls squarely within the definition of attorney work product, and is protected.

8. Evidence— work product doctrine—exception—substantial need and evidence unavailable elsewhere

The trial court did not abuse its discretion by applying an exception to the work product doctrine to a document which plaintiff refused to sign (and for which she was allegedly fired) where plaintiff adequately demonstrated a substantial need and inability to obtain the information elsewhere.

9. Discovery— depositions allowed—further objections allowed

The trial court did not abuse its discretion by allowing plaintiff to depose individuals in connection with discoverable documents, while allowing defendant to raise further attorney-client and work-product objections.

10. Appeal and Error— preservation of issues—broadside assignment of error—dismissed

A single broadside assignment of error which encompassed at least three cognizable and specific legal reasons for error was dismissed.

Cross appeals by defendant and plaintiff from an order entered 13 April 2005 by Judge W. Robert Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 7 February 2006.

Murphy & Chapman, P.A., by Jenny L. Sharpe, for plaintiff.

Hunton & Williams, L.L.P., by Frank E. Emory, Jr., Anthony R. Foxx, and K. Stacie Corbett, for defendant.

ELMORE, Judge.

Kathy L. Isom (Isom) and Bank of America, N.A. (Bank) enter cross appeals from a discovery order granting, in part, the Bank's motion for a protective order, and granting, in part, Isom's motion to compel. After a careful review of the trial court's order, the relevant law, and the parties' arguments, we determine the trial court did not abuse its discretion in issuing the order.

Isom worked for the Bank as a Vice President and manager in the Consumer Deposits Products division. Her duties included managing and implementing programs designed to assist individuals and businesses with their checking needs, and interfacing with the Bank's check vendors. In that capacity, she was intricately involved in the Bank's check vendor consolidation project: an apparent assessment to determine whether the Bank should convert from dual check vendors to a single vendor. The Bank decided to make the consolidation, thus creating a conflict with one of its current vendors. That vendor, under the parties' contract, sought arbitration of the alleged breach. In response, the Bank filed a suit in federal court seeking preliminary and permanent injunctive relief.

On or about 30 January 2004 Isom attended a meeting with bank officials and the Bank's attorneys. There, Isom was asked to sign a document relating to the pending dispute with the check vendor. She refused to sign the document at that time and several times thereafter, claiming it was not accurate.

In February 2004, Isom's supervisor reviewed discovery documents from the check vendor that indicated Isom had relayed sensitive Bank information regarding those proceedings to one of the vendor's employees. That employee was deposed 15 March 2004, and confirmed Isom had provided him with the information contained in the discovery documents.

Thereafter, in late March, the Bank terminated Isom's employment. Isom, in her complaint against the Bank for wrongful discharge, contends the Bank fired her because she would not sign a court-related document presented by the Bank's attorneys, a document that she claims was inaccurate or not truthful. She alleges her termination was in violation of our state's public policy. The Bank responds that Isom was fired for disclosing confidential information, in violation of a non-disclosure agreement related to its check vendor consolidation project. Accordingly, the Bank filed a counterclaim against Isom alleging breach of contract, breach of ethics policies, and breach of fiduciary duties.

The trial court's order at issue before us arises from discovery matters in Isom's wrongful termination suit. Generally speaking, Isom sought information from the Bank related to its dispute with the check vendor. She requested the document she refused to sign, correspondence exchanged between her and the Bank's attorneys pertaining to the vendor dispute, as well as correspondence exchanged between her and other bank officials. The Bank argued that these requests were protected by attorney-client privilege or the work product doctrine, and thus were non-discoverable. The Bank also advanced these theories in protecting information requested by Isom in two depositions. The Bank filed a motion for a protective order regarding the requested documents and testimony on 14 July 2004. Several days later, on 27 July 2004, Isom filed a motion to compel discovery.

Following a hearing on the parties' motions, held 30 August 2004, the Bank presented the requested documents to the trial court on 2 September 2004 for *in camera* inspection. The trial court sent a letter to the Bank's attorneys on 29 October 2004, stating that it had deter-

mined some of the documents were discoverable and were to be produced as requested. The Bank responded by requesting an order clarifying the court's ruling and certifying the issue for appeal. By order issued 13 April 2005, the trial court listed the documents that were to be discovered pursuant to Isom's motion to compel and stated that the remaining documents were non-discoverable pursuant to the Bank's motion for a protective order. The order also certified the issue for immediate appeal.

On appeal, Isom and the Bank, respectively, contend that all the documents should have been discoverable or all the documents should have been protected. As such, each party asks us to affirm in part and reverse in part the trial court's order.

[1] A review of discovery orders is generally considered interlocutory and therefore not usually immediately appealable unless they affect a substantial right. "[W]here a party asserts a statutory privilege which directly relates to the matter to be disclosed under an interlocutory discovery order, and the assertion of such privilege is not otherwise frivolous or insubstantial, the challenged order affects a substantial right . . . ." *Evans v. United Servs. Auto. Ass'n*, 142 N.C. App. 18, 24, 541 S.E.2d 782, 786, *cert. denied*, 353 N.C. 371, 547 S.E.2d 810 (2001). And, since this appeal affects a substantial right that would be lost if not reviewed before the entry of final judgment, the issue is properly before us. That said, our review of a trial court's discovery order is quite deferential: the order will only be upset on appeal by a showing that the trial court abused its discretion. *See id.* at 27, 541 S.E.2d at 788. To demonstrate such abuse, the trial court's ruling must be shown to be "manifestly unsupported by reason" or not the product of a "reasoned decision." *Nationwide Mut. Fire Ins. Co. v. Bourlon*, 172 N.C. App. 595, 601, 617 S.E.2d 40, 45 (2005), *aff'd. per curiam*, 360 N.C. 356, 625 S.E.2d 779 (2006). When the trial court acts within its discretion, "[t]his Court may not substitute its own judgment for that of the trial court." *Id.*

Consequently, we will review the *in camera* documents presented to the trial court and determine whether it abused its discretion in determining that some, but not all, of the documents were protected. We will address the parties' questions presented according to the two theories of protection asserted: first, the theory of attorney-client privilege, and should any documents not be protected by that privilege, we will next review the trial court's determinations as to the work product doctrine. Then, we will review the court's application of any exception to the work product doctrine.

The sixteen documents addressed in the trial court's order can be generally characterized as falling into four distinct groups. The first group consists of six emails exchanged between bank officials and copied to its attorneys. The next group of five emails discusses various discovery issues in the pending vendor dispute. A third group of four emails involves the actual document Isom refused to sign. The final *in camera* document, and the final group, was the draft declaration that Isom had been asked to sign.

I.

[2] The attorney-client privilege protects communications if:

> (1) the relation of attorney and client existed at the time the communication was made, (2) the communication was made in confidence, (3) the communication relates to a matter about which the attorney is being professionally consulted, (4) the communication was made in the course of giving or seeking legal advice for a proper purpose although litigation need not be contemplated and (5) the client has not waived the privilege.

State v. Murvin, 304 N.C. 523, 531, 284 S.E.2d 289, 294 (1981); *Evans*, 142 N.C. App. at 32, 541 S.E.2d at 791.

As to the first group, those emails exchanged between bank officials, the trial court ruled the attorney-client privilege was not applicable to protect their discovery. We agree. Through our review, these emails do not seem to have been sent or received for the purpose of giving or seeking legal advice. Much to the contrary, the emails suggest a purely business matter. The Bank's attorneys appear to have been copied in the exchange merely for informational purposes. "[A] document, which is not privileged in the hands of the client, will not be imbued with the privilege merely because the document is handed over to the attorney." *Mason C. Day Excavating, Inc., v. Lumbermens Mut. Cas. Co.*, 143 F.R.D. 601, 607 (M.D.N.C. 1992) (citing *Gould, Inc. v. Mitsui Min. & Smelting Co.*, 825 F.2d 676, 679-80 (2nd Cir. 1987)). As such, the trial court did not abuse its discretion in ordering these emails discoverable.

[3] As to the second group, emails discussing the pending vendor litigation and arbitration, the trial court found these documents were protected by the attorney-client privilege. We again determine no abuse of discretion in this ruling. At the time these emails were sent, the attorney-client relationship was firmly established; the emails were apparently exchanged in confidence; they related to discovery

matters about which the attorneys were being professionally consulted; and they were exchanged in the course of litigation and arbitration proceedings. *See Evans*, 142 N.C. App. at 32, 541 S.E.2d at 791.

[4] The trial court issued more individualized rulings to the third group of documents than the previous two. This group consisted of: 1) an email discussing revisions to the draft declaration Isom was asked to sign; 2) an email from outside counsel to various individuals requesting a meeting to discuss those revisions; 3) an email from in-house counsel to various individuals; and 4) an email written and sent by Isom, in which she expressed her reluctance to sign the document. Although if permitted to consider the decision on these documents anew, we may arrive at a different conclusion, we cannot say that the trial court's application of the attorney-client privilege here was "manifestly unsupported by reason." *See Bourlon*, 172 N.C. App. at 601, 617 S.E.2d at 45. The trial court found that the first and third emails were protected, but under the circumstances the second and fourth emails were not. An email requesting a meeting and another shared with both attorneys and non-attorneys are not generally protected by the attorney-client privilege. *See Hartsell v. Hartsell*, 99 N.C. App. 380, 392-93, 393 S.E.2d 570, 578 (1990) (attorney's request to client to come to office was not protected by attorney client privilege, only communications that were intended to be confidential are), *aff'd. per curiam*, 328 N.C. 729, 403 S.E.2d 307 (1991).

[5] As to the last group, the draft declaration itself, the trial court ruled it was not protected by attorney-client privilege. Since the declaration does not appear to have been intended as a confidential communication between attorney and client, but rather a court document prepared in relation to the pending vendor litigation, it can hardly be said that the trial court abused its discretion. It does, however, highlight the Bank's alternative argument for protection.

II.

The Bank argues that those documents not deemed protected by the attorney-client privilege were nevertheless protected by the work product doctrine, and thus the trial court erred in ruling some of the *in camera* documents discoverable. In order to successfully assert protection based on the work product doctrine, the party asserting the protection, the Bank here, bears the burden of showing " '(1) that the material consists of documents or tangible things, (2) which were prepared in anticipation of litigation or for trial, and (3) by or for another party or its representatives which may include

an attorney, consultant . . . or agent.' " *Evans*, 142 N.C. App. at 29, 541 S.E.2d at 789 (quoting *Suggs v. Whittaker*, 152 F.R.D 501, 504-05 (M.D.N.C. 1983)).

[6] As to the first group of documents, the trial court determined these emails were not shielded from discovery by the work product doctrine. We see no abuse of discretion in that determination. Notwithstanding the fact that these emails were exchanged during the pending legal dispute between the Bank and its check vendor, a review of their text yields a wholly reasonable determination that the intent of the exchange was not in anticipation of litigation or for the purpose of preparing for trial. These emails appear to be nothing more than that which would be sent in the ordinary course of business. And, it goes without saying that any otherwise business emails, copied to an attorney, are not protected by the work product doctrine solely due to the fact they were sent during a time when the business is anticipating litigation. *See Mason C. Day Excavating*, 143 F.R.D. at 607.

[7] Since the trial court determined the second group of documents, as well as the first and third email from the third group, was covered by the attorney-client privilege, there is no need to review whether the work product doctrine was applicable to them. However, the remaining documents produced for *in camera* inspection—the email written by Isom, the email containing a meeting request, and the draft declaration Isom was asked to sign—must be reviewed since the trial court ruled the attorney-client privilege did not shield them. The trial court ruled these documents were also not protected by the work product doctrine, or otherwise fell within the doctrine's exception, and were thus discoverable. We see no abuse of discretion in that determination either. Ms. Isom's email was not drafted by an attorney, nor was it necessarily prepared in anticipation of litigation; it is a statement of her inclination not to sign a document. And since the work product doctrine should be narrowly construed consistent with its purpose, which is to safeguard the lawyer's work in developing his client's case, *see Suggs*, 152 F.R.D 501 at 505, we cannot say that the trial court abused its discretion when ruling on the meeting request. Last is the draft declaration Isom was asked to sign. This document was clearly prepared by the Bank's attorneys in anticipation of the litigation and arbitration between the Bank and its check vendor. Therefore, it falls squarely within the definition of attorney work product and, barring a showing by Isom of any exception, is protected.

[8] Isom may discover a document protected by the work product doctrine if she can demonstrate that a "substantial need" for the document exists and she would undergo "undue hardship" if forced to obtain a substantial equivalent by other means.

> [A] party may obtain discovery of documents and tangible things otherwise discoverable under subsection (b)(1) of this rule and prepared in anticipation of litigation or for trial . . . only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

N.C. Gen. Stat. § 1A-1, Rule 26(b)(3) (2005). The trial court stated that Isom had adequately demonstrated a substantial need and inability to obtain the information elsewhere. Her cause of action and theory of the case is based on proving that she was fired for refusing to sign this draft declaration. And, since the Bank is the only party in possession of this particular document, we determine the trial court did not abuse its discretion in applying the exception to the work product doctrine for this declaration.

III.

[9] The Bank additionally argues that the trial court abused its discretion in allowing Isom to depose those individuals named in the discoverable documents. While such depositions are allowed by the order, the Bank is not precluded from asserting any privilege that might protect other documents or testimony uncovered during the deposition but not yet reviewed by the trial court.

> Any deposition taken pursuant to this Order shall be considered protected information by all parties. Any information Defendant considers protected by the work-product doctrine and/or attorney-client privilege may be submitted first to the Trial Court for an *in camera* review and determination within 30 days of the deposition.

As such, we cannot say that the trial court abused its discretion in allowing Isom to depose individuals in connection to the discoverable documents, while yet allowing the Bank to raise further objections.

IV.

[10] Isom's cross appeal rests on the assumption that all the *in camera* documents should have been discoverable. Isom also argues that

the crime-fraud exception to the attorney-client privilege is applicable to all the documents related to the declaration. However, Isom's single assignment of error does not comport with the Rules of Appellate Procedure and warrants dismissal. *See*, *e.g.*, *May v. Down East Homes of Beulaville*, *Inc.*, 175 N.C. App. 416, 623 S.E.2d 345 (2006); *Walker v. Walker*, 174 N.C. App. 778, 624 S.E.2d 639 (2005); *Wade v. Wade*, 72 N.C. App. 372, 375-76, 325 S.E.2d 260, 265-66, *disc. review denied*, 313 N.C. 612, 330 S.E.2d 616 (1985); *Electric Co. v. Carras*, 29 N.C. App. 105, 107-08, 223 S.E.2d 536, 538 (1976). Her broadside assignment of error encompasses at least three, if not more, cognizable and specific legal reasons why the trial court erred. *See* N.C.R. App. P. 10(c)(1) ("Each assignment of error shall, so far as practicable, be confined to a single issue of law; and shall state plainly, concisely and without argumentation the legal basis upon which error is assigned."). Furthermore, the assignment of error makes no specific reference to the crime-fraud exception. Accordingly, we dismiss Isom's cross appeal.

In conclusion, we determine that the trial court exercised reasoned and deliberate care in ordering that some of the *in camera* documents were discoverable and some were shielded. Naturally, this appeal is limited to the order before us and we take no position as to the merits of the underlying case.

Affirmed.

Judges McCULLOUGH and LEVINSON concur.

EDGAR MARION MARTIN, JR., Plaintiff, MARILYN KAY ADAMS, Assignee of Judgment, Plaintiff v. LUTHER DANIEL ROBERTS, Defendant

No. COA05-1161

(Filed 2 May 2006)

1. Husband and Wife— consent order to convey—insufficiency as deed of conveyance

A consent order in which a judgment debtor husband agreed to convey to his wife his half of property held by them as tenants by the entirety was insufficient to constitute a conveyance of the husband's interest in the property where the order required

defendant to convey his interest on a future date; the order contained no legal description of the real property to be conveyed and did not state the location of the property; and the order was not filed with the register of deeds and thus did not provide record notice of any purported conveyance from the judgment debtor to his wife.

2. Enforcement of Judgments— tenancy by the entirety— divorce—attachment of judgment lien

The trial court erred by denying plaintiff judgment creditor's motion to subject to an execution sale real property owned at the time of the judgment by defendant judgment debtor and his former wife as tenants by the entirety because plaintiff's judgment lien attached to defendant's interest in the property upon his divorce from his former wife when the property was converted by operation of law into a tenancy in common, and when defendant conveyed his undivided one-half interest in the property to his former wife after their divorce, she took his interest in the property subject to plaintiff's judgment lien.

Appeal by plaintiff Marilyn Kay Adams from an order entered 14 July 2005 by Judge Robert H. Hobgood in Durham County Superior Court. Heard in the Court of Appeals 22 March 2006.

Brent D. Adams & Associates, by Brenton D. Adams, for Marilyn Kay Adams, plaintiff-appellant.

No brief filed for Luther Daniel Roberts, defendant-appellee.

No brief filed for Sheila Carroll Roberts, intervenor-defendant-appellee.

JACKSON, Judge.

On 9 January 1997, a judgment was entered against Luther Daniel Roberts ("defendant") in the amount of sixty-four thousand, six hundred and ninety-one dollars, and eighteen cents ($64,691.18), plus interest and attorney's fees. The judgment was filed with the Durham County Superior Court, and was later assigned to Marilyn Kay Adams ("plaintiff"). On 15 April 2005, plaintiff filed a Motion to Subject Real Estate to Execution Sale. Specifically, plaintiff sought to subject real property held by defendant's former wife to an execution sale in order to satisfy plaintiff's judgment lien.

At the time the judgment was entered in January 1997, defendant owned a parcel of land in Durham County with his wife, Sheila Carroll Roberts, as tenants by the entirety. At this time, the couple was in the process of divorcing. On 28 January 1997, the couple entered into a Consent Order pursuant to which defendant would convey his one-half interest in the tenancy by the entirety to his wife, within thirty days following the execution and filing of the Consent Order. This conveyance did not occur prior to the couple's divorce judgment entered on 27 March 1998. On 20 November 1998, nearly eight months after the couple's divorce, defendant conveyed his interest in the couple's real property to his former wife via a General Warranty Deed. Defendant's former wife subsequently conveyed a Deed of Trust on the subject real property on 4 November 2002.

Plaintiff, through her complaint, sought a declaration that a portion of the real property, formerly held by defendant and his former wife, became subject to her judgment lien upon the couple's divorce in March 1998, and that when defendant's former wife took title to defendant's interest in the real property, she did so subject to plaintiff's lien. Plaintiff sought to subject defendant's former undivided one-half interest in the real property to an execution sale in order to satisfy the lien. On 8 June 2005, Sheila Carroll Roberts filed a Motion to Intervene and a Motion to Dismiss plaintiff's complaint pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure.

A hearing was conducted on the parties' motions, and in an order entered 14 July 2005, the trial court dismissed plaintiff's motion seeking to subject the real property to an execution sale. The trial court concluded that plaintiff's judgment did not constitute an encumbrance upon any portion of the real property formerly held by defendant and his former wife, and that no portion of defendant's former wife's interest in the real property was encumbered by plaintiff's judgment lien. Plaintiff now appeals from this order.

Plaintiff contends the trial court erred in denying her motion to subject real estate formerly owned by defendant to an execution sale. Plaintiff contends her judgment lien attached to defendant's property upon the date of his divorce, and that when he conveyed his undivided one-half interest in the property to his former wife, his former wife took his interest in the property subject to plaintiff's judgment lien. Plaintiff also contends that the 28 January 1997 Consent Order, entered into by defendant and his former wife, did not constitute a conveyance, and did not result in defendant's conveyance of his interest in the tenancy by the entirety to his former wife.

North Carolina General Statutes, section 1-234 details where and how a judgment lien should be docketed. Section 1-234 specifically provides:

> Upon the entry of a judgment under G.S. 1A-1, Rule 58, affecting the title of real property, or directing in whole or in part the payment of money, the clerk of superior court shall index and record the judgment on the judgment docket of the court of the county where the judgment was entered. . . . The judgment lien is effective as against third parties from and after the indexing of the judgment as provided in G.S. 1-233. The judgment is a lien on the real property in the county where the same is docketed of every person against whom any such judgment is rendered, and which he has at the time of the docketing thereof in the county in which such real property is situated, or which he acquires at any time thereafter, for 10 years from the date of the entry of the judgment under G.S. 1A-1, Rule 58, in the county where the judgment was originally entered.

N.C. Gen. Stat. § 1-234 (2005). Pursuant to section 1-234, a judgment lien is perfected upon its docketing in a county in which the debtor owns real property. The judgment lien not only attaches to real property owned by the debtor at the time the judgment is docketed, but also to real property the debtor acquires after the date of docketing. *Thompson v. Avery County*, 216 N.C. 405, 408, 5 S.E.2d 146, 147 (1939).

In the instant case, the judgment against defendant was filed with the Durham County Clerk of Superior Court on 9 January 1997. Therefore, plaintiff's judgment lien was perfected as of this date, and it attached to any real property owned by defendant on this date, or acquired thereafter during the next ten years. However, as defendant and his former wife held their real property as tenants by the entirety, plaintiff's judgment lien against defendant could not attach to defendant's interest in his property held as such. *Johnson v. Leavitt*, 188 N.C. 682, 685, 125 S.E. 490, 492 (1924) (estate "may be taken under execution against one of the parties only when the legal personage of 'husband and wife' has been reduced to an individuality").

"[I]t is well established that an individual creditor of either a husband or a wife has no right to levy upon property held by the couple as tenants by the entirety." *Dealer Supply Co. v. Greene*, 108 N.C. App. 31, 34, 422 S.E.2d 350, 352 (1992). Thus, so long as real property is held by spouses as tenants by the entirety, any judgment against

only one of the spouses may not attach to the real property while it remains as a tenancy by the entirety. *L. & M. Gas Co. v. Leggett*, 273 N.C. 547, 550, 161 S.E.2d 23, 26 (1968); *see also Union Grove Milling and Mfg. Co. v. Faw*, 103 N.C. App. 166, 168, 404 S.E.2d 508, 509 (1991) ("When property is held by married persons as tenants by the entireties, a lien of judgment effective against only one spouse does not attach to the property until the property is converted into another form of estate.") (citing *In re Foreclosure of Deed of Trust*, 303 N.C. 514, 519-20, 279 S.E.2d 566, 569 (1981). Once the tenancy by the entirety has been dissolved, and the real property has been converted into another form of an estate, a creditor's judgment lien may attach to an individual spouse's interest in the new estate. *Dealer Supply Co.*, 108 N.C. App. at 34, 422 S.E.2d at 352.

In North Carolina, a tenancy by the entirety may be destroyed only in specific ways.

> The tenancy by the entirety may be terminated by a *voluntary partition* between the husband and the wife whereby they execute a joint instrument conveying the land to themselves as tenants in common or in severalty. But neither party is entitled to a *compulsory partition* to sever the tenancy. . . .
>
> A divorce *a vinculo*, an absolute divorce destroying the unity of husband and wife that is essential to the existence of the tenancy, will convert an estate by the entirety into a tenancy in common. The divorced spouses become equal cotenants. . . . [E]ach spouse is entitled to an undivided one-half interest in the property . . . .
>
> A divorce *a mensa et thoro*, on the other hand, a divorce from bed and board which does not dissolve the marriage relation, does not sever the "unity of the persons," and does not terminate or change the tenancy by the entirety in any way. . . .

James A. Webster, Jr., *Webster's Real Estate Law in North Carolina* § 7-18, at 223-24 (Patrick K. Hetrick & James B. McLaughlin, Jr., eds., 5th ed. 1999) (emphasis in original); *see also Dealer Supply Co.*, 108 N.C. App. at 35, 422 S.E.2d at 352 (quoting prior edition of *Webster's Real Estate Law in North Carolina*). Therefore, upon an absolute divorce, real property held as a tenancy by the entirety immediately is converted by operation of law to a tenancy in common. When prior to the divorce each spouse held an undivided one-half interest in a tenancy by the entirety, following an absolute divorce, the former spouses now hold an undivided one-half interest in a tenancy in com-

mon estate. *Branch Banking and Trust Co. v. Wright*, 74 N.C. App. 550, 552, 328 S.E.2d 840, 841, *disc. review allowed*, 314 N.C. 662, 335 S.E.2d 321, *appeal withdrawn*, 318 N.C. 505, 353 S.E.2d 225 (1985). Further, "upon [an absolute] divorce, each former spouse's undivided one-half interest [in the tenancy in common] becomes subject to the claims of his or her individual creditors." *Union Grove*, 103 N.C. App. at 169, 404 S.E.2d at 509 (citing *Branch Banking and Trust Co.*, 74 N.C. App. at 553, 328 S.E.2d at 842).

On 28 January 1997, defendant and his former wife entered into a Consent Order stating, in part:

> 13. That it is ordered that Plaintiff shall receive sole ownership of the parties' farm, and that Defendant agrees to transfer his interest in the farm to the person of the Plaintiff, via General Warranty Deed, within thirty (30) days of this Agreement being executed and filed.

It is well established by our State's statutes that a trial court may order the transfer of title, and that an order providing for the transfer of title in real property may constitute a deed of conveyance. *See* N.C. Gen. Stat. § 1A-1, Rule 70 (2005) ("If a judgment directs a party to execute a conveyance of land or to deliver deeds . . . and the party fails to comply within the time specified, the judge may direct the act to be done . . . . If real or personal property is within the State, the judge in lieu of directing a conveyance thereof may enter a judgment divesting the title of any party and vesting it in others and such judgment has the effect of a conveyance executed in due form of law."); N.C. Gen. Stat. § 50-20(g) (2005) (with regards to the distribution by the court of marital and divisible property, "[i]f the court orders the transfer of real or personal property or an interest therein, the court may also enter an order which shall transfer title, as provided in G.S. 1A-1, Rule 70 and G.S. 1-228."); N.C. Gen. Stat. § 1-228 (2005) ("Every judgment, in which the transfer of title is so declared, shall be regarded as a deed of conveyance, executed in due form . . . and shall be registered in the proper county, under the rules and regulations prescribed for conveyances of similar property executed by the party. The party desiring registration of such judgment must produce to the register a copy thereof, certified by the clerk of the court in which it is enrolled, under the seal of the court, and the register shall record both the judgment and certificate.").

[1] In the instant case, the Consent Order was insufficient to constitute a conveyance of defendant's interest in the real property held as

a tenancy by the entirety. The portion of the order pertaining to the former couple's real property called for defendant to convey his interest on a future date, but within thirty days of the date of execution and filing of the Consent Order. In addition, the order failed to provide a legal description of the real property which was to be conveyed, and it did not state the location of the property. The Consent Order also was not filed with the Durham County Register of Deeds, thus it did not provide record notice of any purported conveyance from defendant to his former spouse, and it was not valid against creditors of defendant because at most it constituted an unrecorded transfer. *See Eaton v. Doub*, 190 N.C. 14, 19, 128 S.E. 494, 497 (1925) (holding that a docketed judgment lien is superior in priority over an unrecorded deed purporting to convey title from the debtor to another); *Arnette v. Morgan*, 88 N.C. App. 458, 460, 363 S.E.2d 678, 679 (1988) ("Under our recording statutes, there is no distinction between creditors and purchasers for value: no conveyance of land is valid to pass any property as to either but from the registration of the conveyance.") (citing *Eaton*, 190 N.C. at 19, 128 S.E. at 497). We hold the Consent Order entered on 28 January 1997 constituted a statement concerning a planned future conveyance, and did not constitute a conveyance of defendant's interest in the subject property to his former wife.

Although the instant case is not precisely on point with prior cases in this area of law, the issues and facts in this case are similar to those in *Branch Banking and Trust Co. v. Wright*, 74 N.C. App. 550, 328 S.E.2d 840 (1985), and *Union Grove Milling and Manufacturing Co. v. Faw*, 103 N.C. App. 166, 404 S.E.2d 508 (1991). In, *Branch Banking and Trust Co.*, the bank (BB&T) was permitted to maintain a lien against property held by the debtor's former wife. BB&T held a deed of trust against the property which had been executed by the debtor former husband. The property originally was held between the debtor and his wife as tenants by the entirety. Following the couple's divorce, the former wife received the debtor's interest in the property. This Court held that upon the couple's divorce, the former spouses became tenants in common, and when the former wife acquired the property through the equitable distribution award, she took title to the property subject to BB&T's deed of trust on the debtor former husband's undivided one-half interest in the tenancy in common. *Id.* at 553, 328 S.E.2d at 842.

Union Grove Milling and Manufacturing Co., deals with the effect of a judgment lien against one spouse on marital property,

which also by virtue of the divorce decree, was converted into property held as a tenancy in common. Following the couple's divorce, property formerly held by the couple was awarded through an equitable distribution award to the non-debtor spouse. During the marriage, the couple held the real property as a tenancy by the entirety estate. This Court held that upon the date of divorce, the real property held as a tenancy by the entirety converted to a tenancy in common, and the judgment lien attached immediately to the debtor-spouse's undivided one-half interest in the tenancy in common. *Union Grove*, 103 N.C. App. at 169, 404 S.E.2d at 510. Thus, upon being awarded the subject property in the equitable distribution award, the non-debtor spouse took title in fee simple absolute, subject to the judgment lien on the debtor-spouse's one-half undivided interest. *Id.*

[2] In the instant case, during their marriage, defendant and his former wife held a parcel of land approximately one hundred and thirteen (113) acres large as a tenancy by the entirety. Defendant and his former wife received an absolute divorce on 27 March 1998. Upon this date, the real property defendant and his former wife held as tenants by the entirety was immediately converted by operation of law to a tenancy in common estate, with each former spouse holding an undivided one-half interest in the real property. Thus, upon the divorce, and the conversion of the real property to a tenancy in common, plaintiff's judgment lien could, and did, attach to defendant's undivided one-half interest in the real property. "Once it is established that there has been a tenancy in common, the rule is that the grantee of a tenant in common can take only that tenant's share and step into that tenant's shoes." *Id.* at 169, 404 S.E.2d at 510 (citing *Branch Banking and Trust Co.*, 74 N.C. App. at 552, 328 S.E.2d at 841). Therefore, when defendant conveyed his undivided one-half interest in the tenancy in common to his former wife on 20 November 1998, subsequent to their absolute divorce, she took title to defendant's interest subject to plaintiff's judgment lien.

Thus, we hold the trial court erred in denying plaintiff's motion to subject the real property to execution sale. We reverse the trial court's order stating that plaintiff's judgment lien does not constitute an encumbrance against any portion of the property formerly held by defendant, and that no portion of defendant's former wife's interest in the real property is encumbered by plaintiff's judgment. As plaintiff's judgment lien attached to defendant's interest in the real property upon its conversion to a tenancy in common, defendant's former wife

took title to defendant's undivided one-half interest subject to plaintiff's judgment lien.

Reversed.

Judges ELMORE and STEELMAN concur.

STATE OF NORTH CAROLINA v. ROBERT TURNER

No. COA05-1046

(Filed 2 May 2006)

1. Motor Vehicles— driving while impaired—instruction—expiration date on vials used to collect blood samples

The trial court did not err in a driving while impaired case by failing to give the requested instruction on the expiration date of the vials used to collect the blood samples, because: (1) conflicting expert testimony was presented concerning whether the fact the tubes expired two months prior to their use affected the validity of the blood test; (2) the trial court instructed the jury from N.C.P.I. Crim. 104.94 on how they were to consider expert testimony; and (3) the trial court gave in substance the last two sentences of defendant's request, but declined the first two sentences since they were not accurate statements of the law when it was merely a reiteration of a defense expert's testimony.

2. Evidence— cross-examination—prior statements—waiver

The trial court did not err in a driving while impaired case by permitting the State to cross-examine defendant regarding his prior district court testimony and further by instructing the jury regarding defendant's prior statements, because: (1) there is no proof in the record or trial transcript of defense counsel requesting the contents of the prior statement during the State's cross-examination of defendant, nor did defense counsel request the bench conference to be recorded; (2) absent proof defense counsel asked for and failed to receive the contents of defendant's prior statement, there was no violation of N.C.G.S. § 8C-1, Rule 613; and (3) although the transcript revealed defense counsel questioned the inclusion of the jury instruction regarding prior inconsistent and consistent statements made by defendant due to

there being no presentment of the prior statement, defendant waived consideration of this issue by failing to submit any argument or citation of authority.

3. Evidence— credibility—instruction—defendant an interested witness

The trial court did not err in a driving while impaired case by instructing the jury that defendant was an interested witness, because: (1) the pertinent portion of the jury instruction was a full and accurate statement of the law; and (2) our Supreme Court has ratified the use of jury instructions whereby a testifying defendant is declared to be an interested witness. Further, N.C. R. App. P. 9(a)(3)f provides that the record on appeal in criminal cases needs to contain the transcript of the entire jury charge given by the trial court where error is assigned to the giving or omission of instructions to the jury, and this defect is not cured by filing the trial transcript with the Court of Appeals.

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

Assignments of error numbers one and four are abandoned pursuant to N.C. R. App. P. 28(b)(6) because defendant failed to argue them.

Appeal by defendant from judgment entered 4 May 2005 by Judge Karl Adkins in Mecklenburg County Superior Court. Heard in the Court of Appeals 30 March 2006.

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

Vann Law Firm, P.A., by Christopher M. Vann for defendant-appellant.

CALABRIA, Judge.

Robert Turner ("defendant") appeals from a judgment entered upon a jury verdict finding him guilty of driving while impaired. We find no error.

The State presented evidence at trial that Corporal Steven Copley ("Corporal Copley") observed defendant run a red light and nearly collide with Sergeant James Rollins ("Sergeant Rollins") at the intersection of Highway 51 and U.S. 521 between the late evening hours of 25 December and the early morning hours of 26 Decem-

ber 2002. Sergeant Rollins followed defendant and Corporal Copley followed Sergeant Rollins. Sergeant Rollins stopped defendant and approached his automobile. Sergeant Rollins obtained defendant's driver's license and told Corporal Copley he smelled alcohol on defendant's breath.

Corporal Copley took over the investigation, approached defendant's automobile, noticed his eyes were red and glassy, and noted he was redolent of alcohol. Corporal Copley asked defendant if he had consumed any alcohol and defendant replied "[I] did have one beer about an hour and-a-half ago." Corporal Copley then put defendant through a series of sobriety tests including: stating the ABC's from beginning to end "without singing;" placing his finger to his nose with his feet shoulder length apart, head tilted slightly back and eyes closed; and performing the heel to toe walking test. Defendant failed each test (Id.). Corporal Copley administered an Alco-Sensor test on defendant and concluded "defendant . . . had consumed a sufficient amount of an impairing substance as to appreciably impair his mental and physical capabilities or both." Corporal Copley placed defendant under arrest for driving while impaired (DWI).

In transit to the Mecklenburg County Intake Center, defendant developed chest pains and Corporal Copley immediately notified dispatch he needed an ambulance. The ambulance arrived and transported defendant to Presbyterian Hospital ("hospital"). While in the examination room, defendant informed Corporal Copley he wanted to "call a lawyer or look at a phone book." Corporal Copley gave defendant a phone book and advised him he would be asked to submit to a blood test. Defendant signed a form acknowledging his blood test rights. Corporal Copley called the Mecklenburg County Sheriff's Office and requested a blood test kit be sent to the hospital. A registered nurse performed the blood test on defendant. Corporal Copley placed the blood collection tubes ("the tubes") containing defendant's blood into the police property room.

On 14 January 2003, Jennifer Mills ("Ms. Mills"), a forensic chemist with the Charlotte Police Department Crime Laboratory, analyzed defendant's blood which indicated an alcohol concentration of 0.15. Paul Glover ("Mr. Glover"), a research scientist and training specialist for the Forensic Tests for Alcohol Branch of the North Carolina Department of Health and Human Services, rebutted the testimony of defendant's expert, Dr. Roger Russell ("Dr. Russell"), a forensic pathologist. Under cross-examination, Mr. Glover read a letter dated 3 December 2003 which was sent to Dr. Russell by the manufacturer

of the tubes ("the manufacturer") used to collect blood samples such as defendant's. The December 2003 letter stated the manufacturer recommended the tubes not be used past the expiration date. However, on re-direct examination, Mr. Glover read a letter from the manufacturer dated 7 May 1999 explaining the reason for the recommendation was "solely because the vacuum loss over time." Further, the May 1999 letter also declared "using the tubes within a reasonable time period after expiration would have negligible impact on the accuracy of the blood alcohol examinations."

At trial, defendant's expert, Dr. Russell, testified when he examined defendant's blood samples in January of 2004, they were black in color and "[were] absolutely the wors[t] I have ever seen." Dr. Russell testified the tubes used to collect defendant's blood expired in October of 2002. Dr. Russell testified as the tubes get old, air seeps in and with it moisture, which can degrade the preservatives in the blood. Dr. Russell testified "once you got to the expiration date there is no period beyond the expiration date which the tube should ever be used." Dr. Russell testified the use of the expired tubes combined with "leaving the tube . . . from December 26th through January 7th at room temperature," produced "results [that] should be disregarded."

On 8 October 2004, defendant was convicted of DWI in Mecklenburg County District Court. Defendant appealed for a trial *de novo* in Superior Court. On 4 May 2004, the jury found defendant guilty of DWI. Defendant was sentenced to 30 days in the custody of the Mecklenburg County Sheriff. Defendant's sentence was suspended and he was placed on unsupervised probation for 12 months. Defendant appeals.

I. *Requested Jury Instruction—Test Tubes*:

[1] Defendant argues the trial court erred in failing to give a requested instruction on the expiration date of the vials used to collect the blood samples. Defendant contends that because the tubes used were expired, the results indicating a blood alcohol level above the legal limit had no value, and thus, a jury instruction to that effect was required. We disagree.

"On appeal, this Court reviews jury instructions contextually and in their entirety." *State v. Crow*, 175 N.C. App. 119, 127, 623 S.E.2d 68, 73 (2005). Thus, "[i]f the instructions 'present[] the law of the case in such [a] manner as to leave no reasonable cause to believe the jury was misled or misinformed,' then they will be held to be suffi-

cient." *Id.* (quoting *Jones v. Development Co.*, 16 N.C. App. 80, 86-87, 191 S.E.2d 435, 440 (1972)). Further, "[t]he appealing party must demonstrate that the error in the instructions was likely to *mislead the jury*." *Id.* (emphasis added). " 'In a criminal trial the judge has the duty to instruct the jury on the law arising from all the evidence presented.' " *State v. Smith*, 360 N.C. 341, 346, 626 S.E.2d 258, 261 (2006) (quoting *State v. Moore*, 75 N.C. App. 543, 546, 331 S.E.2d 251, 253 (1985)). "A trial court *must give a requested instruction* if it is a correct statement of the law and is supported by the evidence." *State v. Haywood*, 144 N.C. App. 223, 234, 550 S.E.2d 38, 45 (2001) (emphasis added).

In the instant case, conflicting expert testimony was presented concerning whether the fact the tubes expired two months prior to their use affected the validity of the blood test. The trial judge instructed the jury from North Carolina Pattern Jury Instruction 104.94 on how they were to consider expert testimony, stating: "You should consider the opinion of an expert witness, but you're not bound by it." The defendant requested the following language be added to North Carolina Pattern Jury Instruction 270.20, "Impaired Driving—Including Chemical Test."

> The expiration date on the test tubes used to collect the defendant's blood sample had passed when the samples were collected. There has been evidence that the passage of the expiration date caused the blood sample to degrade such that the result was not accurate. You are the sole judges of the weight to be given any evidence. By this I mean, if you decide that certain evidence is believable you must then determine the importance of that evidence in light of all other believable evidence in the case.

The last two sentences of defendant's request were given in substance by the trial court when it instructed the jury: "You are the sole judges of the weight to be given any evidence. By this I mean if you decide that certain evidence is believable you must then determine the importance of that evidence in light of all other believable evidence in the case." The first two sentences of defendant's request, however, are not accurate statements of the law, but merely a reiteration of Dr. Russell's expert testimony. When instructing the jury, the trial court is no longer required to summarize or recapitulate the evidence presented during the case. N.C. Gen. Stat. § 15A-1232 (2005). Had the trial court given the requested instruction, it would have been tantamount to the court sanctioning the testimony of defendant's expert

and would have contradicted the trial court's instructions to the jury on how they should consider expert testimony. It would also violate the trial court's duty not to express an opinion concerning the evidence. *Id.* What the defendant asked for is not a correct statement of the law, but rather his version of the evidence in the guise of a jury instruction. The trial court properly refused to give this instruction. This assignment of error is overruled.

II. *Cross-Examination and Jury Instruction—Prior Statement*:

[2] Defendant next argues the trial court erred by permitting the State to cross-examine the defendant regarding his prior district court testimony and further erred by instructing the jury regarding defendant's prior statements. We disagree.

We note defendant assigned as error "[t]he court's instruction to the jury regarding . . . impeachment or corroboration by a prior statement." However, in his brief, defendant cited no authority and presented no argument pertaining to this alleged error. Thus, according to N.C. R. App. P. 28(b)(6) (2005), it is abandoned.

N.C. R. Evid. 613 states "[i]n examining a witness concerning a prior statement made by him, whether written or not, *the statement need not be shown nor its contents disclosed to him* at that time, *but on request the same shall be shown or disclosed to opposing counsel*." N.C. Gen. Stat. § 8C-1, Rule 613 (2005) (emphasis added).

In the instant case, there is no proof in the record or trial transcript of defense counsel requesting the contents of the prior statement during the State's cross-examination of the defendant. Defense counsel objected to the State's questioning and asked to approach the bench. After the bench conference, the State resumed its cross-examination of defendant's prior statements. Defense counsel had the opportunity to request that any bench conference conversations be put in the record. "If . . . either party requests that the subject matter of a private bench conference be put on the record for possible appellate review, the trial judge should comply by reconstructing, as accurately as possible, the matter discussed." *State v. Cummings*, 332 N.C. 487, 498, 422 S.E.2d 692, 698 (1992). However, defense counsel failed to request the bench conference be recorded. Absent proof defense counsel asked for and failed to receive the contents of defendant's prior statement, there is no violation of N.C. R. Evid. 613. Though we do note the transcript reveals defense counsel questioning the inclusion of the *jury instruction* regarding prior

inconsistent and consistent statements made by the defendant due to there being no "presentment of the [prior] statement," defendant waived consideration of that contention by failing to submit any argument or citation to authority. This assignment of error is overruled.

III. *Jury Instruction—Interested Witness*:

[3] Defendant argues the trial court erred by instructing the jury that defendant was an interested witness. Defendant contends the instruction unfairly prejudiced defendant regarding his right to testify. We disagree.

"[I]nstructions on the credibility of interested witnesses concern a subordinate feature of the case." *State v. Watson*, 294 N.C. 159, 168, 240 S.E.2d 440, 446 (1978). Nevertheless, "once the court elects to charge on such a feature, it must do so fully and accurately." *Id.* Thus, our Supreme Court has required "that the jury must also be instructed to the effect that if, after such scrutiny, they believed the testimony it should be given the same weight and credence as the testimony of any witness." *State v. Eakins*, 292 N.C. 445, 447, 233 S.E.2d 387, 388 (1977). "[T]he trial court may instruct on the defendant's status as an interested witness . . . ." *Watson*, 294 N.C. at 168, 240 S.E.2d at 446; *see also Eakins*, 292 N.C. at 447, 233 S.E.2d at 388 (stating "[w]e have approved charges that the jury should scrutinize the testimony of a defendant . . . in light of [his] interest in the verdict.")

In the instant case, the trial court's pertinent instruction read

> [i]n deciding whether or not to believe a witness you may take his interest into account. If, after doing so, you believe his testimony in whole or in part you should treat what you believe the same as any other believable evidence.

Pursuant to *Watson* and *Eakins*, *supra*, this portion of the jury instruction relevant to the defendant as an interested witness was a full and accurate statement of the law. Moreover, our Supreme Court has ratified the use of jury instructions whereby a testifying defendant is declared to be an interested witness.

We also note that Rule 9(a)(3)f of the Rules of Appellate Procedure provides that in criminal cases the record on appeal "shall contain" a transcript of the entire jury charge given by the trial court "where error is assigned to the giving or omission of instructions to the jury[.]" N.C. R. App. P. 9(a)(3)f (2005). In this case, two of the three arguments defendant makes to this Court pertain to the trial

court's jury instructions. It was mandatory that the jury instructions be included in the record on appeal. This defect is not cured by filing the trial transcript with this Court. Increasingly, records on appeal in criminal cases are coming to this Court in this manner. I would admonish counsel that the Rules of Appellate Procedure are mandatory and a party's failure to comply with them not only frustrates the review process, but subjects the party to sanctions, including dismissal of the appeal. *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 401, 610 S.E.2d 360, 360 (2005); N.C. R. App. P. 25(b) (2005). This assignment of error is overruled.

[4] Defendant failed to argue assignments of error numbers one and four and thus, pursuant to N.C. R. App. P. 28(b)(6) (2005), they are abandoned.

No error.

Judges McCULLOUGH and STEELMAN concur.

ED S. MITCHELL, JR., HATTIE B. MITCHELL, EVELYN M. SNEAD, ROSA M. SUTTON, PLAINTIFFS v. JAMES E. BROADWAY, T/A JAMES E. BROADWAY LOGGING, DEFENDANT/THIRD-PARTY PLAINTIFF, AND JAMES E. BROADWAY, D/B/A B&B LOGGING COMPANY, THIRD-PARTY PLAINTIFF v. DAL W. MITCHELL, DAL A. MITCHELL, EDNA MITCHELL, ED S. MITCHELL, JR., EVELYN M. SNEAD, ROSA M. SUTTON, WILLIAM P. MITCHELL, JR., EMMITT G. MITCHELL, AARON C. MITCHELL, EDNA M. WARNER, PRESTON MITCHELL, JR., CLIFTON MITCHELL, ANGELA M. COWELL, RACHEL M. LEE, MATTIE M. SPEIGHTS, WINIFRED NELSON, LIZZIE D. MITCHELL, CLIFFORD MITCHELL, RALPH W. MITCHELL, AND WILLIAM M. MITCHELL, THIRD-PARTY DEFENDANTS

No. COA05-1332

(Filed 2 May 2006)

Trespass— logging—authorized by one of several owners—double damages inapplicable

Defendant was not a trespasser when he cut and removed timber from property owned by tenants in common and was not liable for double damages under N.C.G.S. § 1-539.1 where he had contracted with one of the tenants in common to harvest timber from the property.

Appeal by plaintiffs and third-party defendants Edna Mitchell, Ralph W. Mitchell, and William M. Mitchell from order entered 2 August 2005 by Judge Charles Henry in Craven County Superior Court. Heard in the Court of Appeals 12 April 2006.

Lee, Hancock and Lasitter, P.A., by Moses D. Lasitter, for plaintiffs-appellants and third-party defendants-appellants.

Chestnutt, Clemmons, Thomas & Peacock, P.A., by Gary H. Clemmons, for defendant/third party plaintiffs-appellees.

No brief filed for third-party defendants-appellees Dal W. Mitchell, Dal A. Mitchell, William P. Mitchell, Jr., Emmitt G. Mitchell, Aaron C. Mitchell, Edna M. Warner, Preston Mitchell, Jr., Clifton Mitchell, Angela M. Cowell, Rachel M. Lee, Mattie M. Speights, Winifred Nelson, Lizzie D. Mitchell, and Clifford Mitchell.

TYSON, Judge.

Ed S. Mitchell, Jr., Hattie B. Mitchell, Evelyn M. Snead, and Rosa M. Sutton ("plaintiffs") appeal the trial court's order granting James E. Broadway t/a James E. Broadway Logging's ("defendant") motion for partial summary judgment and denying plaintiffs' motion for partial summary judgment. We affirm.

I. Background

Plaintiffs are tenants-in-common and hold an undivided interest in a 60.22 acre tract of land located in Craven County. On 6 March 2000, Dal W. Mitchell, an owner of the property, and defendant entered into a contract to allow defendant to remove timber from the property. Defendant thereafter harvested timber from the property.

Ed S. Mitchell, Jr., Hattie B. Mitchell, Evelyn M. Snead, and Rosa M. Sutton filed suit and alleged defendant cut timber from the property without their consent on 26 February 2003.

Defendant filed a third-party complaint against Dal W. Mitchell, Dal A. Mitchell, Edna Mitchell, Ed S. Mitchell, Jr., Evelyn M. Snead, Rosa M. Sutton, William P. Mitchell, Jr., Emmitt G. Mitchell, Aaron C. Mitchell, Edna M. Warner, Preston Mitchell, Jr., Clifton Mitchell, Angela M. Cowell, Rachel M. Lee, Mattie M. Speights, Winifred Nelson, Lizzie D. Mitchell, Clifford Mitchell, Ralph W. Mitchell, and William M. Mitchell and alleged negligent misrepresentation, breach of warranty, and accounting on 28 March 2003.

On 12 October 2003, defendant moved for partial summary judgment dismissing plaintiffs' claim for double damages pursuant to N.C. Gen. Stat. § 1-539.1.

Plaintiffs moved for partial summary judgment against defendant on the issue of double damages pursuant to N.C. Gen. Stat. § 1-539.1 on 23 October 2003.

The trial court granted defendant's motion for partial summary judgment and denied plaintiffs' motion for partial summary judgment on 4 November 2003. Plaintiffs appealed.

This Court dismissed plaintiffs' appeal as being interlocutory on 2 November 2004 in an unpublished opinion. *Mitchell v. Broadway*, 166 N.C. App. 763, 604 S.E.2d 695 (2004) (unpublished).

The case was heard on 11 July 2005, and the trial court entered an order on 28 July 2005 resolving the undisputed issues remaining to be heard. The trial court certified the case as immediately appealable under Rule 54(b) of the North Carolina Rules of Civil Procedure. Plaintiffs appeal.

II. Issues

Plaintiffs argue the trial court erred when it granted defendant's motion for partial summary judgment regarding double damages under N.C. Gen. Stat. § 1-539.1. We disagree.

III. Standard of Review

> In a motion for summary judgment, the movant has the burden of establishing that there are no genuine issues of material fact. The movant can meet the burden by either: 1) Proving that an essential element of the opposing party's claim is nonexistent; or 2) Showing through discovery that the opposing party cannot produce evidence sufficient to support an essential element of his claim nor [evidence] sufficient to surmount an affirmative defense to his claim.
>
> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Hines v. Yates, 171 N.C. App. 150, 157, 614 S.E.2d 385, 389 (2005) (internal quotations and citations omitted). "On appeal, an order allowing summary judgment is reviewed *de novo*." *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 470, 597 S.E.2d 674, 693 (2004).

IV. Summary Judgment

Plaintiffs contend genuine issues of material fact exist whether Dal W. Mitchell acted as an agent on behalf of plaintiffs when he entered into the timber agreement with defendant and sold timber to defendant.

N.C. Gen. Stat. § 1-539.1(a) (2005) provides:

> Any person, firm or corporation not being the bona fide owner thereof or agent of the owner who shall *without the consent and permission of the bona fide owner enter upon the land of another and injure, cut or remove any valuable wood, timber*, shrub or tree therefrom, shall be liable to the owner of said land for double the value of such wood, timber, shrubs or trees so injured, cut or removed.

(Emphasis supplied).

In *Matthews v. Brown*, this Court held the trial court erred when it granted the plaintiffs double damages under N.C. Gen. Stat. § 1-539.1. 62 N.C. App. 559, 561, 303 S.E.2d 223, 225 (1983). We stated:

> In order for this statute to apply, two requirements must be met. The defendant must: (1) be a trespasser to the land and (2) injure, cut or remove wood, timber, shrubs, or trees thereon or therefrom. In this case, the first part of the test has not been met. In no way was Georgia-Pacific a trespasser; it had a legal right to be on the land under the contract and the assignment. There is no evidence Georgia-Pacific cut any timber outside the boundary described in the timber deed.

Id.

The elements of trespass include:

> 1. That the plaintiff was either actually or constructively in possession of the land at the time the alleged trespass was committed.
>
> 2. That the defendant made an unauthorized, and therefore an unlawful, entry on the land.

> 3. That the plaintiff suffered damage by reason of the matter alleged as an invasion of his rights of possession.

Matthews v. Forrest, 235 N.C. 281, 283, 69 S.E.2d 553, 555 (1952) (internal citations omitted).

Here, plaintiffs contend defendant was a trespasser on their land because Dal W. Mitchell did not have authority to act as an agent on plaintiffs' behalf to grant defendant entry onto the property. Plaintiffs also assert a tenant-in-common "may not bind his co-tenant by any act with relation to the common property not previously authorized or subsequently ratified." Plaintiffs contend, "[o]nly a person who owns the property in fee, or a person with authority to act as an agent of co-tenants, can give valid permission for another to enter upon the property."

Defendant entered into a binding contract with Dal W. Mitchell to harvest and remove timber from the property. The contract provided:

> The buyer, its successors and assigns, their agents and employees, shall have the right of, ingress and egress in, to, on and over the lands hereinabove described and the adjoining land of seller, to a public road for the purposes of doing any and all work necessary to complete the harvest of said timber.

Dal W. Mitchell warranted in the contract that he owned good and sufficient title to the subject property located in Deed Book 309, Page 39 of the Craven County Registry. Defendant relied on Dal W. Mitchell's representation that he was the bonafide owner of the property. In his affidavit, defendant stated:

> [t]hat Dal W. Mitchell represented to me that he was one of several owners of the tract of land upon which timber was to be cut, and was acting for the other individuals who had ownership interests in the property.
>
> . . . .
>
> I asked for written documentation showing his ownership interest in the property. Dal W. Mitchell informed me that he had paid the taxes on the property, and showed me the tax receipts, which indicated he had paid the taxes on the property to be cut.

In *Jones v. McBee*, our Supreme Court stated:

> [t]he possession of one tenant in common is the possession of the other; each has a right to enter upon the land and enjoy it jointly

> with the others. If one tenant in common destroys houses, trees, or does any act amounting to waste or destruction in woods or other such property, the other tenant may have an action on the case against him. But he never can, in any event, have an action of trespass *quare clausum fregit* against his co-tenant. *The other defendants were not trespassers, as they entered and acted by the direction of Meredith.*
>
> . . . .
>
> This Court has held that where an action is brought to recover for damages for logs cut and removed by one in the honest belief on the part of the trespasser that he had title to them, the measure of damages is the value of the logs in the woods from which they were taken, together with the amount of injury incident to removal.

222 N.C. 152, 153-54, 22 S.E.2d 226, 227 (1942) (internal quotations and citations omitted) (emphasis supplied).

Dal W. Mitchell, who held an ownership interest in the property as a tenant-in-common, gave defendant consent to enter onto the property for the purpose of harvesting and removing timber. Defendant had a "legal right to be on the land under the contract." *Brown*, 62 N.C. App. at 561, 303 S.E.2d at 225. Defendant was not a trespasser and is not subject to double damages under N.C. Gen. Stat. § 1-539.1. This assignment of error is overruled.

V. Conclusion

The trial court did not err when it granted partial summary judgment in favor of defendant. Defendant was not a trespasser and not liable for double damages to plaintiffs under N.C. Gen. Stat. § 1-539.1. The trial court's order is affirmed.

Affirmed.

Judges GEER and JACKSON concur.

MADELINE BECKER, JOHN YAHN, DAVID BECKER, AND JOHN BECKER, PLAINTIFFS
v. N.C. DEPARTMENT OF MOTOR VEHICLES, DEFENDANT

No. COA05-669

(Filed 2 May 2006)

Bailments— lawful seizure—implied bailment not created

The Industrial Commission erred by concluding that a bailment was created by the lawful seizure of motor vehicles and parts from plaintiffs, who were alleged to be operating a junk yard and car dealership without a license. The seizure of property is a unilateral act which does not suggest the mutual intent necessary to form even an implied bailment contract. Moreover, there were no findings about breach of duty or proximate cause, no findings about the standard of care, and all of the findings indicated that defendant used commensurate care.

Appeal by defendant from Decision and Order entered 3 January 2005 by the North Carolina Industrial Commission. Heard in the Court of Appeals 6 March 2006.

The Vincent Law Firm, P.C., by Branch W. Vincent, III.

Roy A. Cooper, III, Attorney General, by Dahr Joseph Tanoury, Assistant Attorney General, for the State.

MARTIN, Chief Judge.

On 25 October 2001, plaintiffs filed claims with the North Carolina Industrial Commission for damages under the Tort Claims Act, alleging negligence on the part of the Department of Motor Vehicles and its agents and employees. The claim arose from the 27 October 1998 seizure and subsequent storage of numerous motor vehicles and vehicle component parts. Acting on an informant's tip that plaintiffs were operating a junk yard and car dealership without a license, DMV inspectors entered plaintiffs' property, noticed a forged window inspection sticker on a vehicle, and, upon further investigation, discovered that the public vehicle identification numbers (PVINs) on other vehicles either did not match the confidential vehicle identification numbers (CVINs) or were missing, which can be an indication of theft. Plaintiffs John and David Becker were arrested on misdemeanor and felony charges of violating the North Carolina Motor Vehicle code, and their vehicles were taken to Grant's

Texaco for holding while the criminal case was pending. The Industrial Commission found as a fact that "[t]his seizure created a bailment by implication, with the owners of the vehicles being the bailors."

At the time of the seizure, the DMV inspector informed plaintiffs that the vehicles were being seized due to the missing and altered PVINs, calling the title and rightful ownership of the vehicles into question. The vehicles could not be returned until proper vehicle identification numbers were applied for and assigned because it is illegal to possess a vehicle with a missing or altered PVIN. David Becker was acquitted of the criminal charges, and the charges against John Becker were dismissed by the district attorney. Plaintiffs requested special VIN numbers for the seized vehicles in 2001 and the vehicles were returned to plaintiffs, except for a junked white Camero plaintiffs exchanged with Grant's Texaco for the $600.00 storage fee. Other property was lost or damaged and a carburetor was also stolen from one of the vehicles while it was in storage, "but it is not known who stole it, how such persons gained access to the vehicle, or what acts or omissions, if any, on the part of Grant's contributed to the theft."

The Industrial Commission found that plaintiffs participated in repairing automobiles as a family hobby, and that due to this "collective experience in automobile and engine repair" they could "credibly assess the value of automobile parts that were either lost or damaged while in storage." The Commission found damages of $6,025.00 for David Becker, $2,050.00 for John Becker, $13,397.50 for John Yahn and $3,575.00 for Madeline Becker. Based on these facts, the Industrial Commission concluded as a matter of law that:

> 1. It is plaintiffs' burden to prove that all the elements of negligence, including that defendant breached an owed duty of care, and that the breach was the proximate cause of plaintiff's injury. The evidence must be sufficient to raise more than speculation, guess, or mere possibility.
>
> 2. Plaintiffs failed to show by the greater weight of the evidence that defendant's employees breached a duty of care owed to plaintiffs by defendant with respect to the arrests and criminal prosecutions. Plaintiffs are entitled to no damages for loss of wages, claimed emotional distress, costs of bail, or costs of criminal trial transcripts or costs of civil trial transcripts. In addition, defendant proved that plaintiffs' reputations were not harmed by

the actions of the enforcement officers in the carrying out of their lawful duties.

3. It is well-settled that once a bailment contract is created between a bailor and bailee, either expressly or by implication, the bailee is charged with a duty of care to protect the bailed property from damage or loss. When a bailee fails to return or deliver the bailed property in an undamaged condition, the bailor may bring an action to recover damages for breach of bailment contract and/or negligence based on proof that the bailee failed to exercise due care to safeguard the bailed property from damage, loss, or theft. *See 46 Am. Jur. Proof of Facts 3d 361.*

4. Plaintiffs proved that employees of defendant seized their vehicles, creating a bailment by implication. Plaintiffs also proved that defendant failed to return or deliver the bailed property in an undamaged condition and that department [sic] failed to exercise due care to safeguard the bailed property from damage, loss, or theft.

5. Under the circumstances of this case, the damages set forth in paragraph 73 of the findings of fact are proper damages with respect to the negligence of defendant in failing to care for and return the bailed property.

The Industrial Commission ordered defendant to pay damages to plaintiffs in accordance with its findings. Defendant appeals.

Defendant argues that the Industrial Commission erred as a matter of law when it concluded that the lawful seizure created a bailment by implication between plaintiffs and defendant. For the reasons stated below, we agree.

Our standard of review under the Tort Claims Act is well established:

> The standard of review for an appeal from the Full Commission's decision under the Tort Claims Act "shall be for errors of law only under the same terms and conditions as govern appeals in ordinary civil actions, and the findings of fact of the Commission shall be conclusive if there is any competent evidence to support them." N.C. Gen. Stat. § 143-293 (2003).

Simmons v. Columbus Cty. Bd. of Educ., 171 N.C. App. 725, 727-28, 615 S.E.2d 69, 72 (2005). Our Supreme Court has stated that "to give

the Industrial Commission jurisdiction of a tort claim, the claim must be based on negligence." *Collins v. North Carolina Parole Commission*, 344 N.C. 179, 183, 473 S.E.2d 1, 3 (1996). To establish a claim for negligence under the Tort Claims Act, "plaintiff must show that (1) [defendant] owed plaintiff a duty of care; (2) the actions, or failure to act, by [defendant]'s named employee breached that duty; (3) this breach was the actual and proximate cause of plaintiff's injury; and (4) plaintiff suffered damages as a result of such breach." *Simmons v. N.C. Dept. of Transportation*, 128 N.C. App. 402, 406, 496 S.E.2d 790, 793 (1998); N.C. Gen. Stat. § 143-291 (2005).

Here, rather than make findings with respect to the issue of defendant's negligence, the Industrial Commission determined that a bailment was created by the lawful seizure of plaintiffs' vehicles, and, as a result, defendant could be held liable for any damage to plaintiffs' property. The Industrial Commission misconstrued the concept of bailment.

"This Court has previously held that a bailment is created upon the delivery of possession of goods and the acceptance of their delivery by the bailee." *Atlantic Contr'g & Material Co. v. Adcock*, 161 N.C. App. 273, 277, 588 S.E.2d 36, 39 (2003) (internal citation omitted). "Liability for any damages to the [goods] while in [bailee]'s possession turns upon the question of the presence or absence of actionable or ordinary negligence on its part." *Mills, Inc. v. Terminal, Inc.*, 273 N.C. 519, 521, 160 S.E.2d 735, 738 (1968). A bailor must offer evidence showing "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 . . . returned it in a damaged condition" to create a prima facie case of negligence, and, once a prima face case has been made, the bailor retains the burden of proof. *McKissick v. Jewelers, Inc.*, 41 N.C. App. 152, 155-56, 254 S.E.2d 211, 213 (1979) (internal citations omitted).

Here there are no findings of fact regarding delivery and acceptance between plaintiffs and defendant. While the Commission concluded that defendant's "seizure created a bailment by implication," it made no findings of fact regarding any delivery of goods by plaintiffs or acceptance by defendant, which are necessary elements of a prima facie case of negligence on a bailment contract. The Commission found only that the property was seized, and after the criminal investigation was completed, the property was returned in damaged condition. The Industrial Commission failed to cite, and our own research does not reveal, any basis in the law of this State for the

proposition that a lawful seizure, pursuant to the government's police powers, creates a bailment of the property which is seized. We decline to extend the duty of care created by a bailment to lawful seizures. The seizure of property is a unilateral act which does not suggest the mutual intent necessary to form even an implied bailment contract.

Even assuming *arguendo* that the Industrial Commission's findings of facts support the conclusion that an "implied bailment" was created, its findings of fact remain inadequate to award plaintiffs damages. The finding of a bailment satisfies only the first element of a claim for negligence under the Tort Claims Act, establishing a duty of care; however, there are no findings of breach of this duty or proximate cause in this case. There are no findings of fact regarding the standard of care owed by either the officers or defendant regarding the storage of plaintiffs' goods after they had been seized, nor are there findings regarding the proximate cause of the damage, despite the implication that the vehicles were subject to theft while in storage. *See*, *e.g. McKissick*, 41 N.C. App. at 156, 254 S.E.2d at 213 (holding no recovery from bailee jewelry store in bailment for mutual benefit situation where items left for repair were stolen from bailee).

Instead, the findings by the Industrial Commission indicated that defendant used commensurate care, noting that 1) the length of time the property was stored was not unusual; 2) plaintiffs knew where their property was and why it was seized; and 3) unknown individuals stole the carburetor from the vehicle while it was at Grant's. The Commission left unresolved the question of Grant's liability regarding the carburetor. Moreover, plaintiffs' initial claim was for negligent investigation by defendant, and the Industrial Commission explicitly found that "[t]here has been no finding that the officers did not have probable cause for the arrests they made" and further found that the seizures were due to the missing PVINs and pending criminal charges.

Reversed.

Judges WYNN and STEPHENS concur.

IN RE D.D.J., D.M.J.

[177 N.C. App. 441 (2006)]

IN THE MATTER OF: D.D.J., D.M.J., MINOR CHILDREN

No. COA05-903

(Filed 2 May 2006)

Termination of Parental Rights— lack of jurisdiction—children not in custody of DSS—children not residing in or found in North Carolina

The trial court lacked jurisdiction in a termination of parental rights case, and the trial court's order is vacated, because: (1) the children were not in custody of the Department of Social Services at the time the petition to terminate respondent mother's parental rights was filed; and (2) the children were not residing in or found in North Carolina at that time as required by N.C.G.S. § 7B-1101.

Appeal by respondent mother from order entered 14 October 2004 by Judge Paul A. Hardison in Onslow County District Court. Heard in the Court of Appeals 9 February 2006.

Cindy Goddard Strope for petitioner-appellee.

Richard E. Jester for respondent-appellant.

M. Lynn Smith for guardian ad litem.

GEER, Judge.

Respondent mother, A.J., appeals from an order terminating her parental rights with respect to her son D.D.J. and her daughter D.M.J. We hold that the trial court lacked jurisdiction because (1) the children were not in the custody of the Onslow County Department of Social Services at the time the petition to terminate A.J.'s parental rights was filed, and (2) the children were not "resid[ing] in" or "found in" North Carolina at that time. N.C. Gen. Stat. § 7B-1101 (2005). We, therefore, vacate the trial court's order.

Factual and Procedural History

The children were adjudicated neglected juveniles on 29 November 2001, primarily because of domestic violence and substance abuse issues in their home. Following this adjudication, the children resided in foster care for a time, but the Onslow County Department of Social Services ("DSS") ultimately placed them in South Carolina with their maternal great-uncle and great-aunt,

Durand and Tammy Williams. Respondent mother separated from the children's father in the summer of 2002, and the father moved to Texas.[1]

On 15 August 2003, the district court held a permanency planning hearing. Subsequently, it entered an order on 26 September 2003 placing "[f]ull custody" of the children with Durand and Tammy Williams and stating that DSS, the guardian ad litem, and the attorney advocate were released and the children's case was closed.

Two months later, on 3 December 2003, DSS filed a petition to terminate the parental rights of respondent mother and the children's father. Thereafter, on 17 March 2004, the district court amended the 26 September 2003 order, purporting to sign it *nunc pro tunc* 15 August 2003. Rather than giving full custody to Mr. and Mrs. Williams, the amended order gave legal custody to DSS and physical custody to the Williamses. The new order also, rather than closing the case, provided that the case plan for the children was changed from relative placement to termination of parental rights.

The trial court held a hearing on DSS' 3 December 2003 petition on 16 April 2004 and 6 May 2004. More than five months later, on 14 October 2004, the trial court entered an order terminating both parents' parental rights. Respondent mother has timely appealed from this order.

Discussion

Respondent mother argues on appeal that the district court did not have jurisdiction to rule on DSS' petition to terminate her parental rights. Because DSS did not have custody of the children when it filed the petition, we agree and vacate the order terminating respondent mother's parental rights.

N.C. Gen. Stat. § 7B-1101 provides that "[t]he court shall have exclusive original jurisdiction to hear and determine any petition or motion relating to termination of parental rights to any juvenile who resides in, is found in, or is in the legal or actual custody of a county department of social services or licensed child-placing agency in the district at the time of filing of the petition or motion." In other words, there are three sets of circumstances in which the court has jurisdiction to hear a petition to terminate parental rights: (1) if the juvenile *resides in* the district at the time the petition is filed; (2) if the juve-

1. The children's father is not party to this appeal.

nile *is found in* the district at the time the petition is filed; or (3) if the juvenile is in the legal or actual custody of a county department of social services or licensed child-placing agency in the district at the time the petition is filed.

It is undisputed that DSS did not have custody of the children on 3 December 2003, the date upon which the petition was filed. Furthermore, according to the petition itself, the children were living in South Carolina at the time of the filing, so they were not "residing in" or "found in" this State. *See In re Leonard*, 77 N.C. App. 439, 440, 335 S.E.2d 73, 73-74 (1985) (holding that because mother left with child for Ohio four days before filing of petition to terminate parental rights, the child was neither "residing in" nor "found in" the district at the time of filing, and the petition failed for lack of subject matter jurisdiction). Given these facts, the trial court lacked jurisdiction under N.C. Gen. Stat. § 7B-1101 to enter any order terminating respondent mother's parental rights.

Moreover, N.C. Gen. Stat. § 7B-1103 (2005) specifies who has standing to file a termination of parental rights petition. DSS relied upon § 7B-1103(a)(3), which allows a petition to be filed by "[a]ny county department of social services, consolidated county human services agency, or licensed child-placing agency to whom custody of the juvenile has been given by a court of competent jurisdiction." Although DSS' petition alleged it had been granted custody pursuant to a non-secure custody order dated 25 October 2001, it no longer had custody as of the date of the filing of the petition. DSS, therefore, lacked standing to file the petition. *In re Miller*, 162 N.C. App. 355, 358, 590 S.E.2d 864, 866 (2004) ("Because DSS no longer had custody of the child, DSS lacked standing, under the plain language of N.C. Gen. Stat. § 7B-1103(a), to file a petition to terminate respondent's parental rights."). This Court held in *Miller* that DSS' lack of standing deprived the district court of subject matter jurisdiction, meaning that "the proceedings to terminate respondent's parental rights were a nullity." *Id.* at 359, 590 S.E.2d at 866.

DSS argues on appeal, however, that the amended order filed on 17 March 2004, which purported to undo the trial court's grant of full custody to the Williamses, should operate retroactively to validate DSS' 3 December 2003 petition. DSS contends that the 26 September 2003 order was entered due to a clerical mistake, and the 17 March 2004 order should be applied retroactively because it merely corrected that mistake.

A clerical error is " '[a]n error resulting from a minor mistake or inadvertence, esp[ecially] in writing or copying something on the record, and not from judicial reasoning or determination.' " *State v. Jarman*, 140 N.C. App. 198, 202, 535 S.E.2d 875, 878 (2000) (quoting *Black's Law Dictionary* 563 (7th ed. 1999)). Generally, clerical errors include mistakes such as inadvertent checking of boxes on forms, *e.g.*, *id.*, or minor discrepancies between oral rulings and written orders, *e.g.*, *State v. Sellers*, 155 N.C. App. 51, 59, 574 S.E.2d 101, 106-07 (2002). Although DSS relies upon Rule 60(a) of the Rules of Civil Procedure, authorizing the correction of clerical mistakes in judgments, courts do not have the power under Rule 60(a) to affect the substantive rights of the parties or to correct substantive errors in their decisions. *Hinson v. Hinson*, 78 N.C. App. 613, 615, 337 S.E.2d 663, 664 (1985) ("We have repeatedly rejected attempts to change the substantive provisions of judgments under the guise of clerical error."), *disc. review denied*, 316 N.C. 377, 342 S.E.2d 895 (1986).

On its face, the 17 March 2004 amendment makes a very substantial, substantive change in the 26 September 2003 order. We can perceive no basis for classifying it as a clerical correction. In the 26 September 2003 order—in contrast to prior orders involving the children—"[f]ull custody" of the children was placed with the Williamses, while DSS, the guardian ad litem, and the attorney advocate were released. Further, the order specified that "this case is closed." In March, custody was changed to provide that DSS retained legal custody, while the Williamses had only physical custody. Rather than closing the case, the order provided that "[t]he case plan is changed from relative placement to termination of parental rights and adoption." Such changes cannot be classified as clerical.

We also note it is questionable whether the court had authority to enter the March order. N.C. Gen. Stat. § 7B-1000(b) (2005) (emphasis added) provides: "In any case where the court finds the juvenile to be abused, neglected, or dependent, the jurisdiction of the court to modify any order or disposition made in the case shall continue during the minority of the juvenile, *until terminated by order of the court*, or until the juvenile is otherwise emancipated." Our Court has held that once jurisdiction has been terminated by court order, "the trial court [has] no further duty or authority to conduct reviews." *In re Dexter*, 147 N.C. App. 110, 115, 553 S.E.2d 922, 925 (2001). DSS has provided no explanation of how the trial court came to enter the 17 March 2004 amended order; the record contains no motions, pleadings, or transcripts of hearings relating to the entry of either the 26 September

2003 order or the 17 March 2004 order. Nor does DSS include in its brief any citation of statutory or case law authority that would allow the court to act after it had closed the case. *See In re P.L.P.*, 173 N.C. App. 1, 7-8, 618 S.E.2d 241, 245 (2005) (holding that jurisdiction in the district court was "terminated by the trial court's order to 'close' the case" and that DSS was required to file a new petition alleging neglect), *aff'd per curiam*, 360 N.C. 360, 625 S.E.2d 779 (2006).

Because, at the time of the filing of the DSS petition, DSS lacked standing to petition for termination of parental rights and the trial court lacked subject matter jurisdiction to hear DSS' petition, "the proceedings to terminate respondent's parental rights were a nullity," and the order from which respondent appeals must be vacated. *Miller*, 162 N.C. App. at 359, 590 S.E.2d at 866.

Vacated.

Judges HUDSON and TYSON concur.

HUBERT JET AIR, LLC, PLAINTIFF v. TRIAD AVIATION, INC.; OTHMAN RASHED, AND H & B LUMBER COMPANY, AND PAUL H. BARTLETT, DEFENDANTS

No. COA05-725

(Filed 2 May 2006)

Appeal and Error— assignments of error and record references—insufficiency

An appeal was dismissed where the assignments of error did not provide a legal basis for the error alleged and the record references did not provide an additional understanding of the legal basis of the alleged errors.

Judge WYNN concurring in the result.

Appeal by plaintiff Hubert Jet Air, LLC from an order entered 3 December 2004 by Judge Robert H. Hobgood and cross-appeal by defendants Triad Aviation and Othman Rashed from an order entered 2 December 2004 by Judge J.B. Allen, Jr. in Alamance County Superior Court. Heard in the Court of Appeals 10 January 2006.

Dean & Gibson, L.L.P., by Susan L. Hofer; and Steven M. Chait, P.L.C., by Steven M. Chait, for plaintiff-appellant/cross-appellee.

Womble Carlyle Sandridge & Rice, PLLC, by Michael Montecalvo, for Triad Aviation, Inc. and Othman Rashed, defendants-appellees/cross-appellants.

JACKSON, Judge.

Defendants Triad Aviation, Inc. ("Triad") and Othman Rashed ("Rashed") appeal from an order entered 2 December 2004 in the Superior Court of Alamance County by the Honorable J.B. Allen, Jr. denying defendants' joint motion for enforcement of mediated settlement agreement and motion for enforcement of memorandum of settlement. Plaintiff Hubert Jet Air, LLC ("Hubert") cross appeals from an order granting partial summary judgment in favor of defendants entered 3 December 2004 in the Superior Court of Alamance County by the Honorable Robert H. Hobgood. Triad and Rashed cross-assigned error to the trial court's failure to consider argument on the issues for which summary judgment was denied as well as the trial court's failure to grant summary judgment in their favor on those issues.

The dispute at issue arose from the allegedly negligent repair by Triad and Rashed of an aircraft engine owned by defendant H & B Lumber Company ("H & B"). H & B sold the airplane on which the engine was installed to Hubert. After purchasing the airplane, the engine suffered catastrophic failure, allegedly due to the negligence of Triad and Rashed, resulting in extensive damage to the engine and airplane as well as financial loss to Hubert.

The parties were ordered to participate in a mediated settlement conference in an effort to settle the dispute without litigation. As a result of the mediated settlement conference, the parties signed a memorandum of settlement. Part of the memorandum of settlement required Hubert to sign a general release of all claims and liability arising out of the subject matter of the action. Subsequently, Hubert refused to sign the general release, which resulted in Triad, Rashed, and H & B filing motions to enforce the memorandum of settlement and the settlement agreement. Both motions were denied by the trial court without explanation in the order.

Triad and Rashed also filed a motion for summary judgment. Summary judgment was granted in favor of Triad and Rashed on

Hubert's breach of warranty, strict liability in tort, vicarious liability, breach of contract under the Uniform Commercial Code, unfair and deceptive trade practices, and punitive or exemplary damages claims, and was denied as to Hubert's negligence claims. Hubert appeals from the order granting partial summary judgment, and Triad and Rashed cross-appeal the denial of summary judgment on the negligence claims.

The North Carolina Rules of Appellate Procedure require that "[e]ach assignment of error . . . shall state plainly, concisely and without argumentation the legal basis upon which error is assigned." N.C. R. App. P., Rule 10(c)(1) (2005). Rule 10 further provides, "the scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal in accordance with this Rule 10." N.C. R. App. P., Rule 10(a) (2005). "[A]ssignments of error [that are] . . . broad, vague, and unspecific . . . . [sic] do not comply with the North Carolina Rules of Appellate Procedure[.]" *Walker v. Walker*, 174 N.C. App. 778, 780-81, 624 S.E.2d 639, 641 (2005) (quoting *In re Appeal of Lane Co.*, 153 N.C. App. 119, 123, 571 S.E.2d 224, 226-27 (2002)).

Triad and Rashed's assignments of error state:

1. The trial court's failure to grant the Defendants' Joint Motion for Enforcement of Settlement Agreement.

   Record p. 65 (Order Denying Enforcement of Settlement Agreement)

2. The trial court's failure to find that it had sufficient authority to enforce a settlement agreement signed by the parties and their counsel at the mediation.

   Record p. 65 (Order Denying Enforcement of Settlement Agreement)

3. The trial court's failure to enforce the Memorandum of Settlement signed by the parties and their counsel.

   Record p. 65 (Order Denying Enforcement of Settlement Agreement)

Hubert's assignment of error states:

1. The trial court's partial granting of the Defendants' Motion for Summary Judgment as to Counts 3 through 8.

   R. pp. 66 (Order of Judge Hobgood).

Triad and Rashed's cross-assignments of error state:

1. The trial court's refusal to consider argument on Counts 1 and 2 of Defendant's Motion for Summary Judgment.

   R. pp. 66 (Order of Judge Hobgood).

2. The trial court's failure to grant summary judgment as to Counts 1 and 2 of Defendants' Motion for Summary Judgment.

   R. pp. 66 (Order of Judge Hobgood).

None of these assignments of error or cross-assignments of error provide any legal basis for the error alleged. Nor do any of the record references serve to provide this Court with any additional understanding of the legal basis for the alleged errors. These assignments of error "essentially amount to no more than an allegation that 'the court erred because its ruling was erroneous.' " *Walker*, 174 N.C. App. at 783, 624 S.E.2d at 642. " 'Such an assignment of error is designed to allow counsel to argue anything and everything they desire in their brief on appeal. This assignment—like a hoopskirt—covers everything and touches nothing.' " *Id.* (quoting *Wetchin v. Ocean Side Corp.*, 167 N.C. App. 756, 759, 606 S.E.2d 407, 409 (2005)) (internal quotation omitted).

We hold that none of these assignments of error comply with Rule 10 of the North Carolina Rules of Appellate Procedure. As the assignments of error do not comply with the requirements of our rules of appellate procedure the issues presented in the briefs were not properly preserved for appeal. This failure subjects these appeals and cross-appeals to dismissal. *See Viar v. N.C. DOT*, 359 N.C. 400, 610 S.E.2d 360 (2005), *reh'g denied*, 359 N.C. 643, 617 S.E.2d 662 (2005); *Walker*, 174 N.C. App. 783, 624 S.E.2d 639.

As all parties have failed to properly preserve the issues presented for appellate review, all of these appeals and the cross-appeal are dismissed.

DISMISSED.

Judge WYNN concurs in results only in a separate opinion.

Judge LEVINSON concurs.

WYNN, Judge, concurring in the result.

For the reasons stated in my concurrence in *Broderick v. Broderick*, 175 N.C. App. 501, 623 S.E.2d 806 (2006) (Wynn, J., concurring), I concur in the result only.

CHRISTOPHER P. STARK, PLAINTIFF v. JANAKI RATASHARA, DEFENDANT

No. COA05-1119

(Filed 2 May 2006)

Divorce— alimony—lack of subject matter jurisdiction

The trial court did not have subject matter jurisdiction to award alimony in favor of defendant wife because: (1) when a party has secured an absolute divorce, it is beyond the power of the court thereafter to enter an order awarding alimony; (2) although defendant filed an answer stating the claims for alimony and equitable distribution pending the action for absolute divorce are to be reserved, she failed to file a counterclaim against plaintiff for alimony and did not file a separate claim for alimony; and (3) the parties cannot confer subject matter jurisdiction upon the trial court by waiver or consent.

Appeal by plaintiff from judgment entered 17 December 2004 and from an order entered 16 February 2005 by Judge Otis M. Oliver in Stokes County District Court. Heard in the Court of Appeals 22 March 2006.

Christopher Paul Stark, pro se, for plaintiff-appellant.

R. Michael Bruce, for defendant-appellee.

JACKSON, Judge.

Christopher P. Stark ("plaintiff") appeals from the trial court's orders awarding alimony in favor of Janaki Ratashara-Stark ("defendant"), and denying plaintiff's motion for new trial.

On 27 November 2002, plaintiff filed a complaint for absolute divorce on the ground of one-year separation, pursuant to N.C. Gen. Stat. § 50-6. On 13 January 2003, defendant filed her answer, and stated that "the claims for alimony and equitable distribution pending

this action are to be reserved." Defendant failed to include a counterclaim for alimony in her answer, and failed to file a separate action for alimony. On 18 February 2003, after hearing evidence from plaintiff and defendant, the Honorable Charles M. Neaves entered an order granting an absolute divorce. The trial court found that "[t]he plaintiff has requested the court for an Equitable Distribution hearing regarding the remaining marital property," but the trial court did not enter any findings regarding alimony.

On 2 October 2003, defendant filed an amended answer and counterclaim for alimony and equitable distribution, and plaintiff filed his answer. On 20 December 2004, the Honorable Otis M. Oliver entered an order awarding alimony to defendant. On 16 February 2005, the trial court denied plaintiff's amended motion for new trial. Plaintiff appeals from the 17 December 2004 order awarding alimony and the 16 February 2005 order denying plaintiff's amended motion for new trial.

On appeal, plaintiff argues that the trial court erred because: (1) the order awarding alimony contained findings of fact that were unsupported by the evidence, and the findings did not support the conclusions of law; (2) the trial court failed to grant a new trial after plaintiff obtained an affidavit that defendant withheld during discovery; (3) the trial court failed to impeach defendant as a witness; (4) the trial court denied plaintiff due process of law; and (5) the trial court failed to enter findings of fact to support its alimony award regarding the duration, amount, and form of alimony payments.

Before we address plaintiff's substantive claims, we first must address whether the trial court had subject matter jurisdiction to enter the order awarding alimony.

Our jurisdiction recognizes that when a party has secured an absolute divorce, it is beyond the power of the court thereafter to enter an order awarding alimony. *Mitchell v. Mitchell*, 270 N.C. 253, 258, 154 S.E.2d 71, 75 (1967). Specifically, North Carolina General Statutes § 50-11 provides:

> (a) After a judgment of divorce from the bonds of matrimony, all rights arising out of the marriage shall cease and determine except as hereinafter set out, and either party may marry again without restriction arising from the dissolved marriage.
>
> (c) A divorce obtained pursuant to G.S. 50-5.1 or G.S. 50-6 shall not affect the rights of either spouse with respect to any

> action for alimony or postseparation support pending at the time the judgment for divorce is granted. Furthermore, a judgment of absolute divorce shall not impair or destroy the right of a spouse to receive alimony or postseparation support or affect any other rights provided for such spouse under any judgment or decree of a court rendered before or at the time of the judgment of absolute divorce.

N.C. Gen. Stat. § 50-11 (2005).

Our Supreme Court has stated that a party's filed counterclaim is sufficient to constitute an action pending when judgment of absolute divorce is entered. *Stegall v. Stegall*, 336 N.C. 473, 474-77, 444 S.E.2d 177, 178-79 (1994). Furthermore, a person must apply specifically for the claim by cross-action or by a separate action, and the bare reservation by a trial court only preserves the claim for the party who has asserted the right prior to judgment of absolute divorce. *See Lutz v. Lutz*, 101 N.C. App. 298, 301-03, 399 S.E.2d 385, 387-88 (1991), *disc. rev. denied*, 328 N.C. 732, 404 S.E.2d 871 (1991); *see also Gilbert v. Gilbert*, 111 N.C. App. 233, 431 S.E.2d 805 (1993). While we recognize that *Lutz* applies to equitable distribution, we see no reason why alimony should not be treated the same for preservation purposes.

In the present case, on 27 November 2002, plaintiff filed a complaint for absolute divorce on the ground of a one-year separation, pursuant to N.C. Gen. Stat. § 50-6. Plaintiff alleged that "there are no claims for support, or alimony pending in this action or any other action filed in any court." On 13 January 2003, defendant filed her answer stating that "the claims for alimony and equitable distribution pending this action are to be reserved." However, defendant failed to file a counterclaim against plaintiff for alimony, nor did she file a separate claim for alimony. On 18 February 2003, the trial court entered a judgment for absolute divorce without preserving a claim for alimony. Therefore, defendant did not have a claim for alimony pending at the time the trial court entered the judgment for absolute divorce. Defendant's mere assertion in her answer that "the claims for alimony and equitable distribution pending this action are to be reserved" is insufficient to constitute an action pending at the time the trial court entered the judgment for absolute divorce. *See Stegall*, *supra*. Therefore, defendant lost her claim for alimony by failing to assert it prior to the trial court's judgment of absolute divorce.

Subject matter jurisdiction cannot be conferred upon a court by consent, waiver or estoppel, and failure to demur or object to the

jurisdiction is immaterial. *See In re McKinney*, 158 N.C. App. 441, 447, 581 S.E.2d 793, 797 (2003); *see also Lockamy v. Lockamy*, 111 N.C. App. 260, 262, 432 S.E.2d 176, 177 (1993) ("the fact that both parties participated in the equitable distribution hearing does not save plaintiff. Jurisdiction over the subject matter cannot be conferred upon a court by consent, waiver or estoppel."); *DeGree v. DeGree*, 72 N.C. App. 668, 670, 325 S.E.2d 36, 37 (1985), *disc. rev. denied*, 313 N.C. 598, 330 S.E.2d 607 (1985) ("Although the parties stipulated in a pre-trial conference 'that the court has jurisdiction of the parties and of the subject matter,' we find such to be ineffective in conferring jurisdiction upon the court.").

Here, defendant's amended answer and counterclaim for alimony filed well after the trial court's judgment for absolute divorce and plaintiff's answer to defendant's amended answer and counterclaim did not confer subject matter jurisdiction upon the trial court to award alimony. Therefore, the trial court did not have subject matter jurisdiction to award alimony.

In conclusion, defendant did not have a claim for alimony pending at the time the trial court entered a judgment for absolute divorce. The parties could not confer subject matter jurisdiction upon the trial court by waiver or consent. Because we hold that the trial court did not have subject matter jurisdiction to enter a judgment awarding alimony, we do not address plaintiff's appeal from the trial court's order denying the motion for new trial. Accordingly, we vacate the judgment granting alimony.

Vacate.

Judges ELMORE and STEELMAN concur.

STATE OF NORTH CAROLINA v. SAMMIE DONALD CORNETT, DEFENDANT

No. COA05-722

(Filed 2 May 2006)

1. Motor Vehicles— driving while impaired—public vehicular area—no private road signs

A road was open to vehicular traffic within the meaning of N.C.G.S. § 20-4.01(32)(c) and was a public vehicular area where defendant and an officer testified that they drove the road and

that there were no gates or signs indicating that it was private. The trial court did not err by denying defendant's motion to dismiss a charge of driving while impaired.

2. Motor Vehicles— driving while impaired—public vehicular area—road within subdivision

A road on which a DWI defendant was stopped was within or leading to a subdivision (and so was a public vehicular area) where there were six homes on the street, with five or six different owners, each with a driveway leading off the road.

3. Criminal Law— discovery—DWI case

The trial court did not err by denying a DWI defendant's pretrial motion to compel discovery from the State of written protocols regarding Intoxylizer operation, calibration, and measures. No statutory right to discovery exists for criminal cases originating in district court and there is no constitutional right to discovery other than for exculpatory evidence.

Defendant appeals from judgment entered 4 February 2005 by Judge John O. Craig, III, in the Superior Court in Surry County. Heard in the Court of Appeals 1 December 2005.

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

Guy B. Oldaker, III, for defendant-appellant.

HUDSON, Judge.

In February 2005, a jury convicted defendant of driving while impaired ("DWI"). The court ordered defendant to perform 24 hours of community service and to pay a $100 fine. Defendant appeals. For the reasons discussed below, we conclude that there was no error.

The evidence tends to show the following facts. On 31 August 2002, Deputy Greg Hemric of the Surry County Sheriff's Department responded to a call about suspicious activity at a local school. Upon investigation, he discovered some guns on the school property. Hemric and other officers who came to assist him also found an ATV on the property and had seen some ATV's leaving the property. At about 10:20 p.m., Hemric went to the intersection of Flippin Road and Timber Lane, about 200 yards from the school. He parked on Timber Lane, a dead-end dirt road with six homes on it, with driveways lead-

ing off of Timber Lane to each of the homes, which have different owners. After Hemric parked on Timber Lane, he intended to stop all vehicles traveling on Timber Lane to question the occupants about the guns found on the school property. At about 11:45 p.m., defendant left a house on Timber Lane and drove down Timber Lane to where Hemric had parked. Due to the way Hemric had parked, defendant had to stop. Hemric asked defendant for his driver's license and noticed that defendant smelled of alcohol and had glassy eyes and slurred speech. Believing that defendant was impaired, Hemric called the Highway Patrol for assistance. Approximately 20 minutes later, Trooper Brian Jones arrived. He noted that defendant smelled of alcohol, that he had red, glassy eyes, that his speech was slurred, and that he seemed a little unsteady on his feet. With defendant's permission, Jones performed a horizontal gaze nystagmus test and the results were consistent with a 0.10 blood alcohol concentration. Jones placed defendant under arrest and took him to the Sheriff's office and administered an Intoxylizer test at 1:23 p.m., which showed an alcohol concentration of 0.09.

[1] Defendant argues that the trial court erred in failing to grant its motion to dismiss for insufficiency of the evidence. He contends that the State failed to introduce sufficient evidence that Timber Lane is a "public vehicular area" ("PVA"). We disagree.

In reviewing the trial court's ruling on a motion to dismiss, we must evaluate the evidence in the light most favorable to the State. *State v. Molloy*, 309 N.C. 176, 179, 305 S.E.2d 718, 720 (1983). All contradictions must be resolved in favor of the State. *Id.* Ultimately, we must determine "whether a reasonable inference of the defendant's guilt may be drawn from the circumstances." *State v. Lee*, 348 N.C. 474, 488, 501 S.E.2d 334, 343 (1998). If the evidence supports a reasonable inference of defendant's guilt, it is up to the jury to decide whether there is proof beyond a reasonable doubt. *State v. Trull*, 349 N.C. 428, 447, 509 S.E.2d 178, 191 (1998).

Our DWI statute prohibits driving impaired "upon any highway, any street, or *any public vehicular area* within this State." N.C. Gen. Stat. § 20-138.1 (a) (2001) (emphasis added). The relevant definition of PVA is: "a road opened to vehicular traffic within or leading to a subdivision for use by subdivision residents, their guests, and members of the public, whether or not the subdivision roads have been offered for dedication to the public." N.C. Gen. Stat. § 20-4.01(32)(c) (2001). Defendant argues that although Timber Lane is opened to

vehicular traffic, it is not a PVA because it is not within or leading to a "subdivision," and is not opened to vehicular traffic for use by the public. Both Officer Hemric and defendant testified that they drove on Timber Lane and that there were no gates or signs indicating that it was a private road. Thus, viewing the evidence in the light most favorable to the State, we conclude that Timber Lane was opened to vehicular traffic within the meaning of the statute; we note that a PVA must only be opened to vehicular traffic, but not necessarily "offered for dedication to the public." N.C. Gen. Stat. § 20-4.01(32)(c).

[2] We now turn to defendant's contention that Timber Lane is not within or leading to a subdivision. In *State v. Turner*, this Court rejected a similar argument, where the defendant contended that a privately-maintained road within a mobile home park was not a PVA. 117 N.C. App. 457, 458, 451 S.E.2d 19, 20 (1984). In interpreting N.C. Gen. Stat. § 20-4.01(32), the Court applied the Black's Law Dictionary definition of subdivision:

> Division into smaller parts of the same thing or subject matter. The division of a lot, tract, or parcel of land into two or more lots, tracts, parcels or other divisions of land for sale or development.

Turner, 117 N.C. App. at 458, 451 S.E.2d at 20. Here, evidence presented at trial showed that there were six homes on Timber Lane, with five or six different owners, each with a driveway leading off of Timber Lane. Accordingly, we conclude that there was sufficient evidence at trial that Timber Lane is within or leading to a subdivision.

[3] In his next argument, defendant contends that the trial court erred in denying his pre-trial motion to compel discovery from the State, in violation of his due process rights under the North Carolina constitution to confront adverse witnesses and prepare his defense. Prior to trial, defendant moved for discovery of numerous written protocols regarding Intoxylizer operation, calibration, and measures. In North Carolina, no statutory right to discovery exists for criminal cases originating in district court. N.C. Gen. Stat. § 15A-901 (2001). The official commentary to this section states:

> As cases in district court are tried before the judge, and usually on a fairly expeditious basis, the Commission decided there was no need at present to provide for discovery procedures prior to trial in district court. As misdemeanors tried in superior court on trial de novo have already had a full trial in district court, there is little reason for requiring discovery after that trial and prior to the new trial in superior court.

Id. Furthermore, it is well-established that there is no Constitutional right to discovery other than to exculpatory evidence. *See*, *e.g.*, *State v. Cunningham*, 108 N.C. App. 185, 195, 423 S.E.2d 802, 808 (1992). Under *Brady v. Maryland*, the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. 83, 87, 10 L. Ed. 2d 215, 218 (1963). On appeal, defendant has not argued that he was denied *Brady* materials and the cases he cites in support of his argument that he was entitled to discovery all involve statutory discovery rights in Superior Court. *See Cunningham; State v. Canady*, 355 N.C. 242, 559 S.E.2d 762 (2002); *State v. Fair*, 164 N.C. App. 770, 596 S.E.2d 871 (2004); *State v. Dunn*, 154 N.C. App. 1, 571 S.E.2d 650 (2002). We overrule this assignment of error.

No error.

Judges LEVINSON and JACKSON concur.

OZIE L. HALL, PLAINTIFF v. STEVEN I. COHEN (D/B/A: HOMESTEAD MOBILE HOME PARK), DEFENDANT

No. COA05-1048

(Filed 2 May 2006)

Appeal and Error— Rule 60 motion while appeal pending— remanded for evidentiary hearing and indication of ruling

An appeal was dismissed and the case was remanded to the trial court for entry of a final order on defendant's Rule 60(b)(3) motion where defendant had filed an appeal to the Court of Appeals, then a Rule 60(b)(3) in the trial court; the Court of Appeals remanded for an evidentiary hearing and an indication of how the trial court would rule; and the trial court then held the hearing, made findings, and indicated an inclination to rule in favor of defendant. This practice allows the appellate court to delay consideration of the appeal until a final judgment is rendered.

Appeal by Steven I. Cohen, d/b/a Homestead Mobile Home Park, from a judgment entered 7 April 2004 by Judge W. Russell Duke, Jr. in Pitt County Superior Court. Heard in the Court of Appeals 10 April 2006.

Ozie L. Hall, pro se, plaintiff-appellee.

Mills & Economos, LLP, by Larry C. Economos, for defendant-appellant.

BRYANT, Judge.

Steven I. Cohen, d/b/a Homestead Mobile Home Park, (defendant) appeals from a judgment entered 7 April 2004 consistent with a jury verdict finding defendant liable on a claim of breach of contract and awarding Ozie L. Hall (plaintiff) $41,000.00 in damages and interest at eight percent (8%). For the reasons below we dismiss this appeal and remand this matter to the trial court.

Facts and Procedural History

In November 1998, plaintiff and defendant entered into a contract stating that plaintiff would provide specified services in exchange for compensation. According to the contract, plaintiff was to be paid twenty percent (20%) of the actual net proceeds of the sale of Homestead Mobile Home Park. Plaintiff alleges the contract entitled him to a security interest in defendant's property in the amount of $80,000.00. Because defendant failed to provide the security interest, *inter alia*, plaintiff filed a complaint for breach of contract, specific performance, fraudulent misrepresentation, and deceptive trade practices.

This matter came to trial on 15 March 2004 at the civil session of Pitt County Superior Court, the Honorable W. Russell Duke, Jr., presiding. On 18 March 2004, the jury returned its verdict finding defendant liable for breach of contract. On 7 April 2004, the trial court entered its judgment consistent with the jury verdict, awarding plaintiff damages of $41,000.00 plus costs and interest. Defendant filed a Notice of Appeal of the trial court's judgment to this Court on 13 April 2004.

On 18 May 2004, defendant filed with the trial court a motion for relief from judgment pursuant to Rule 60(b)(3) of the North Carolina Rules of Civil Procedure. Defendant filed a motion with this Court on 22 September 2004 requesting this matter be remanded to the trial court for consideration of defendant's Rule 60(b) motion. This Court

entered an Order on 5 October 2004 remanding the matter for the trial court to conduct an evidentiary hearing on the pending Rule 60(b) motion and enter an indication of how it would hold if an appeal were not before this Court. The 5 October 2004 Order also required that the proposed record on appeal be served within thirty days of the trial court's report of its inclination to rule on the Rule 60(b) motion. An evidentiary hearing on the Rule 60(b) motion was held on 13 December 2004 and on 18 February 2005 the trial court entered "Evidentiary Findings, Conclusions of Law, and Inclination to Rule" in favor of defendant; thereby noting an inclination to grant defendant's Rule 60(b) motion for relief.

As a general rule, an appellate court's jurisdiction trumps that of the trial court when one party files a notice of appeal unless the case has been remanded from the appellate court for further determination in the trial court. *Bell v. Martin*, 43 N.C. App. 134, 140, 258 S.E.2d 403, 407 (1979) (citing *Wiggins v. Bunch*, 280 N.C. 106, 184 S.E.2d 879 (1971)), *rev'd on other grounds*, 299 N.C. 715, 264 S.E.2d 101 (1980). The trial court retains limited jurisdiction to indicate how it is inclined to rule on a Rule 60(b) motion. *Bell*, 43 N.C. App. at 140-42, 258 S.E.2d at 408-09.

Upon the appellate court's notification of a Rule 60(b) motion filed with the trial court, this Court will remand the matter to the trial court so the trial court may hold an evidentiary hearing and indicate "how it [is] inclined to rule on the motion were the appeal not pending." *Id.* at 142, 258 S.E.2d at 409. This practice allows the appellate court to "delay consideration of the appeal until the trial court has considered the [Rule] 60(b) motion. [So that upon] an indication of favoring the motion, appellant would be in position to move the appellate court to remand to the trial court for judgment on the motion and the proceedings would thereafter continue until a final, appealable judgment is rendered." *Id.* Arguments pertaining to the grant or denial of the motion along with other assignments of error could then be considered by the appellate court simultaneously. *Id.* Where, as here, the trial court entered an inclination to rule in favor of defendant and grant his Rule 60(b) motion, we dismiss the instant appeal and remand this matter to the trial court for entry of a final order on defendant's Rule 60(b) motion.

Appeal dismissed and remanded.

Chief Judge MARTIN and Judge HUDSON concur.

GUILFORD COUNTY BY AND THROUGH ITS CHILD SUPPORT ENFORCEMENT OFFICE, EX REL. WILAMENIA N. NORWOOD, PLAINTIFF v. AKAN B. DAVIS, DEFENDANT

No. COA05-645

(Filed 2 May 2006)

Child Support, Custody, and Visitation— IV-D child support— mandatory wage withholding

The trial court erred by failing to order the provision for wage withholding in a IV-D child support case under N.C.G.S. §§ 110-136.3 and 110-136.4(b), because mandatory statutory provisions applicable to IV-D cases require the trial court to order wage withholding.

Appeal by defendant from an order entered 4 February 2005 by Judge Joseph E. Turner in Guilford County District Court. Heard in the Court of Appeals 27 March 2006.

Guilford County Attorney's Office, by Deputy County Attorney Angela F. Liverman, for plaintiff-appellant.

No brief submitted by defendant-appellee.

BRYANT, Judge.

The Guilford County Child Support Enforcement Agency (GCCSEA-plaintiff), on behalf of Wilamenia N. Norwood, appeals an order entered 4 February 2005 denying a request to establish income wage withholding[1] from Akan B. Davis (defendant) in support of T.A.[2] Davis, his minor child.

GCCSEA filed a complaint on 19 October 2004, on behalf of plaintiff seeking adjudication of paternity, child support, and medical insurance for T.A., reimbursement of past paid public assistance and wage withholding. The parties submitted to DNA paternity testing on 26 March 2003, and the probability of paternity was 99.99%. Defendant did not contest paternity at the 7 January 2004 hearing. GCCSEA testified plaintiff was not working due to an accident and she was receiving public assistance for her three minor children, one of whom was defendant's child. Defendant testified he earned ap-

1. The order requires defendant to pay $565.00 monthly and a total of $375.00 in child support arrears (an additional $30.00 per month), effective 1 February 2005.

2. Initials are used to protect the identity of the juvenile.

proximately $3,743.56 per month. Defendant also testified he paid $117.00 for health insurance premiums and voluntarily pays $300.00 monthly for another child he is obligated to support. Defendant stated he voluntarily gives plaintiff $200.00 monthly for T.A. After hearing the evidence regarding the parties' earnings, the trial court imputed minimum wage earnings for plaintiff because she was working before the accident and a worksheet "A" was completed. According to the N.C. Child Support Guidelines, the monthly child support obligation for defendant was $565.00. The complaint requested income wage withholding be implemented immediately. At the hearing, GCCSEA requested defendant pay $565.00 for current child support and $30.00 for arrears through wage withholding. In its order, the trial court denied plaintiff's request for wage withholding.

On appeal plaintiff argues the trial court erred by failing to order the provision for wage withholding in a IV-D[3] child support case pursuant to N.C. Gen. Stat. §§ 110-136.3 and 110-136.4(b). We note defendant did not file a brief.

"When determining a child support award, a trial judge has a high level of discretion, not only in setting the amount of the award, but also in establishing an appropriate remedy." *Taylor v. Taylor*, 128 N.C. App. 180, 182, 493 S.E.2d 819, 820 (1997) (citation omitted). However, the court's discretion is curtailed in IV-D cases in which services involve a child support enforcement agency. *McGee v. McGee*, 118 N.C. App. 19, 31, 453 S.E.2d 531, 538 (1995). Mandatory statutory provisions applicable to IV-D cases require the trial court to order wage withholding. *Id.* at 31, 453 S.E.2d at 538.

North Carolina General Statutes Section 110-136.3 states "[a]ll child support orders, civil or criminal, entered or modified in the State in IV-D cases *shall* include a provision ordering income withholding to take effect immediately[.]" N.C. Gen. Stat. § 110-136.3 (2005) (emphasis added). Section 110-136.4(b) states "[w]hen a new or modified child support order is entered, the *district court judge shall*, after hearing evidence regarding the obligor's disposable income, place the obligor under an order for immediate income withholding." N.C. Gen. Stat. § 110-136.4(b) (2005) (emphasis added).

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3. A "IV-D" case is one in which "services have been applied for or are being provided by a child support enforcement agency established pursuant to Title IV-D of the Social Security Act as amended [42 U.S.C.S. § 666 (2005).]" N.C. Gen. Stat. § 110-129(7) (2005).

The evidence in the case *sub judice* showed defendant had gross monthly earnings of $3,743.56. Defendant was given a $300.00 credit on worksheet "A" for his voluntary payment for another minor child and $117.00 credit for monthly payments for health insurance premiums. The trial court found "[p]laintiff has applied for Child Support Services and the Child Support Agency is required to provide service to [eligible] individuals" and GCCSEA had requested immediate wage withholding pursuant to N.C.G.S. § 110-136.3. Based on its findings and conclusions, the trial court ordered defendant to pay $565.00 per month in child support for T.A. and $375.00 in arrears ($30.00 per month), beginning 1 February 2005.

Despite the fact this is a child support order in a IV-D case, the trial court "denied the request for income withholding from the [d]efendant's disposable income." Contrary to the statutory mandate applicable in IV-D cases, the trial court failed to order wage withholding from defendant. *See McGee* at 29, 453 S.E.2d at 537 (the trial court erred by failing to direct income withholding to ensure payment of the father's child support arrearage). Therefore, we must reverse and remand to the trial court for entry of judgment ordering immediate income withholding pursuant to N.C.G.S. § 110-136.4(b). *See Griffin v. Griffin*, 103 N.C. App. 65, 68, 404 S.E.2d 478, 480 (1991) (The trial court properly withheld income to assure "that all children . . . who are in need of assistance in securing financial support from their parents will receive assistance regardless of their circumstances.") (citation omitted).

Reversed and remanded.

Chief Judge MARTIN and Judge HUDSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 2 MAY 2006

BUTNER v. PIEDMONT TRIAD HOMES, INC. No. 05-1028	Indus. Comm. (I.C. #252880)	Affirmed
FOSTER-LONG v. DURHAM CTY. No. 05-1287	Indus. Comm. (I.C. #101235)	Affirmed
IN RE B.B., C.B. & N.B. No. 05-1355	Buncombe (97J416)	Dismissed
IN RE T.H.F. & S.F. No. 05-819	Johnston (02J97) (02J98)	Reversed
IN RE Z.M., Z.M. & J.M. No. 05-709	Orange (03J1) (00J92) (00J83)	Affirmed
INTERNATIONAL FURN. PRODS. SHIPPERS ASS'N v. MASTEN FURN. CO. No. 05-976	Guilford (04CVD111446)	Affirmed
LITTLE v. LYNTON No. 05-1044	Mecklenburg (03CVS21282)	No prejudicial error
MYERS v. MYERS No. 05-274	Guilford (02CVD156)	Vacated and remanded
NAGS HEAD CONSTR. & DEV., INC. v. TOWN OF NAGS HEAD No. 05-1086	Dare (04CVS055)	Affirmed
RUSSELL v. RUSSELL No. 05-1261	Nash (02CVD1572)	Affirmed
SHUE v. SHUE No. 05-917	Rowan (99CVD619)	Dismissed
STATE v. BROWN No. 05-957	Mecklenburg (04CRS241584)	No error
STATE v. BROWN No. 05-914	Burke (02CRS6654)	No error
STATE v. BULLOCK No. 05-859	Pitt (04CRS7030) (04CRS7031) (04CRS7032) (04CRS54812)	No prejudicial error

STATE v. CUMMINGS No. 05-1063	Columbus (04CRS51726)	Affirmed
STATE v. GARIBAY No. 05-444	Beaufort (02CRS52336)	No error
STATE v. GLENN No. 05-1014	Forsyth (04CRS55492) (04CRS15563)	No error
STATE v. HALL No. 05-654	Pender (04CRS1390)	No error
STATE v. NIX No. 05-1122	Vance (98CRS3500) (98CRS3501) (98CRS3502) (98CRS4750)	Remanded for resentencing in part, dismissed in part
STATE v. RAYFIELD No. 05-862	Harnett (04CRS53314) (04CRS53484) (04CRS53485) (04CRS53486) (04CRS8907)	Affirmed
STATE v. RIDLEY No. 03-1543	Craven (03CRS2594) (03CRS51405) (03CRS51406) (03CRS51407) (03CRS51408) (03CRS51409)	New sentencing hearing
STATE v. ROSE No. 05-994	Robeson (03CRS12260)	Affirmed
STATE v. SIMMONS No. 05-494	Forsyth (03CRS37633) (03CRS62847)	Vacated
STATE v. SULLIVAN No. 05-532	Durham (02CRS49147) (02CRS49149) (02CRS49150) (03CRS1782)	No error
STATE v. TAYLOR No. 05-761	Forsyth (04CRS15587) (04CRS56733)	No error
STATE v. WALL No. 05-898	Richmond (04CRS50537)	New trial

STATE v. WILLIAMS No. 05-554	Pitt (04CRS11161) (04CRS11162) (04CRS11163)	No error
STATE v. WILSON No. 05-1088	Duplin (03CRS51317)	No error
STATE v. YOUNG No. 04-1669	Henderson (03CRS55979) (04CRS1)	No error
VINCENT v. BILLINGSLEY No. 05-657	Guilford (02CVS10110)	Affirmed in part; no error in part
WEEKS v. TOWN OF NAGS HEAD No. 05-798	Dare (04CVS492)	Dismissed

SHAVITZ v. CITY OF HIGH POINT

[177 N.C. App. 465 (2006)]

HENRY H. SHAVITZ, FOR HIMSELF AND OTHERS SIMILARLY SITUATED, PLAINTIFF v. CITY OF HIGH POINT, A MUNICIPAL CORPORATION, ELECTRONIC DATA SYSTEMS CORPORATION, A CORPORATION DOING BUSINESS IN NORTH CAROLINA, ALLEN L. PEARSON, II, PEEK TRAFFIC, INC., A CORPORATION DOING BUSINESS IN NORTH CAROLINA, PHIL WYLIE, SREEKANTH NANDAGIRI, ARNOLD KOONCE, MAYOR OF THE CITY OF HIGH POINT, ALBERT A. CAMPBELL, M. CHRISTOPHER WHITLEY, AARON M. CHRISTOPHER, RONALD B. WILKINS, M. C. ROWE, WILLIAM S. BENCINI, JR., DAVID B. WALL, EACH MEMBERS OF THE HIGH POINT CITY COUNCIL, STRIB BOYNTON, CITY MANAGER OF THE CITY OF HIGH POINT, AND THE GUILFORD COUNTY BOARD OF EDUCATION, DEFENDANTS

No. COA05-571

(Filed 16 May 2006)

1. Penalties, Fines, and Forefeitures— red light camera program—North Carolina Constitution Article IX, Section 7

The trial court did not err by ruling that Article IX, Section 7 of the North Carolina Constitution applies to defendant city's red light camera program, because: (1) if money is collected for the transgression of both a municipal ordinance and a coordinate state statute, then the penal laws of our state are implicated and Article IX, Section 7 controls the disposition of the funds; (2) our Supreme Court stated the nature of the offense committed and not the method employed by the municipality to collect fines for commission of the offense should be considered; and (3) the money collected under the city's ordinance serves to punish transgressions of both local and state penal laws when the red light cameras are an alternative means for capturing traffic control violations and the ultimate determination as to whether to issue a citation rests with a city police officer.

2. Penalties, Fines, and Forfeitures— red light camera program—amount of clear proceeds paid to Board of Education

The trial court did not err by allegedly miscalculating the amount of the clear proceeds to be paid to the Board of Education (BOE) under Article IX, Section 7 of the North Carolina Constitution arising out of collections for violations of a red light camera program and by concluding that defendant city must pay ninety percent of the amount collected by its red light camera program to the BOE, because: (1) although defendant city contends the portion of the penalties it paid to the company that installed and maintains the red light cameras, as well as the fee it paid to the appeal hearing officers, should be deducted to deter-

mine the clear proceeds of its red light camera program, these expenditures constitute enforcement costs rather than collection costs; (2) the city is bound by the definition of clear proceeds as set forth in N.C.G.S. § 115C-437; (3) the plain language of Article IX, Section 7 states that the clear proceeds of applicable penalties, fines, and forfeitures shall belong to and remain in the several counties, and shall be faithfully appropriated and used exclusively for maintaining free public schools; and (4) the statutory limitation on a municipality's ability to withhold collection costs, as codified by N.C.G.S. § 115C-437, comports with the language of Article IX, Section 7.

3. Interest— postjudgment—city—sovereign capacity

The trial court erred by awarding postjudgment interest in an action where defendant city sought to enforce its state and municipal traffic laws through its red light camera program and for management of the proceeds collected for violations, because: (1) N.C.G.S. § 24-5(b) does not operate against the state when interest may not be awarded against the state unless the state has manifested its willingness to pay interest by an Act of the General Assembly or by a lawful contract to do so; and (2) N.C.G.S. § 24-5(b) cannot be used against defendant city since it is a political subdivision of the state acting in its sovereign capacity.

Appeal by defendant City of High Point from judgments entered 22 December 2004 by Judge Lindsay R. Davis and 23 February 2005 by Judge A. Moses Massey in Guilford County Superior Court. Heard in the Court of Appeals 11 January 2006.

Womble Carlyle Sandridge & Rice, PLLC, by Burley B. Mitchell, Jr., Sean E. Andrussier, and Gusti W. Frankel, for the City of High Point defendant appellant.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Robert J. King III, Jill R. Wilson, and Elizabeth V. LaFollette, for the Guilford County Board of Education defendant appellee.

General Counsel Andrew L. Romanet, Jr., Senior Assistant General Counsel Gregory F. Schwitzgebel III, and Senior Assistant City Attorney for the City of Charlotte Robert Hagemann, for the North Carolina League of Municipalities, amicus curiae.

Tharrington Smith, L.L.P., by Michael Crowell and Deborah Stagner; and Allison Schafer for the North Carolina School Boards Association, amicus curiae.

McCULLOUGH, Judge.

Article IX, Section 7 of the North Carolina Constitution provides that "the clear proceeds of all penalties and forfeitures and of all fines collected in the several counties for any breach of the penal laws of the state, shall belong to and remain in the several counties, and shall be faithfully appropriated and used exclusively for maintaining free public schools." N.C. Const. art. IX, § 7 (2003), *amended by* 2003 N.C. Sess. Laws ch. 423, § 1 (effective Jan. 1, 2005).[1] The present appeal requires us to determine whether this constitutional provision applies to penalties collected by the City of High Point under its red light camera program.

On motions for summary judgment, the superior court ruled that the Constitution was applicable to the program and that the ordinance failed to dispose of red light camera penalties in accordance with constitutional mandate, and ordered High Point to pay ninety percent of the penalties collected under the program to the Guilford County Board of Education. For the reasons set forth herein, we uphold these rulings of the superior court.

The present case also raises an issue as to whether High Point should have been ordered to pay post-judgment interest. We conclude that the general statutory provision governing post-judgment interest is not applicable to the City and vacate the portion of the superior court's order requiring High Point to pay interest.

Background

Since the enactment of Chapter 583, Section 2 of the 1949 North Carolina Session Laws, section 20-158 of our General Statutes have prohibited motorists from entering an intersection while a stoplight is emitting a red light. *See* N.C. Gen. Stat. § 20-158(b)(2) (2003), *amended by* 2004 N.C. Sess. Laws ch. 141, §§ 1, 2 and ch. 172, § 2. Under the General Statutes, failure to stop for a red stoplight is an infraction, and a violator "may be ordered to pay a penalty of not more than one hundred dollars." N.C. Gen. Stat. § 20-176(a), (b) (2005).

1. The amendment added a subsection (b) to Article IX, Section 7, which is not at issue in the instant case.

Beginning in 1997, certain specified municipalities were legislatively imbued with the authority to "adopt ordinances for the civil enforcement of [section] 20-158 [of the General Statutes] by means of a traffic control photographic system," or as such systems are referred to in the vernacular, "red light cameras." N.C. Gen. Stat. § 160A-300.1(c) (2005), *enacted by* 1997 N.C. Sess. Laws ch. 216, §§ 1, 2; *see also id.* § 160A-300.1(a) (providing a technical definition for "traffic control photographic system"). The enabling legislation, section 160A-300.1(c), provides that, "[n]otwithstanding the provisions of [section] 20-176 [of the General Statutes], in the event that a municipality adopts [a red light camera] ordinance . . . , a violation of [section] 20-158 at a location at which a traffic control photographic system is in operation shall not be an infraction." *Id.* § 160A-300.1(c). The statute further requires red light camera ordinances to contain language to the following effect:

> (2) A violation detected by a traffic control photographic system shall be deemed a noncriminal violation for which a civil penalty of fifty dollars ($50.00) shall be assessed, and for which no points authorized by [section] 20-16(c) [of the General Statutes] shall be assigned to the owner or driver of the vehicle nor insurance points as authorized by [section] 58-36-65 [of the General Statutes].
>
> (3) The owner of the vehicle shall be issued a citation which shall clearly state the manner in which the violation may be challenged, and the owner shall comply with the directions on the citation. The citation shall be processed by officials or agents of the municipality and shall be forwarded by personal service or first-class mail to the address given on the motor vehicle registration. If the owner fails to pay the civil penalty or to respond to the citation within the time period specified on the citation, the owner shall have waived the right to contest responsibility for the violation, and shall be subject to a civil penalty not to exceed one hundred dollars ($100.00). The municipality may establish procedures for the collection of these penalties and may enforce the penalties by civil action in the nature of debt.
>
> (4) The municipality shall institute a nonjudicial administrative hearing to review objections to citations or penalties issued or assessed under this section.

Id. § 160A-300.1(c)(2), (3), (4). In 1999, the City of High Point was granted the authority to enact a red light camera ordinance. *See id.* § 160A-300.1(d), *as amended by* 1999 N.C. Sess. Laws ch. 181, § 2.

Shortly thereafter, High Point enacted section 10-1-306 of its Code of Ordinances, which provided as follows:

> (a) *Administration.* The City of High Point shall implement a system for capturing traffic control violations, as defined under [section] 20-158 [of the General Statutes], with a traffic control photographic system that will use the photographic images as prima facie evidence of the traffic violations and will authorize the High Point Department of Transportation or an agent of the department to issue civil citations.
>
> The City of High Point Department of Transportation shall administer the traffic control photographic program and shall maintain a list of system locations where traffic control photographic systems are installed.
>
> Any citation for a violation for [section] 20-158 [of the General Statutes] or other traffic violation, issued by a duly authorized law enforcement officer at a system location shall be treated, pursuant to [section] 20-176 [of the General Statutes], as an infraction so long as the system photographic images are not used as prima facie evidence of the violation.
>
> The citation shall clearly state the manner in which the violation may be reviewed. The citation shall be processed by officials or agents of the city and shall be forwarded by personal service or first-class mail to the owner's address as given on the motor vehicle registration.
>
> (b) *Offense*
>
> (1) It shall be unlawful for a vehicle to cross the stop line at a system location when the traffic signal for that vehicle's direction of travel is emitting a steady red light, or for a vehicle to violate any other traffic regulation specified in [section] 20-158 [of the General Statutes].
>
> (2) The owner of a vehicle shall be responsible for a violation under this section, unless the owner can furnish evidence that the vehicle was in the care, custody or control of another person at the time of the violation . . . .
>
> * * * *
>
> (c) *Penalty.* Any violation of this section shall be deemed a noncriminal violation for which a civil penalty of $50.00 shall be

> assessed, and for which no points authorized by [section] 20-16(c) [of the General Statutes] shall be assigned to the owner or driver of the vehicle, nor insurance points as authorized by [section] 58-36[-]65 [of the General Statutes]. Failure to pay the civil penalty or to respond to the citation within 21 days shall constitute a waiver of the right to contest responsibility for the violation and shall subject the owner to a civil penalty not to exceed $100.00. The city shall establish procedures for the collection of the civil penalties and shall enforce the penalties by a civil action in the nature of a debt.
>
> (d) *Nonjudicial administrative hearing.* The City of High Point Department of Transportation shall establish an administrati[ve] process to review objections to citations or penalties issued or assessed. A notice requesting a hearing to review objections shall be filed within 21 days after notification of the violation. An individual desiring a nonjudicial hearing must post a bond in the amount of $50.00 before a hearing will be scheduled. The determination of the hearing officer will be final.

HIGH POINT, N.C., CODE OF ORDINANCES § 10-1-306 (2001), *amended by* HIGH POINT, N.C., ORDINANCE NO. 01-68, § 1 (Aug. 16, 2001), NO. 6071/03-45, § 1 (Aug. 21, 2003), and NO. 6074/03-48, § 1 (Sept. 2, 2003).

In implementing this ordinance, High Point entered into a contract with Peek Traffic, Inc., pursuant to which Peek was to install red light cameras at several of the City's intersections. Peek also agreed to, *inter alia*, collect the photographs from the cameras and prepare potential citations. Peek entered into a subcontract with Electronic Data Systems Corporation (EDS) pursuant to which EDS was to perform some of Peek's contractual duties to High Point.

Under its contract with Peek, EDS reviewed the red light camera photographs for potential violations. EDS eliminated from consideration for a citation those photographs which demonstrated an obvious legitimate explanation for the motorist's behavior, such as a lawful right turn at a red light, and those photographs which failed to contain a legible image of the offending vehicle's license plate. For the remaining photographs, EDS identified the registered owner of the pictured vehicle and printed a "candidate" citation for the pictured violation. A police officer employed by the City of High Point then reviewed each candidate citation and made a determination as to whether an official citation should be issued. EDS then mailed the

approved citations to the owners of the vehicles appearing in the corresponding photographs.

The citation received by each unhappy motorist contained, *inter alia*, reproductions of the images captured by the red light camera, a record of the date and time that the images were taken, and the following statement: "The civil penalty for this violation is $50.00. . . . Failure to pay the civil penalty or respond to the citation within 21 days of notification will result in the automatic waiver of right to appeal and will result in an additional late penalty of $50.00." The back of the citation contained the following notice:

> If you wish to contest this citation, fill out the Appeal section and return this form along with a deposit of $50.00, which shall constitute a bond. Once your appeal is received, you will be contacted so that an administrative hearing can be scheduled. An independent hearing officer will hear your appeal.
>
> . . . If your citation is dismissed, your deposit will be refunded.

A space for registering the reasons for an appeal was included.

Appeals from red light camera citations were heard by one of two High Point University professors who agreed to serve as appeal hearing officers. These appeal hearing officers were compensated at a rate of $25.00 per hearing, regardless of the decision rendered.

High Point placed the money collected in connection with the red light camera citations in the "Red Light Camera Campaign Penalties Fund," which is separate from the City's general operating fund. Pursuant to its contractual obligations, High Point dispersed seventy percent of the revenue in the Red Light Camera Campaign Penalties Fund to pay Peek for the installation and operation of the red light camera system; this expense amounted to $35 of each $50 ticket. Monies from the fund were also used to compensate the appeal hearing officers, and a small amount was expended from the Fund to educate the public about the red light camera system. The remaining balance, if any, was dedicated for traffic safety programs and for safety-related transportation improvements.

The Facts and Procedural History of the Present Case

On 4 April 2001, a red light camera recorded Henry H. Shavitz failing to observe a red stoplight at the intersection of Main and College Streets in High Point. On 3 May 2001, a citation was issued to Shavitz

in accordance with High Point's red light camera ordinance. Shavitz refused to pay the $50.00 fine in the prescribed twenty-one day period, and on 25 May 2001, he was issued a citation for $100.00, which included the cost of the red light violation and the penalty for failing to timely pay or appeal the original citation.

Shavitz responded by filing a lawsuit in Guilford County Superior Court against the City of High Point, its mayor, city manager, and city council members, the Guilford County Board of Education, Peek, and EDS. Shavitz' complaint sought declarations that section 160A-300.1 of the General Statutes and section 10-1-306 of the High Point City Code of Ordinances were repugnant to the North Carolina Constitution; that the contracts between High Point, Peek and EDS were illegal; that the penalties collected constituted an illegal tax; and that statutory section 160A-300.1 and ordinance section 10-1-306 and the contracts entered into between High Point, Peek, and EDS established a scheme which violated the equal protection and due process guarantees of the United States Constitution and the "law of the land" clause of the North Carolina Constitution. Shavitz' complaint further sought, as an alternative basis for relief in the event that the superior court found that the red light camera program was valid, a declaration that Article IX, Section 7 of the North Carolina Constitution required High Point to pay the clear proceeds of all past and present fines collected by the red light camera program to the Guilford County Board of Education.

The action was removed to the Federal District Court for the Middle District of North Carolina. While the action was pending in federal court, the Guilford County Board of Education filed an answer to Shavitz' lawsuit and a request for declaratory judgment that it was entitled to the clear proceeds of the red light camera fines pursuant to Article IX, Section 7 of the North Carolina Constitution.

On cross motions for summary judgment filed by a number of the parties, the district court ruled against Shavitz on all federal-law claims and certain state law claims and remanded to state court all but one of Shavitz' state-law claims. *Shavitz v. City of High Point*, 270 F. Supp. 2d 702 (M.D.N.C. 2003), *vacated in part sub nom.*, *Shavitz v. Guilford County Bd. of Educ.*, 100 Fed. Appx. 146 (4th Cir. 2004). The court retained Shavitz' claim under Article IX, Section 7 of the North Carolina Constitution and ruled that High Point did not owe the clear proceeds of its red light camera penalties to the Guilford County Board of Education. *Id*. at 729-30. On an appeal by the Board of Education, the United States Court of Appeals for the Fourth

Circuit issued an unpublished, *per curiam* opinion vacating the district court's ruling as to Article IX, Section 7 and instructing the district court to remand that claim to state court. *Shavitz v. Guilford County Bd. of Educ.*, 100 Fed. Appx. at 151-52.

Once the matter was remanded to the superior court, Shavitz voluntarily dismissed all of his claims. There remained, however, a dispute between High Point and the Board of Education concerning whether the Board was entitled to the clear proceeds of the penalties collected by the red light camera program. *See Jennette Fruit v. Seafare Corp.*, 75 N.C. App. 478, 483, 331 S.E.2d 305, 308 (1985) ("[U]nless a crossclaim is dependent upon plaintiff's original claim (as would be, *e.g.*, a crossclaim for indemnity or contribution) or is purely defensive, a plaintiff's dismissal of its claims against all defendants does not require dismissal of crossclaims properly filed in the same action."). Both High Point and the Board of Education moved for summary judgment on this issue.

The superior court ruled that Article IX, Section 7 of the North Carolina Constitution was applicable to High Point's red light camera program and that it required the clear proceeds of the penalties collected thereunder to be paid the Board of Education. Thereafter, the superior court entered a judgment awarding to the School Board

> 90% of all amounts collected by or on behalf of the City from the inception of [the red light camera program] through its termination, such amount to include $1,453,703.40 through December 21, 2004, and 90% of all amounts collected thereafter, less any amounts returned by or on behalf of the City to drivers who successfully appeal their penalties.

High Point was further ordered to pay post-judgment interest pursuant to section 24-5 of the General Statutes.

High Point now appeals to this Court, contending that the superior court erred by (1) ruling that Article IX, Section 7 of the North Carolina Constitution applies to its red light camera program, (2) miscalculating the amount of the clear proceeds to be paid to the Board under this provision if it is applicable, and (3) awarding post-judgment interest.

The Standard of Review

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any ma-

terial 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). On a motion for summary judgment, "[t]he evidence is to be viewed in the light most favorable to the nonmoving party." *Moore v. Coachmen Industries, Inc.*, 129 N.C. App. 389, 394, 499 S.E.2d 772, 775 (1998). When determining whether the trial court properly ruled on a motion for summary judgment, this Court conducts a *de novo* review. *Va. Electric and Power Co. v. Tillett*, 80 N.C. App. 383, 385, 343 S.E.2d 188, 191, *cert. denied*, 317 N.C. 715, 347 S.E.2d 457 (1986). There is no dispute as to the facts in the instant case; therefore, our analysis is confined to issues of law.

Discussion of the Issues

I. The applicability of Article IX, Section 7 of the North Carolina Constitution to High Point's Red Light Camera Program

[1] Article IX, Section 7 controls the disposition of "penalties" and "fines" which are imposed for "breach[es] of the penal laws of the State." High Point contends that it has not imposed the type of penalty which falls under the ambit of this constitutional provision. We disagree.

Our Supreme Court has defined a penalty to be a sum collected under a "penal law[]," or a "law[] that impose[s] a monetary payment for [its] violation [where] [t]he payment is punitive rather than remedial in nature and is intended to penalize the wrongdoer rather than compensate a particular party." *Mussallam v. Mussallam*, 321 N.C. 504, 509, 364 S.E.2d 364, 366-67, *reh'g denied*, 322 N.C. 116, 367 S.E.2d 915 (1988). In the technical sense, "[a] 'fine' is the sentence pronounced by the court for a violation of the criminal law . . . ." *Board of Education v. Henderson*, 126 N.C. 689, 691, 36 S.E. 158, 159 (1900).

Our courts do not employ an "unduly restrictive" test to differentiate between fines and penalties:

> The heart of th[e] . . . distinction lies not in whether the monies are *denominated* "fines" or "penalties." [T]he label attached to the money does not control. Neither does the heart of the distinction rest in whether there has been an actual criminal prosecution resulting in a "sentence pronounced by the court." The crux of the distinction lies in the *nature* of the *offense* committed, and not in the *method* employed by the municipality to collect fines for commission of the offense.

Cauble v. Asheville, 301 N.C. 340, 344, 271 S.E.2d 258, 260 (1980) ("*Cauble II*") (citations omitted), *aff'g in part and rev'g in part*, 45 N.C. App. 152, 263 S.E.2d 8 (1980) ("*Cauble I*"). Thus, an assessment is a penalty or a fine if it is "imposed to deter future violations and to extract retribution from the violator" for his illegal behavior. *N.C. School Bds. Ass'n v. Moore*, 359 N.C. 474, 496, 614 S.E.2d 504, 517 (2005).

In large measure, High Point's argument to this Court is premised upon our Supreme Court's early Twentieth Century opinion in *Board of Education v. Henderson*, 126 N.C. [439] 689, 36 S.E. 158 (1900). In the *Henderson* case, the Vance County Board of Education sued the Town of Henderson seeking the proceeds of fines and penalties collected by the Town. *Id.* at 690-91, 36 S.E. at 158-59. In a decision predating the Court's subsequent declaration that no restrictive test should be employed to differentiate fines and penalties, the justices noted that

> [a] municipal corporation has the right, by means of its corporate legislation, commonly called town ordinances, to create offenses, and fix penalties for the violation of its ordinances, and may enforce these penalties by civil action; but it has no right to create criminal offenses. And this being so, it was found to be almost impossible to administer and enforce a proper police government in towns and cities by means of penalties alone. It therefore became necessary to make the violation of town ordinances . . .—a criminal offense—which was done by [section 14-4 of the General Statutes].

Id. at 691, 36 S.E. at 159. The Supreme Court drew a now somewhat outdated distinction between fines and penalties, and issued the following ruling:

> [A]ll the fines the [Town] has collected upon prosecutions for violations of the *criminal laws* of the State, whether for violations of *its ordinances* made criminal by section [14-4 of the General Statutes], or by other criminal statutes, such fines belong to the common school fund of the county. It is thus appropriated by the Constitution, and it can not be diverted or withheld from this fund without violating the Constitution. This is not so with regard to "penalties" which the [Town] may have sued for and collected out of offenders violating its ordinances. These are not penalties collected for the *violation of a law of the State*, but of a town ordinance. But wherever there was a fine imposed in a State pros-

> ecution for a misdemeanor under section [14-4] of the [General Statutes], it belongs to the school fund, and, as we have said, must go to that fund.

Id. at 692, 36 S.E. at 159; *see also School Directors v. Asheville*, 137 N.C. 503, 508-09, 50 S.E. 279, 281 (1905) ("It is settled that the Legislature may give to cities and towns the entire penalty incurred for the violation of ordinances to be recovered in a civil action, but when the State interposes and declares the violation of an ordinance a misdemeanor, the fine imposed for the criminal offense must go in the way directed by the Constitution.").

Eighty years after *Henderson*, the Supreme Court decided *Cauble II*, 301 N.C. 340, 271 S.E.2d 258 (1980). The *Cauble II* case involved a suit by citizens seeking to have the proceeds of the penalties imposed by the City of Asheville for overtime parking given to the public schools in accordance with Article IX, Section 7. After indicating that an "unduly restrictive" test should not be utilized to distinguish between penalties and fines, *id.* at 344, 271 S.E.2d at 260, the Court issued the following holding:

> The Asheville Code makes it unlawful to park overtime. [Section] 14-4 [of the General Statutes] specifically makes criminal the violation of a city ordinance, unless "the council shall provide otherwise" . . . . Thus, where, as here, the ordinances do not provide otherwise, a person who violates the overtime parking ordinance also breaches the penal law of the State. Consequently, fines collected for overtime parking constitute fines collected for a breach of the penal laws of the State. We, therefore, hold that the clear proceeds of all penalties, forfeitures and fines collected for breaches of the ordinances in question remain in Buncombe County and be used exclusively for the maintenance of free public schools.

Id. at 345, 271 S.E.2d at 261.

For the sake of clarity, we note that, in the *Henderson* and *Cauble* cases, section 14-4 of the General Statutes was the "penal law[] of the State" which triggered the operation of the Constitution. Pursuant to section 14-4, a person commits a misdemeanor if he "violate[s] an ordinance of a . . . city . . . sewerage district" and commits an infraction if he "violate[s] an ordinance of a . . . city . . . regulating the operation or parking of vehicles." N.C. Gen. Stat. §§ 14-4(a), (b) (2005). Unless a municipality provides otherwise, the

> violation of a city ordinance is a misdemeanor or infraction as provided by [section] 14-4. An ordinance may provide by express statement that the maximum fine, term of imprisonment, or infraction penalty to be imposed for a violation is some amount of money or number of days less than the maximum imposed by [section] 14-4.

N.C. Gen. Stat. § 160A-175(b) (2005).

In 2002, this Court decided the case of *Donoho v. City of Asheville*, 153 N.C. App. 110, 569 S.E.2d 19 (2002), *disc. reviews denied and cert. denied*, 356 N.C. 669, 576 S.E.2d 110 (2003). The *Donoho* case involved penalties under a local air pollution control program. The local program used penalties to enforce state environmental laws. *Id.* at 113-15, 569 S.E.2d at 21-22. When environmental laws were enforced by penalties imposed by the North Carolina Department of Environment and Natural Resources, the proceeds of the penalties were disposed of in accordance with Article IX, Section 7. *Id.* at 113, 569 S.E.2d at 21. However, when penalties were imposed under the local program, the proceeds were not given to the public schools. *Id.* at 115, 569 S.E.2d 22. This Court ruled that Article IX, Section 7 applied to the penalties assessed by the local program:

> It would be anomalous for violations of state-mandated air quality standards to result in civil penalties allocated to local school boards in all counties where the Commission enforces the state air pollution laws but a similar violation in the counties with local programs approved by the Commission experienced a different result. If such were the case, every county and local governmental unit could circumvent the state constitution by setting up a local air quality enforcement unit pursuant to state-delegated authority, and thereby develop a new revenue stream, while depriving the schools of funds directed to them by Article IX, Section 7 of the North Carolina Constitution.

Id. at 118, 569 S.E.2d at 24.

Finally, in 2005, our Supreme Court decided *North Carolina School Boards Association v. Moore*, 359 N.C. 474, 614 S.E.2d 504 (2005). *Moore* involved the applicability of Article IX, Section 7 to monies collected by the University of North Carolina campuses for violations of vehicle registration, traffic, and parking ordinances adopted by the board of trustees of the state's university system. *Id.* at 494, 614 S.E.2d at 516. The General Assembly authorized the board

of trustees to provide that the violation of one of its ordinances would " 'subject[] the offender to a civil penalty' " to be collected " 'by civil action in the nature of debt.' " *Id.* (quoting N.C. Gen. Stat. § 116-44.4(h) (2003)). If the system did not provide for such a penalty, then ordinance violations were nevertheless infractions punishable by a monetary penalty under section 116-44.4(g) of the General Statutes. *Id.* The university system did provide for the imposition of its own civil penalties and argued that "the payments collected [thereunder] by the constituent institutions for violation of parking, traffic, and vehicle registration ordinances [were] not civil penalties collected for a breach of the State's penal laws." *Id.* at 495, 614 S.E.2d at 517. In an analysis that mostly concerned the penal nature of the assessments at issue, the Supreme Court held that Article IX, Section 7 controlled the disposition of the funds. *Id.* at 497, 614 S.E.2d at 518.

The foregoing authorities establish, at the very least, that if money is collected for the transgression of both a municipal ordinance and a coordinate state statute, then the penal laws of our state are implicated and Article IX, Section 7 controls the disposition of the funds. Thus, in the instant case, the Constitution applies to the High Point red light camera program if the program exacts penalties for violations of the City's red light camera ordinance and also exacts penalties to enforce the penal laws of our state.

It is uncontested that the failure to observe a red stoplight is illegal by virtue of section 20-158(b)(2) of the General Statutes. Generally, section 20-158(b)(2) is enforced by statutory section 20-176(b), which makes a violation an infraction, punishable by a fine. When this method of enforcement is employed, section 20-158 is clearly a penal law of the state. *See ante*, slip op. at 13-14, —— N.C. App. at ——, —— S.E.2d at —— (discussing what constitutes a penal law); David M. Lawrence, *Fines Penalties, and Forfeitures: An Historical and Comparative Analysis*, 65 N.C.L. REV. 49, 81 (1986) ("A law that is enforced as an infraction is clearly a penal law. A monetary payment is imposed upon proof of its violation, and the penalty is clearly intended to be punitive rather than compensatory.").

Section 160A-300.1, which authorizes municipal red light camera programs, merely creates an alternative mechanism for enforcement of section 20-158(b)(2). Specifically, section 160A-300.1 delegates enforcement to municipalities, and decriminalizes violations of section 20-158(b)(2) by providing that "[n]otwithstanding the provisions

of [section] 20-176, in the event that a municipality adopts [a red light camera] ordinance . . . , a violation of [section] 20-158 shall not be an infraction" and by making red light camera violations "noncriminal violation[s] for which a civil penalty of fifty dollars ($50.00) shall be assessed." N.C. Gen. Stat. §§ 160A-300.1(c), (c)(2).

High Point Ordinance 10-1-306 establishes the red light camera program authorized by section 160A-300.1 of the General Statutes. High Point's ordinance implements a system for "capturing traffic control violations, as defined under [section] 20-158 [of the General Statutes]" with red light cameras, "us[ing] the photographic images as prima facie evidence of traffic violations," and having "the High Point Department of Transportation or an agent . . . issue civil citations" based on the photographs. HIGH POINT, N.C., CODE OF ORDINANCES § 10-1-306(a).

If a motorist fails to observe a red stoplight at an intersection at which High Point has placed a red light camera, that motorist undoubtedly has violated section 20-158(b)(2) of the General Statutes. If High Point punishes that motorist by imposing the civil penalty established by its red light camera ordinance, then High Point is enforcing a penal law of the state because the City is acting under the authority of section 160A-300.1 of the General Statutes, which provides for municipal civil enforcement of section 20-158. To hold otherwise would be to permit High Point to "circumvent the state constitution by setting up a local [penalty program] pursuant to state-delegated authority, and thereby develop a new revenue stream, while depriving the schools of funds directed to them by Article IX, Section 7 of the North Carolina Constitution." *Donoho*, 153 N.C. App. at 118, 569 S.E.2d at 24. Further, the fact that the violation results in a civil penalty rather than a fine for an infraction is irrelevant if we are to observe the Supreme Court's admonition to consider "the *nature* of the *offense* committed, and not . . . the *method* employed by the municipality to collect fines for commission of the offense." *Cauble II*, 301 N.C. at 344, 271 S.E.2d at 260. Whether red light violations are punished as infractions or by the assessment of civil penalties by High Point, monetary payments are nevertheless "imposed [ ] to deter future violations and to extract retribution from the violator" for a transgression of section 20-158 of the General Statutes. *Moore*, 359 N.C. at 496, 614 S.E.2d at 517.

It is immaterial that High Point's ordinance also makes running a red stoplight illegal by providing that

> [i]t shall be unlawful for a vehicle to cross the stop line at a system location when the traffic signal for that vehicle's direction of travel is emitting a steady red light, or for a vehicle to violate any other traffic regulation specified in [section] 20-158 [of the General Statutes].

HIGH POINT, N.C., CODE OF ORDINANCES § 10-1-306(b)(1). As the ordinance provision tacitly indicates, the violation it creates already exists by virtue of section 20-158. Accordingly, the money collected under the ordinance serves to punish transgressions of both local and state penal laws.

Our analysis is borne out by the uncontested evidence that High Point's enforcement of what it now alleges is an entirely municipal program remains largely unsegregated from the City's enforcement of state penal law. High Point's red light camera ordinance includes a provision for traditional enforcement:

> Any citation for a violation of [section] 20-158 [of the General Statutes] . . . issued by a duly authorized law enforcement officer at a [red light camera] system location shall be treated . . . as an infraction so long as the system photographic images are not used as prima facie evidence of the violation.

HIGH POINT, N.C., CODE OF ORDINANCES § 10-1-306(a). By the terms of the ordinance, the red light cameras are an alternative means for "capturing traffic control violations, as defined under [section] 20-158 [of the General Statutes]." *Id.* § 10-1-306(a). In both cases, the ultimate determination as to whether to issue a citation rests with a city police officer, who determines whether there has been a violation of section 20-158 of the General Statutes. *Ante*, slip op. at 7, —— N.C. App. at ——, —— S.E.2d at ——.

Finally, we note that there is no merit in High Point's argument that the penalties it collects do not accrue to the state. The reach of Article IX, Section 7 is limited to that portion of a penalty which accrues to the state; however, this mostly historical limitation has been construed to exempt only that portion of a penalty which is due a private citizen who has brought a private action to enforce state law, also known as a *qui tam* action. *See Donoho*, 153 N.C. App. at 117, 569 S.E.2d at 23 ("Several cases have held that the phrase 'accrue to the State' should be taken in the context in which it was developed—as opposed to being payable to a private party."); Lawrence, *supra*, 65 N.C.L. REV. at 70 (noting that the phrase "accrue to the State" is to be contrasted with funds collected in a *qui tam* action).

Accordingly, we hold that Article IX, Section 7 applies to the civil penalties assessed by High Point under its red light camera ordinance. The superior court's ruling to this effect must be affirmed.

II. The Amount of the "Clear Proceeds" Owed to the Board of Education Under Article IX, Section 7

[2] Article IX, Section 7 requires that the "clear proceeds" of all penalties, fines and forfeitures be "appropriated and used exclusively for maintaining free public schools." N.C. Const. Art. IX, § 7. "[T]he term 'clear proceeds' as used in Article IX, Section 7 is synonymous with net proceeds[,] . . . and . . . the costs of collection should be deducted from the gross proceeds of monies received for traffic violations in order to determine the net or 'clear proceeds.' " *Cauble v. Asheville*, 314 N.C. 598, 604, 336 S.E.2d 59, 63 (1985) ("*Cauble IV*"), *aff'g* 66 N.C. App. 537, 311 S.E.2d 889 (1984) ("*Cauble III*").

Our Supreme Court has characterized its cases interpreting the phrase "clear proceeds" as follows:

> In [*State v.*] *Maultsby* the Court stated that "[b]y 'clear proceeds' is meant the total sum *less only the sheriff's fees for collection, when the fine and cost[s] are collected in full.*" 139 N.C. [583, 585], 51 S.E. 956 [(1905)] (emphasis added). In *Hightower* [*v. Thompson*] the Court stated that "the 'clear proceeds' have been judicially defined as the amount of the forfeit *less the cost of collection, meaning thereby the citations and process against the bondsman usual in the practice.*" 231 N.C. 493-94, 57 S.E.2d 765 [1950] [emphasis added]. In *School Directors v. Asheville*, we emphasize the language "that the power of the Legislature is exhausted by giving to the clerk or sheriff a reasonable commission for collecting the fines—to be deducted from the amount before paying it over to the treasurer of the school fund." 137 N.C. at 511-12, 50 S.E. at 282.

Cauble IV, 314 N.C. at 605-06, 336 S.E.2d at 64. According to the Court,

> these cases indicate that the costs of collection do not include the costs associated with enforcing the ordinance but are limited to the administrative costs of collecting the funds. If . . . the costs of enforcing the penal laws of the State were a part of collection of fines imposed by the laws, there could never by any *clear proceeds* of such fines to be used for the support of the public schools. This would in itself contravene that portion of Article IX,

> Section 7 of the North Carolina Constitution which directs that clear proceeds of penalties, forfeitures and fines collected for any breach of the penal laws of the State shall be applied to the public schools. We do not believe that the framers of our Constitution intended such a result. Conversely it would be an impractical and harsh rule to deny municipalities the reasonable costs of collections.

Id. at 606, 336 S.E.2d at 64.

Article IX, Section 7 "is not self-executing"; therefore, the General Assembly may "specify[] how the provision's goals are to be implemented." *Moore*, 359 N.C. at 512, 614 S.E.2d at 527; *see also* Lawrence, *supra*, 65 N.C.L. REV. at 74 ("[I]t is implicit in the North Carolina cases and consistently upheld in other states [with a constitutional provision comparable to Article IX, Section 7] that the general assembly does have the power to define those collection related costs that are deductible."). In exercise of this authority, the Legislature has enacted section 115C-437 of the General Statutes:

> The clear proceeds of all penalties and forfeitures and of all fines collected for any breach of the penal laws of the State, as referred to in Article IX, Sec[tion] 7 of the Constitution, shall include the full amount of all penalties, forfeitures or fines collected under authority conferred by the State, diminished only by the actual costs of collection, not to exceed ten percent (10%) of the amount collected.

N.C. Gen. Stat. § 115C-437 (2005).

High Point argues that the portion of the penalties it paid to Peek and the fees it paid to the appeal hearing officers should be deducted to determine the "clear proceeds" of its red light camera program. This assertion is nonsensical, as these expenditures clearly constitute enforcement costs rather than collection costs. The payments to Peek accomplish enforcement of the traffic laws in much the same way as paying police officers for traditional enforcement, and the payment of the appeal hearing officers is comparable to the payment of judges who preside over traditional infraction hearings. As the costs of employing police and judges are not deducted to determine the clear proceeds of a penalty, *ante*, slip op. at 24, —— N.C. App. at ——, —— S.E.2d at —— (citing *Cauble IV's* discussion of enforcement costs versus collection costs), High Point may not deduct its analogous enforcement costs.

High Point also argues that the General Assembly did not intend for the ten percent formula of section 115C-437 to apply in determining the clear proceeds of red light camera penalties. As the City notes, the statute which enables red light cameras in High Point and approximately two dozen other cities does not state that the clear proceeds of the camera program must go to the schools, but the statutes which specifically authorize red light cameras in the City of Concord and in the County of Wake do direct that the clear proceeds of those local programs be paid to the schools. *Contrast* N.C. Gen. Stat. § 160A-300.1 *with* 2001 N.C. Sess. Laws ch. 286, §§ 3, 4, *as amended by* 2003 N.C. Sess. Laws ch. 380, §§ 3, 4. Further, High Point notes that the Concord and Wake County statutes provide a different definition for the phrase "clear proceeds," to wit: "the funds remaining after paying for the lease, lease purchase, or purchase of the traffic control photographic system; paying a contractor for operating the system; and paying any administrative costs incurred by the municipality related to the use of the system." 2001 N.C. Sess. Laws ch. 286, §§ 3, 4, *as amended by* 2003 N.C. Sess. Laws ch. 380, §§ 3, 4.

However, we are unpersuaded that the laws which, by their terms, are limited in applicability to the red light camera programs in Concord and Wake have any bearing on the definition of "clear proceeds" by which High Point is bound. As indicated in section I of our discussion, the clear proceeds of the penalties collected by High Point's red light camera program must be paid to the Guilford County Board of Education. Further, the General Assembly's 2001 enactment concerning Concord and Wake makes it clear that the Legislature feels it has the authority to clarify the meaning of clear proceeds in the context of red light camera programs. As the General Assembly has not made a new definition applicable to High Point, we must conclude that the City is bound by the definition of clear proceeds set forth in section 115C-437 of the General Statutes.

High Point finally argues that, even if applicable, section 115C-437 cannot limit its collection costs to ten percent of the amount of the penalties collected because this limitation runs afoul of the flexible test for determining the costs of collection established by the Supreme Court in *Cauble IV*. The *Cauble IV* decision, which predated the enactment of section 115C-437, affirmed this Court's reversal of a superior court order disallowing Asheville's attempt to withhold penalty collection costs from the local school board. *Cauble IV*, 314 N.C. at 605-06, 336 S.E.2d at 64. In reaching this decision, the Supreme Court held that the Constitution was not so "impractical and

harsh" as to "deny municipalities the reasonable costs of collections." *Id.* at 606, 336 S.E.2d at 64. Read closely and in context, *Cauble IV* stands for the proposition that Article IX, Section 7 allows localities to retain their reasonable collection costs; however, the decision stops far short of declaring a constitutional mandate that local governments receive the entirety of their collection expenses.

Our courts "give[] acts of the General Assembly great deference, and a statute will not be declared unconstitutional under our Constitution unless the Constitution clearly prohibits that statute." *In re Spivey*, 345 N.C. 404, 413, 480 S.E.2d 693, 698 (1997). In conducting such an analysis, our Constitution will be given an interpretation " 'based upon broad and liberal principles designed to ascertain the purpose and scope of its provisions.' " *Moore*, 359 N.C. at 513, 614 S.E.2d at 527 (quoting *Elliott v. State Bd. of Equalization*, 203 N.C. 749, 753, 166 S.E. 918, 920-21 (1932)). Further, "the General Assembly's actions in . . . implement[ing] [Article IX, Section 7] must be held to be constitutional unless the statutory scheme runs counter to the plain language of or the purpose behind Article IX, Section 7." *Id.* at 512, 614 S.E.2d at 527.

As already indicated, the plain language of Article IX, Section 7 states that the clear proceeds of applicable penalties, fines, and forfeitures "shall belong to and remain in the several counties, and shall be faithfully appropriated and used exclusively for maintaining free public schools." This language is unequivocal as to its drafters' intent to benefit the public schools as opposed to city treasuries. We conclude that the statutory limitation on a municipality's ability to withhold collection costs, as codified by section 115C-437 of the General Statutes, comports with the language of Article IX, Section 7. We likewise conclude that *Cauble IV* does not require a contrary result.

Accordingly, the superior court did not err by using section 115C-437 to determine the amount of the clear proceeds earned by High Point's red light camera program. Further, the superior court correctly applied section 115C-437 to determine that High Point must pay ninety percent of the amount collected by its red light camera program to the Guilford County Board of Education. With regard to this issue, the challenged summary judgment must be affirmed.

III. The Applicability of Post-Judgment Interest to the Judgment Against High Point

[3] Section 24-5 of the General Statutes provides that,

> [i]n an action other than contract, any portion of a money judgment designated by the fact finder as compensatory damages bears interest from the date the action is commenced until the judgment is satisfied. Any other portion of a money judgment in an action other than contract, except the costs, bears interest from the date of entry of judgment . . . until the judgment is satisfied. Interest on an award in an action other than contract shall be at the legal rate.

N.C. Gen. Stat. § 24-5(b) (2005). This statute does not operate against the state because "interest may not be awarded against the State unless the State has manifested its willingness to pay interest by an Act of the General Assembly or by a lawful contract to do so." *Yancey v. Highway Commission*, 222 N.C. 106, 109, 22 S.E.2d 256, 259 (1942) (holding that the predecessor of the Department of Transportation could not be ordered to pay post-judgment interest because it was an unincorporated agent of the state). High Point argues that "[b]ecause [s]ection 24-5 cannot be used to impose interest against the State, and because counties and cities are political subdivisions of the State, it follows that [s]ection 24-5 cannot be used to impose interest against a county or city acting in its sovereign capacity." We agree.

In holding that post-judgment interest cannot run against the state absent a statutory declaration to the contrary, our Supreme Court noted that " 'it is a known and firmly established maxim that general statutes do not bind the sovereign unless expressly mentioned in them. Laws are *prima facie* made for the government of the citizen and not of the State itself.' " *Id.* at 110, 22 S.E.2d at 260. This maxim has also been applied in favor of the political subdivisions of the state. *See O'Berry, State Treasurer v. Mecklenburg County*, 198 N.C. 357, 363, 151 S.E. 880, 884 (1930) ("[G]eneral statutes do not bind the sovereign unless the sovereign is expressly mentioned. . . . [T]he General Assembly did not intend to include governmental agencies within the [statutory definition at issue].").

Indeed, the political subdivisions of the state are "exempt . . . from the running of time limitations unless the pertinent statute expressly includes the State" so long as the function at issue is governmental, not proprietary. *Rowan County Bd. of Education v. U.S. Gypsum Co.*, 332 N.C. 1, 8-9, 418 S.E.2d 648, 653-54 (1992). "[A]n analysis of the various activities that th[e] Court has held to be proprietary in nature reveals that they involved a *monetary charge* of some type," such as providing water and sewer services

to municipal citizens. *Sides v. Hospital*, 287 N.C. 14, 22, 213 S.E.2d 297, 302 (1975) (citing *Foust v. Durham*, 239 N.C. 306, 79 S.E.2d 519 (1954)). "[A]ll of the activities held to be governmental functions by th[e] Court are those historically performed by the government, and which are not ordinarily engaged in by private corporations," such as the "installation and maintenance of traffic light signals." *Id.* at 23, 213 S.E.2d at 303 (citing *Hamilton v. Hamlet*, 238 N.C. 741, 78 S.E.2d 770 (1953)).

We conclude that the same rule that applies to general statutes of limitation should obtain in the case of general interest statutes. Thus, absent a legislative provision to the contrary, a municipality should not be ordered to pay interest pursuant to a general interest statute where the issue which has been litigated involves a governmental function of the municipality.

In the present case, High Point was sued for enforcing state and municipal traffic laws and for its management of the proceeds collected for violations. These functions were governmental such that, under the foregoing analysis, the general post-judgment interest provisions of section 24-5 of the General Statutes did not apply to any judgment against the City.

Accordingly, the superior court erred by ordering High Point to pay post-judgment interest in this case. The interest portion of the superior court's judgment is vacated.

Conclusion

The superior court properly ruled that Article IX, Section 7 requires the clear proceeds of High Point's red light camera program to be paid to the Board of Education, and properly determined the amount of the clear proceeds due to the Board. However, the trial court erred by ordering High Point to pay post-judgment interest on the award. Therefore, the challenged judgments are

Affirmed in part; vacated in part.

Judges ELMORE and LEVINSON concur.

STATE OF NORTH CAROLINA v. BRETT CHARLES BROWNING

No. COA05-831

(Filed 16 May 2006)

1. Rape— statutory—mistake of age—strict liability

There was no error in a statutory rape prosecution in the denial of defendant's requested jury instruction on reasonable mistake of fact as to the victim's age. Statutory rape is a strict liability crime and defendant's requested instruction was not supported by the law of North Carolina. *Lawrence v. Texas*, 539 U.S. 558, by its own language does not involve minors, and policy arguments about the appropriateness of strict liability are more appropriately addressed to the General Assembly.

2. Evidence— guidance counselor—truthfulness of statutory rape victim—corroboration—harmless error

Any error was harmless in a statutory rape prosecution where a guidance counselor testified that she believed the victim's account of the rape. The testimony was admitted for corroboration, in the context of a guidance counselor who was required to report abuse to social services. Any error was harmless because statutory rape is a strict liability crime and defendant admitted that he had sex with the victim.

3. Evidence— prior crimes or bad acts—deferred prosecution—false statements

There was no error in a statutory rape prosecution in the admission of defendant's testimony about a prior theft which was the subject of a deferred prosecution. The State limited its inquiry to defendant's false statements to the police, and did not ask him about a conviction which had been expunged or offer extrinsic evidence of his false statements. Moreover, any error was harmless, because defendant admitted having sex with the victim.

Appeal by defendant from judgment entered 26 January 2005 by Judge Edwin G. Wilson, Jr. in Superior Court, Randolph County. Heard in the Court of Appeals 22 March 2006.

Attorney General Roy Cooper, by Assistant Attorney General Jane Rankin Thompson, for the State.

Rudolf Widenhouse & Fialko, by M. Gordon Widenhouse Jr., for defendant-appellant.

McGEE, Judge.

Brett Charles Browning (defendant) was convicted of (1) statutory rape in violation of N.C. Gen. Stat. § 14-27.7A(a) and (2) taking indecent liberties with a child in violation of N.C. Gen. Stat. § 14-202.1. Defendant was acquitted of a charge of crime against nature. The trial court sentenced defendant to a term of 144 months to 182 months in prison. Defendant appeals.

At trial, A.R. testified that she was fourteen years old when she met defendant at his place of employment in the fall of 2002. She testified that when she met defendant, she told him she was fourteen years old. A.R. and defendant began a friendship and regularly "hung out" at defendant's house three to four times a month.

A.R. testified she called defendant on Friday, 5 March 2004, when she was fifteen years old, and that defendant picked her up at her house. A.R. and defendant drove to an ABC store and defendant purchased liquor. A.R. and defendant ate at a McDonald's restaurant and, afterwards, went to defendant's house.

A.R. testified that at defendant's house, she played video games and began to watch a movie with defendant. She drank two shots of liquor and ate pizza with defendant. After a while, A.R. lay down on a couch and fell asleep. When she woke up, defendant was kissing her on her face, neck and arms. A.R. told defendant to take her home, but defendant said he would not take her home "until [it was] over." A.R. testified that defendant then nudged her into a bedroom and engaged in oral and vaginal sex with her.

A.R. testified that on the following Monday, 8 March 2004, she got into an argument at school with three other students and was sent to see the guidance counselor, Linda Thrift (Ms. Thrift). A.R. told Ms. Thrift that she had been raped on the previous Friday by defendant, a man in his thirties.

Ms. Thrift testified she was a guidance counselor and in 2004, had worked at the school A.R. attended. Ms. Thrift testified she met with A.R. on Monday, 8 March 2004. The State introduced into evidence Ms. Thrift's written statement regarding her conversation with A.R. The trial court admitted the statement and advised the jury that the statement was admitted for the purpose of corroboration only. Ms. Thrift read from her written statement that A.R. "told me she was raped the previous Friday night by a man who was in his thirties."

Ms. Thrift further testified that she reported the rape to the Department of Social Services and to the school's resource officer. In response to the State's question regarding what Ms. Thrift told the school resource officer, Ms. Thrift testified as follows:

> A. I didn't have to go into much. I—In a case like this, I'm not going to go into details because that's not something I have to know about. All I have to know, have a suspicion that something happened and it was not right. And I—
>
> Q. Okay. Well, let me ask you then, are you law enforcement?
>
> A. No.
>
> Q. Why didn't you ask for more details about what happened?
>
> A. Because I didn't need to know that. The—That's—I don't do the investigation. All I have to have is a suspicion that something happened, and [A.R.'s] behavior and the way [A.R.] was acting and just knowing [A.R.], I believed what [A.R.] was saying.
>
> [DEFENSE COUNSEL]: Object, Your Honor, please. Move to strike.
>
> THE COURT: Overruled.

Defendant testified on his own behalf at trial. Defendant testified that A.R. told him she was sixteen years old when he first met her. Defendant further testified that when he met A.R., she asked him if she could drive his car. Defendant asked A.R. if she had a driver's license and A.R. showed defendant a New York driver's license with her picture on it. Defendant testified that he saw A.R. purchase cigarettes on several occasions. Defendant said he was led to believe that A.R. was a senior in high school in 2004. Defendant admitted that he engaged in oral and vaginal sex with A.R. on 5 March 2004, and that he was forty-two years old at the time.

On cross-examination of defendant, the State engaged in the following inquiry regarding an incident unrelated to the charges for which defendant was on trial:

> Q. Yes, sir. . . . You remember Detective Thompson?
>
> A. Yes, sir.
>
> Q. Okay. And Detective Thompson asked you on three separate occasions if you knew anything about the thefts of electronic equipment from [defendant's place of employment]?

A. I don't remember.

Q. And do you—You've never seen him before?

A. I said I'd seen him before, yes, but I don't recollect him asking me on three separate occasions.

Q. Okay. Well, how many times did he ask you if you [knew] anything about the thefts from [defendant's place of employment]?

A. He did ask me about that, yes.

Q. And that was the theft of electronic equipment of the store that you were the manager, is that right?

A. Not electronic equipment, it was a single camera.

Q. Oh, it was just one thing. He just asked you about one thing?

A. Yes, sir.

Q. And you lied to him?

A. Yes, sir.

Q. And then you later admitted to him that you lied to him?

A. I don't remember ever saying I lied to him. I admitted a full confession.

Q. You admitted stealing the items from [defendant's place of employment]?

A. Yes.

Q. Okay. No further questions. Thank you, sir.

Based upon evidence showing that defendant believed A.R. was over the age of fifteen when he engaged in sexual relations with her, defendant requested a jury instruction regarding the defense of a reasonable mistake of fact as to A.R.'s age. The requested instruction stated as follows:

> The [d]efendant contends that he was acting under the reasonable belief that the complaining witness was greater than 15 years of age. If you find from the evidence that the [d]efendant acted under a reasonable belief that the complaining witness in this case was greater than fifteen (15) years of age at the time the [d]efendant and the witness engaged in vaginal intercourse, it would be your duty to find the [d]efendant not guilty. If the facts

> were as the defendant honestly believed them to be, the defendant's conduct would not be criminal.

The trial court denied defendant's request and did not give defendant's requested instruction.

I.

[1] Defendant first argues the trial court erred by denying his requested jury instruction on reasonable mistake of fact as to A.R.'s age. Defendant relies upon the United States Supreme Court's decision in *Lawrence v. Texas*, 539 U.S. 558, 156 L. Ed. 2d 508 (2003). Defendant specifically argues in his brief that although *Lawrence* "does not prevent the criminalization of sexual conduct with minors, . . . *Lawrence* supports a mistake of age claim because a defendant's reasonable belief that his partner fell outside the age restriction would entitle him to constitutional protection." Defendant further explains that this "result attends because [a defendant] would not have the requisite *mens rea* or criminal intent necessary to justify punishment."

A trial court must give a jury instruction requested by a defendant, at least in substance, if that instruction is proper and supported by the evidence. *State v. Craig*, 167 N.C. App. 793, 795, 606 S.E.2d 387, 388 (2005). However, " '[t]he proffered instruction must . . . contain a correct legal request and be pertinent to the evidence and the issues of the case.' " *Id.* (quoting *State v. Scales*, 28 N.C. App. 509, 513, 221 S.E.2d 898, 901, *disc. review denied*, 289 N.C. 619, 223 S.E.2d 395 (1976)). A trial court, in its discretion, may refuse to give a legally erroneous instruction. *Craig*, 167 N.C. App. at 795, 606 S.E.2d at 388.

In the present case, defendant's requested instruction was not supported by the law of our State. N.C. Gen. Stat. § 14-27.7A(a) (2005) directs as follows:

> A defendant is guilty of a Class B1 felony if the defendant engages in vaginal intercourse or a sexual act with another person who is 13, 14, or 15 years old and the defendant is at least six years older than the person, except when the defendant is lawfully married to the person.

Statutory rape, under N.C.G.S. § 14-27.7A is a strict liability crime. *State v. Sines*, 158 N.C. App. 79, 84, 579 S.E.2d 895, 899, *cert. denied*, 357 N.C. 468, 587 S.E.2d 69 (2003). "Criminal *mens rea* is not an ele-

ment of statutory rape." *State v. Ainsworth*, 109 N.C. App. 136, 145, 426 S.E.2d 410, 416 (1993) (citing *State v. Rose*, 312 N.C. 441, 445, 323 S.E.2d 339, 342 (1984)). In *State v. Anthony*, 133 N.C. App. 573, 516 S.E.2d 195 (1999), *aff'd*, 351 N.C. 611, 528 S.E.2d 321 (2000), our Court held that mistake of fact is no defense to statutory rape. *Id.* at 579, 516 S.E.2d at 199. "[I]t is clear the manifest intent of the legislature was for § 14-27.7A to protect children in the three full years following age twelve." *State v. Roberts*, 166 N.C. App. 649, 652, 603 S.E.2d 373, 375 (2004), *disc. review denied*, 359 N.C. 325, 611 S.E.2d 843 (2005).

Moreover, we do not agree with defendant's contention that *Lawrence* has "altered the legal landscape" regarding the availability of a mistake of fact defense to statutory rape. In *Lawrence*, the United States Supreme Court declared unconstitutional a Texas law banning homosexual sodomy and recognized that private, consensual sexual activity between adults is constitutionally protected conduct under the due process clause of the Fourteenth Amendment. *Lawrence*, 539 U.S. at 578-79, 156 L. Ed. 2d at 525-26. However, the Supreme Court specifically limited its holding as follows:

> The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle.

Id. at 578, 156 L. Ed. 2d at 525.

Our Court has consistently refused to apply *Lawrence* to prosecutions for sexual crimes involving minors. In *State v. Whiteley*, 172 N.C. App. 772, 616 S.E.2d 576 (2005), our Court stated that in light of the *Lawrence* Court's express exclusion of minors from its holding, "state regulation of sexual conduct involving minors . . . falls outside the boundaries of the liberty interest protecting personal relations and is therefore constitutionally permissible." *Id.* at 777, 616 S.E.2d at 580. Therefore, out Court concluded that our State's regulation of sexual conduct involving minors remains constitutional after *Lawrence*. *Id.* at 777, 616 S.E.2d at 580.

In *State v. Oakley*, 167 N.C. App. 318, 605 S.E.2d 215 (2004), *disc. review denied*, 359 N.C. 285, 610 S.E.2d 386 (2005), the defendant was convicted of two counts of sexual activity by a substitute parent. *Id.* at 319, 605 S.E.2d at 217. At trial, the State introduced, over the defendant's objection, fifteen photographs of men taken from the defendant's home. *Id.* at 320, 605 S.E.2d at 217. The defendant argued that, in light of *Lawrence*, the photographs which showed the defendant to be homosexual were grossly prejudicial. *Id.* at 321, 605 S.E.2d at 218. Our Court rejected this argument, holding that "Lawrence's recognition of autonomy and personal choice within consensual adult relationships does not offer constitutional protection to evidence presented in a charge of criminally prohibited activity with minors, as in the case *sub judice*." *Id.* at 322, 605 S.E.2d at 218.

In *State v. Clark*, 161 N.C. App. 316, 588 S.E.2d 66 (2003), *disc. review denied*, 358 N.C. 157, 593 S.E.2d 81 (2004), the defendant was convicted of statutory rape. *Id.* at 317, 588 S.E.2d at 66. Relying upon *Lawrence*, the defendant argued that N.C.G.S. § 14-27.7A(a) violates equal protection because it exempts married couples. *Id.* at 320-21, 588 S.E.2d at 68. Our Court rejected the defendant's argument on the basis of the *Lawrence* Court's express exclusion of prosecutions involving minors. *Id.* at 321, 588 S.E.2d at 68-69.

While *Whiteley*, *Oakley*, and *Clark* did not involve the propriety of a mistake of fact defense to statutory rape after *Lawrence*, we find these cases, in conjunction with *Lawrence*, to be controlling. Moreover, defendant has not cited, nor has our research revealed, any case in which a State court has recognized a mistake of fact defense to statutory rape on the basis of *Lawrence*. Only seven states recognize some version of a mistake of fact defense to statutory rape, all of which did so before *Lawrence* was decided. *See State v. Ballinger*, 93 S.W.3d 881 (Tenn. Crim. App. 2001); *Lechner v. State*, 715 N.E.2d 1285 (Ind. App. 1999); *Perez v. State*, 803 P.2d 249 (N.M. 1990); *State v. Dodd*, 765 P.2d 1337 (Wash. Ct. App. 1989); *State v. Jalo*, 696 P.2d 14 (Or. Ct. App. 1985); *State v. Guest*, 583 P.2d 836 (Alaska 1978); *People v. Hernandez*, 393 P.2d 673 (Cal. 1964); *see also*, Colin Campbell, Annotation, *Mistake or Lack of Information as to Victim's Age as Defense to Statutory Rape*, 46 A.L.R.5th 499 (1997).

Defendant also makes several policy arguments in support of his contention that strict liability is inappropriate in the context of statutory rape. Defendant argues that the *mens rea* requirement is a fun-

damental principle of criminal jurisprudence and that strict liability criminal offenses are only acceptable for public welfare crimes involving little or no potential incarceration. Defendant further argues that strict liability is inappropriate because of the severe penalties and stigmatization accompanying convictions for statutory rape. However, these arguments, as well as defendant's argument that "North Carolina should move to a more reasonable position with regard to statutory rape[,]" are more appropriately addressed to the legislative branch of government, our General Assembly, which makes policy for our State. *See State v. Arnold*, 147 N.C. App. 670, 673, 557 S.E.2d 119, 121 (2001), *aff'd per curiam*, 356 N.C. 291, 569 S.E.2d 648 (2002) (noting that while courts may analyze the constitutionality of a statute, the General Assembly is the policy-making branch of the State); *see also*, *Clark*, 161 N.C. App. at 319, 588 S.E.2d at 67 (recognizing that although statutory rape "does carry a very severe punishment for an offense not requiring proof of force or a lack of consent, this is an issue for the legislature and not the courts").

For the reasons stated above, we overrule defendant's assignments of error grouped under this argument.

II.

[2] Defendant next argues the trial court committed reversible error by allowing Ms. Thrift to testify that she believed A.R.'s account of the rape. Defendant argues Ms. Thrift gave impermissible expert testimony regarding A.R.'s credibility. We review this issue *de novo*. *See State v. Bell*, 164 N.C. App. 83, 87-88, 594 S.E.2d 824, 826-27 (2004). We must also determine whether any error should result in a new trial. *See* N.C. Gen. Stat. § 15A-1443(a) (2005).

It is well settled that an expert witness may not testify "to the effect that a prosecuting witness is believable, credible, or telling the truth[.]" *State v. Bailey*, 89 N.C. App. 212, 219, 365 S.E.2d 651, 655 (1988); *see also*, *State v. Aguallo*, 318 N.C. 590, 350 S.E.2d 76 (1986). N.C. Gen. Stat. § 8C-1, Rule 608(a) (2005) states that "[t]he credibility of a witness may be attacked or supported by evidence in the form of reputation or opinion as provided in Rule 405(a)[.]" Rule 405(a) states that "[e]xpert testimony on character or a trait of character is not admissible as circumstantial evidence of behavior." In *Aguallo*, our Supreme Court recognized that the phrase "as provided in Rule 405(a)" was inserted into Rule 608(a) "to make clear that expert tes-

timony on the credibility of a witness is not admissible." *Aguallo*, 318 N.C. at 598, 350 S.E.2d at 81.

Defendant relies upon *State v. Hannon*, 118 N.C. App. 448, 455 S.E.2d 494 (1995). In *Hannon*, the defendant was convicted of taking indecent liberties with a "fifteen-year-old trainable mentally handicapped student at South Park High School." *Id.* at 448, 455 S.E.2d at 495. At trial, the State called an assistant principal at the high school to testify as an expert. *Id.* at 449, 455 S.E.2d at 495. Although the assistant principal had not been tendered as an expert at the time of her testimony, the assistant principal was later tendered and accepted as an expert in mental retardation and the behavior of mentally retarded children. *Id.* at 450, 455 S.E.2d at 495-96. The State asked the assistant principal to give her opinion as to the victim's truthfulness or untruthfulness, and the assistant principal testified that the victim was truthful. *Id.* at 449, 455 S.E.2d at 495. The assistant principal further testified that, based upon the victim's behavior, she could tell when the victim was telling the truth and when the victim was lying. *Id.* at 449-50, 455 S.E.2d at 495.

In *Hannon*, our Court found it was error to admit the assistant principal's testimony, whether the testimony was viewed as an opinion that the victim told the truth on that particular occasion, or whether the testimony was viewed as an expert opinion regarding the victim's credibility. *Id.* at 450, 455 S.E.2d at 496. Our Court further stated: "In this case there was no evidence of sexual intercourse other than the [victim's] testimony. Therefore, [the victim's] credibility was of critical importance." *Id.* at 451, 455 S.E.2d at 496. Thus, our Court found that the assistant principal's testimony regarding the victim's credibility amounted to plain error. *Id.*

Unlike in *Hannon*, Ms. Thrift was not tendered as an expert. Although it is true that a witness can testify as an expert without having been tendered as an expert, *see State v. Greime*, 97 N.C. App. 409, 413, 388 S.E.2d 594, 596 (1990), we do not find this occurred in the present case. Ms. Thrift was not questioned regarding her education and experience, nor was she asked for her opinion regarding A.R.'s credibility. Ms. Thrift testified that she believed A.R.'s account of the rape in the context of her role as a guidance counselor who suspected that a child had been abused. *See* N.C. Gen. Stat. § 7B-301 (2005) (requiring any person or institution who suspects that a juvenile has been abused or neglected to report the case to the director of the department of social services in the county where the juvenile resides

or can be found). Moreover, Ms. Thrift's statement regarding her conversation with A.R. was admitted only for the purpose of corroboration and Ms. Thrift testified primarily as a corroboration witness.

Even assuming, *arguendo*, the trial court erred by allowing Ms. Thrift's testimony, defendant has not shown he was prejudiced by the testimony. Relying upon *State v. McMillan*, 55 N.C. App. 25, 284 S.E.2d 526 (1981), defendant argues that Ms. Thrift's testimony was prejudicial in the present case because the jury had acquitted defendant on a charge of crime against nature. *See Id.* at 33, 284 S.E.2d at 531 (finding that the jury's acquittal on one charge "takes on added significance" when determining whether error on another charge was prejudicial). However, in the present case, defendant admitted that he engaged in sexual intercourse with A.R. As we previously stated, statutory rape is a strict liability crime, the elements of which are sexual intercourse between a person who is thirteen, fourteen, or fifteen years old and a person who is at least six years older. *See* N.C.G.S. § 14-27.7A(a). Because defendant admitted he engaged in sexual intercourse with A.R., any error in admitting Ms. Thrift's testimony was not prejudicial. We overrule this assignment of error.

III.

[3] Defendant argues the trial court committed reversible error by allowing the State to impeach defendant regarding defendant's false statements about an offense which had been the subject of a deferred prosecution. We review this issue *de novo*. *See Bell*, 164 N.C. App. at 87-88, 594 S.E.2d at 826-27. We also determine whether any error should result in a new trial. *See* N.C.G.S. § 15A-1443(a).

N.C. Gen. Stat. § 8C-1, Rule 608(b) (2005) states as follows:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

Rule 609(a) provides that a witness' credibility may be attacked by evidence showing the witness has been convicted of certain crimes.

N.C. Gen. Stat. § 8C-1, Rule 609(a) (2005). However, Rule 609(c) directs that "[e]vidence of a conviction is not admissible under this rule if the conviction has been pardoned." N.C. Gen. Stat. § 8C-1, Rule 609(c) (2005). N.C. Gen. Stat. § 15A-146(a) (2005) states that when a person is charged with a crime, and the charge is later dismissed, the person may apply to a trial court for an order of expungement. N.C.G.S. § 15A-146(a) further states as follows:

> No person as to whom such an order has been entered shall be held thereafter under any provision of any law to be guilty of perjury, or to be guilty of otherwise giving a false statement or response to any inquiry made for any purpose, by reason of his failure to recite or acknowledge any expunged entries concerning apprehension or trial.

Defendant specifically argues that

> the prohibition on the use of [a] conviction for which a witness has been pardoned, *see* N.C. R. Evid. 609(c), in tandem with the prohibition in the expungement statute from using information about a person that has been removed from the record, *see* N.C. Gen. Stat. § 15A-146, means the prosecutor should not have been able to cross-examine [defendant].

However, in the present case, the State properly cross-examined defendant concerning prior false statements to police. As our Court held in *State v. Springer*, 83 N.C. App. 657, 351 S.E.2d 120 (1986), *disc. review denied*, 319 N.C. 226, 353 S.E.2d 410 (1987), a false swearing to a magistrate is a specific instance of conduct showing untruthfulness. *Id.* at 660, 351 S.E.2d at 122. Likewise, in the present case, defendant's false statements to police regarding the theft of a camera showed defendant's untruthfulness. The State did not ask defendant about a conviction which had been expunged. The State limited its inquiry to defendant's false statements.

Defendant also relies upon *State v. Seay*, 59 N.C. App. 667, 298 S.E.2d 53 (1982), *disc. review denied*, 307 N.C. 701, 301 S.E.2d 394 (1983) and *State v. Cook*, 165 N.C. App. 630, 599 S.E.2d 67 (2004). *In Seay*, the defendant was impeached by evidence of a crime for which he had been pardoned. *Seay*, 59 N.C. App. at 670, 298 S.E.2d at 55. North Carolina had not yet adopted Rule 609(c), which now prohibits such impeachment. Our Court noted that the Federal Rules of Evidence would not allow such cross-examination but found no

reversible error. *Id*. In the present case, defendant was not impeached by evidence of a conviction which had been expunged. Defendant was properly impeached regarding false statements he had made to police.

In *Cook*, the defendant was convicted of embezzlement. *Cook*, 165 N.C. App. at 632, 599 S.E.2d at 69. The trial court allowed the State to present extrinsic evidence during its case in chief that the defendant had previously embezzled money on another occasion. *Id*. at 635, 599 S.E.2d at 71. However, the defendant had completed the requirements of a deferred prosecution in regard to that incident and the charge had been dropped. *Id*. The defendant argued that the admission of the evidence violated Rule 404(b). *Id*. at 634, 599 S.E.2d at 70.

Our Court held that the trial court erred by admitting the evidence because the sole purpose of introducing the evidence was to attack the defendant's credibility. *Id*. at 636-38, 599 S.E.2d at 72-73. We also held that, by allowing the State to introduce extrinsic evidence regarding the prior, unrelated incident of embezzlement, "the trial court allowed the State to circumvent the strict limitations of Rules 608 and 609." *Id*. at 637, 599 S.E.2d at 72. Our Court recognized that Rule 608(b) does not allow the State to prove specific instances of conduct related to untruthfulness by extrinsic evidence. *Id*. at 636-37, 599 S.E.2d at 72. Under Rule 609, the State may not offer evidence of details underlying a conviction. *Id*. at 637, 599 S.E.2d at 72. Our Court did not hold that the evidence was inadmissible because the defendant had completed a deferred prosecution with respect to the unrelated charge.

In the present case, the State did not offer extrinsic evidence of defendant's false statements. The State, pursuant to Rule 608(b), inquired into defendant's false statements on cross-examination of defendant. *See* N.C.G.S. § 8C-1, Rule 608(b) (stating that specific instances of conduct of a witness, if probative of untruthfulness, may "be inquired into on cross-examination of the witness"). As discussed above, the State in the present case complied with the requirements of Rule 608(b).

Even assuming, *arguendo*, the trial court erred by allowing the State to cross-examine defendant regarding defendant's false statements, any error was harmless. As we stated in the previous section of this opinion, defendant admitted that he engaged in sexual intercourse with A.R. We overrule this assignment of error.

Defendant does not set forth arguments pertaining to his remaining assignments of error. We deem those assignments of error abandoned pursuant to N.C.R. App. P. 28(b)(6).

No error.

Judges McCULLOUGH and GEER concur.

TERESA SMITH GILREATH, Plaintiff v. NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, Defendant

No. COA05-940

(Filed 16 May 2006)

1. Appeal and Error— preservation of issues—no ruling on motion below

Plaintiff's failure to obtain a ruling on her motion to strike portions of affidavits resulted in the dismissal of her assignment of error on that point.

2. Evidence— affidavits not based on personal knowledge—fax cover sheet not a business record

The trial court erred by granting summary judgment for defendant in a declaratory judgment action concerning defendant's efforts to recover alleged on-call overpayments. The only evidence establishing the pay rate was from affidavits which could not have been based on personal knowledge, and a fax cover sheet which purports to summarize missing memos. There is nothing to establish that the facsimile cover page is a record of regularly conducted activity which would fall under the business records exception.

Judge Hunter concurring in part and dissenting in part.

Appeal by plaintiff from an order entered 3 June 2005 by Judge W. Russell Duke, Jr. in Granville County Superior Court. Heard in the Court of Appeals 22 February 2006.

Schiller & Schiller, PLLC, by David G. Schiller and Kathryn H. Schiller, for plaintiff-appellant.

Attorney General Roy Cooper, by Assistant Attorney General Angel E. Gray, for defendant-appellee.

BRYANT, Judge.

Teresa Smith Gilreath (plaintiff) appeals from an order entered 3 June 2005 granting summary judgment in favor of the North Carolina Department of Health and Human Services (defendant) and dismissing plaintiff's Complaint. The trial court found plaintiff was overpaid for her work for defendant and ordered plaintiff to repay $12,359.53 to the State of North Carolina. For the reasons below, we reverse the order of the trial court and remand for further proceedings.

Facts

Plaintiff is employed by defendant as an Advocate II, working at the Whitaker School located on the campus of John Umstead Hospital. Whitaker School is a separate entity from John Umstead Hospital and each facility has its own director. Beginning on or about 21 March 2001, plaintiff began receiving $2.00 per hour for on-call time she worked in her position at the Whitaker School. In August 2003, plaintiff was informed that there was a question as to whether or not she was being overpaid for her on-call time. On 25 June 2004, plaintiff received a letter from the Human Resources Director for John Umstead Hospital informing her that defendant had made a salary overpayment to her due to a miscalculation in her on-call pay rate and that she was required to repay the overpayment.

Procedural History

On 6 August 2004, plaintiff filed a complaint in this matter, seeking, *inter alia*, a declaratory judgment that she is the exclusive owner of the funds defendant seeks to recover from her. Defendant answered on 27 August 2004 and filed a motion for summary judgment on 28 April 2005. Defendant's motion for summary judgment was heard on 9 May 2005 in Granville County Superior Court, before the Honorable W. Russell Duke, Jr. On the same day as the hearing on defendant's motion, plaintiff filed a cross-motion for summary judgment and a motion to strike certain paragraphs from various affidavits filed by defendant in support of its motion for summary judgment. On 3 June 2005, the trial court entered an order granting defendant's motion for summary judgment and dismissing plaintiff's

complaint. The trial court found plaintiff was overpaid for her work for defendant and ordered plaintiff to repay $12,359.53 to the State of North Carolina. The trial court's order does not explicitly address either of plaintiff's motions. Plaintiff appeals.

Plaintiff raises two issues on appeal: (I) whether the trial court erred in failing to grant plaintiff's motion to strike; and (II) whether the trial court erred in granting defendant's, and denying plaintiff's, motion for summary judgment.

I

[1] Plaintiff first claims the trial court erred in failing to grant her motion to strike several paragraphs from affidavits submitted in support of defendant's motion for summary judgment. Plaintiff filed her motion to strike portions of the affidavits on the grounds that the affidavits failed to comply with the requirements of Rule 56 of the North Carolina Rules of Civil Procedure. However, the trial court's order granting defendant's motion for summary judgment does not address plaintiff's motion to strike and there is no indication in the record before this Court that the trial court otherwise ruled on plaintiff's motion to strike. Rule 10(b)(1) of the North Carolina Rules of Appellate Procedure provides that in order to preserve a question for appellate review, it is "necessary for the complaining party to obtain a ruling upon the party's request, objection or motion." N.C. R. App. P. 10(b)(1); *see also Finley Forest Condo. Ass'n v. Perry*, 163 N.C. App. 735, 738, 594 S.E.2d 227, 230 (2004) (holding the Court was unable to review an issue concerning the trial court's admission and consideration of affidavits since there was nothing in the record indicating the trial court's ruling on the plaintiff's objection and motion to strike). Because plaintiff failed to obtain a ruling on her motion to strike, this assignment of error is overruled.

II

[2] Plaintiff next argues the trial court erred in granting defendants' motion for summary judgment and in denying her own motion for summary judgment. Under Rule 56(c) of the North Carolina Rules of Civil Procedure, summary judgment shall be granted only if the trial court finds "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). "[I]n ruling on a motion for summary judgment the court does not resolve issues of fact and must deny the motion if there is any issue of genuine material fact." *Singleton v.*

Stewart, 280 N.C. 460, 464, 186 S.E.2d 400, 403 (1972) (citations omitted). "[T]he 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).

"On appeal, this Court has the task of determining whether, on the basis of the materials presented to the trial court, there is a genuine issue as to any material fact and whether the moving party is entitled to judgment as a matter of law." *Eckard v. Smith*, 166 N.C. App. 312, 318, 603 S.E.2d 134, 138 (2004) (citing *Oliver v. Roberts*, 49 N.C. App. 311, 314, 271 S.E.2d 399, 401 (1980)), *aff'd per curiam*, 360 N.C. 51, 619 S.E.2d 503 (2005). We review the trial court's grant of summary judgment *de novo*. *Shroyer v. County of Mecklenburg*, 154 N.C. App. 163, 167, 571 S.E.2d 849, 851 (2002).

The dispositive issue in this matter is whether there is evidence to support the trial court's determination no genuine issue of material fact exists concerning the rate at which plaintiff should have been paid for her on-call time. The trial court found as fact that plaintiff was employed as an Advocate II at the Whitaker School and that "Whitaker School established an on-call pay rate of $0.94 per hour for its eligible employees, including the Plaintiff." Based on this finding, the trial court held that plaintiff had been mistakenly compensated at a rate of $2.00 per hour for her on-call time, resulting in a net overpayment by defendant of $12,359.53. However, the only evidence as to the on-call pay rate for employees of the Whitaker School is found in the affidavits of Debbie Johnson, Michael Sinno, and Anna Bass, each of whom asserts that the Whitaker School had established an on-call pay rate of $0.94 per hour for plaintiff.

On-call pay for plaintiff and other eligible employees at the Whitaker School and John Umstead Hospital was provided under a pilot program initiated by defendant effective 1 December 2000. The authority to establish the on-call pay rate was vested under the pilot program with the individual divisions within the Department of Health and Human Services. For the Whitaker School it is apparent from the record that this authority was vested with the Whitaker School Management Team. There is no evidence that Johnson, Sinno, or Bass are members of the Whitaker School Management Team or were otherwise involved in the establishment of the on-call pay rate

for the Whitaker School. Therefore, any knowledge they have of the on-call pay rate can only be through a statement made by another, namely the Whitaker School Management Team. Each of the statements made by Johnson, Sinno and Bass establishing plaintiff's on-call pay rate in their affidavits, and in the exhibits submitted in support of their affidavits, are hearsay and are inadmissible to prove the on-call pay rate for employees at the Whitaker School. These statements should not have been considered by the trial court in ruling on defendant's motion for summary judgment.

Affidavits supporting or opposing a motion for summary judgment "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." N.C. Gen. Stat. § 1A-1, Rule 56(e) (2005). "Hearsay matters included in affidavits should not be considered by a trial court in entertaining a party's motion for summary judgment." *Moore v. Coachmen Indus. Inc.*, 129 N.C. App. 389, 394, 499 S.E.2d 772, 776 (1998). Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c) (2005).

Defendant does not address any hearsay concerns in its brief, but rather asserts that Johnson, Sinno and Bass had first-hand personal knowledge of plaintiff's on-call pay rate which is not hearsay. The dissent, however, creates an argument for defendant that Johnson, Sinno and Bass' personal knowledge of plaintiff's on-call pay rate was gathered from business records which fall under the "business records exception" to the hearsay rule.[1] We agree with the dissent that "[k]nowledge obtained from the review of records, qualified un-

1. Rule 803(6) of the North Carolina Rules of Evidence provides the following exception to the hearsay rule:

> Records of Regularly Conducted Activity.—A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

N.C. Gen. Stat. § 8C-1, Rule 803(6) (2005); *see also State v. Wilson*, 313 N.C. 516, 533, 330 S.E.2d 450, 462 (1985) ("Business records made in the ordinary course of business at or near the time of the transaction involved are admissible as an exception to the hearsay rule if they are authenticated by a witness who is familiar with them and the system under which they are made.").

der Rule 803(6), constitutes 'personal knowledge' within the meaning of Rule 56(e)." *Hylton v. Koontz*, 138 N.C. App. 629, 635, 532 S.E.2d 252, 256 (2000). However, "[i]f . . . the affiant obtained information from a written record and the record did not comply with requirements of the business records exception to the hearsay rule, this information would . . . not be based on the affiant's personal knowledge." *Id.* at 635 n.3, 532 S.E.2d at 257 n.3 (citations omitted).

The dissent cites to *Moore v. Coachmen Indus. Inc.*, 129 N.C. App. 389, 499 S.E.2d 772 (1998), in support of its contention that the affidavits in the instant case provide for the establishment of plaintiff's on-call pay rate as acquired through business records. However, in *Moore* the affiant specifically addressed the foundational requirements of establishing a document under the business records exception. The affiant in *Moore* stated:

> I am the Senior Corporate Attorney of [defendant Coachmen]. Prior to [defendant Sportscoach's] corporate dissolution in 1995, I held the same position with both [defendants] Sportscoach and Coachmen. I have custody and access to the business records of [defendant] Sportscoach relating to [plaintiffs'] vehicle[,] which is the subject of the instant action . . . .
>
> I am familiar with the system by which . . . Sportscoach records were generated. The entries in these records were made in the regular course of [defendant] Sportscoach's business[,] at or near the time of the events recorded[, and] based upon the personal knowledge of the person making them, or upon information transmitted by the person with knowledge.
>
> . . .
>
> It was the regular business practice of [defendant] Sportscoach to require the dealer to deliver and have signed the Warranty Registration and pre-delivery and acceptance declaration, and to deliver the Owners Manual and the New Recreational Vehicle Limited Warranty and other information about the Sportscoach warranty before or contemporaneously with the delivery and sale of the vehicle to the dealer's customer. That this practice was followed with respect to the sale of the vehicle to the plaintiffs is confirmed by plaintiff Luther Deleon Moore's signature, certifying that all warranties were clearly explained to him.

Id. at 395, 499 S.E.2d at 776. In the instant case, none of the affidavits address the foundational requirements for the admission of evidence

which would establish plaintiff's on-call pay rate through a "business record," and thus do not present personal knowledge setting forth facts admissible in evidence.

It is uncontested that Johnson is the Director of Human Resources for John Umstead Hospital, and that office provides human resources functions to plaintiff's employer, the Whitaker School. While her affidavit states the facts within are based on her personal knowledge, Johnson also states the following:

> 10. Effective December 1, 2000, DHHS received approval from the Office of State Personnel to participate in an On-Call Pilot Program. The Pilot Program provided that certain classes and/or specific positions were approved for on-call consideration. Advocate II positions were included in the list of positions approved for on-call pay if the employing entities chose to participate in the program. Pursuant to the pilot program, eligible employees may be compensated at a rate ranging from $0.94 per hour up to $2.00 per hour. *The decision about the applicable rate of on-call pay was determined by each individual division within DHHS.*
>
> 11. Pursuant to this pilot program, John Umstead Hospital established an on-call pay rate of $2.00 per hour for its eligible employees. Whitaker School established an on-call pay rate of $0.94 per hour for its eligible employees, including Ms. Gilreath.
>
> 12. I informed the Payroll Office of Whitaker School's decision to establish a $0.94 per hour on-call rate via facsimile on January 3 1, 2001. The document attached as Exhibit 7 is a fair and accurate copy of the facsimile I transmitted to Payroll on January 31, 2001 and bears my initials at the bottom.

(Emphasis added). The facsimile attached as Exhibit 7 to Johnson's affidavit is merely the cover page of a seven-page set of documents. According to the handwritten note on the cover page, "All these memos were sent to Payroll and Timekeeping to inform you of the rate changes. It is official @ JUH that Physicians make $5.00/hr and others are in the 1/8/01 memo. Whitaker and Town are still .94¢/hr. DSJ." None of the supporting memos mentioned in the fax cover sheet are included in the record before this Court and it appears none were submitted to the trial court for its review of this matter.

There is nothing in Johnson's affidavit to establish the foundation that the facsimile cover page is a record of regularly conducted activ-

ity which would fall under the business records exception to the hearsay rule, as required by Rule 803(6). At best, Johnson's affidavit could be interpreted to find that the missing memos following the facsimile cover page would so qualify, but those documents are not attached in support of the affidavit. Instead, Johnson relies on a handwritten note on a cover page that purports to summarize the contents of the missing memos. Thus, Johnson's written note on the facsimile cover page is hearsay and as that is the only support for Johnson's personal knowledge of the on-call rate for employee's at the Whitaker School, the cover page and her statements as to the on-call rate contained in her affidavit cannot be considered by the court when ruling on defendant's motion for summary judgment.

No other competent evidence exists in the record to support a finding that plaintiff's proper on-call pay rate was $0.94/hour and plaintiff offers no uncontested evidence, other than the fact of her actual payments, to establish her proper on-call pay rate. Therefore, a genuine issue of material fact exists as to the on-call pay rate to which plaintiff was entitled and, considering the facts on record, the trial court erred in granting defendant's motion for summary judgment. Further, as a genuine issue of material fact exists in this matter, the trial court did not err in not granting plaintiff's motion for summary judgment.

Reversed and remanded for further proceedings.

Judge HUDSON concurs.

Judge HUNTER concurs in part and dissents in part in a separate opinion.

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

Although I concur with the majority opinion that plaintiff failed to preserve her assignment of error as to the motion to strike, I respectfully dissent from the majority's holding that defendant's affidavits should have been excluded as hearsay.

As noted by the majority, the dispositive issue in this matter is whether an issue of material fact exists concerning the rate at which plaintiff should have been paid for her on-call time. The trial court found as fact that the pay rate for on-call employees of the Whitaker School, which included plaintiff, was set at $0.94 per hour. The find-

ing is based on the affidavit of Debbie Johnson ("Johnson"), the Director of Human Resources at John Umstead Hospital, and an exhibit attached to her affidavit.

The majority finds that the affidavit of Johnson, as well as those of two other affiants who stated that the pay rate for Whitaker was $0.94, do not appear to be based on personal knowledge, as they are not members of the Whitaker School Management Team and were not involved in the establishment of the pay rate. The majority thus concludes that such statements must be hearsay and therefore should not be considered by the trial court in a motion for summary judgment.

The North Carolina Rules of Civil Procedure state that affidavits in support of a motion for summary judgment "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." N.C. Gen. Stat. § 1A-1, Rule 56(e) (2005). This Court has held that when a Rule 56 affidavit does not specifically state that it is based on "personal knowledge," it may still be sufficient if its content and context show its material parts are founded on the affiant's personal knowledge. *Hylton v. Koontz*, 138 N.C. App. 629, 634, 532 S.E.2d 252, 256 (2000). We note that in the instant case it is unnecessary to consider the context and content in an attempt to determine if Johnson had personal knowledge. Unlike in *Hylton*, Johnson specifically averred personal knowledge of the contents of her affidavit.

Despite Johnson's averment of personal knowledge, however, the majority's analysis assumes that as Johnson did not herself set the rate, her knowledge of that information was not personal and must be hearsay. In *Moore v. Coachmen Industries, Inc.*, 129 N.C. App. 389, 499 S.E.2d 772 (1998), this Court held that "[t]he fact that an affiant's knowledge was gathered from business records or communications is not fatal to the Rule 56(e) requirement that an affidavit be based on the personal knowledge of the affiant." *Id.* at 394, 499 S.E.2d at 776. In *Moore*, the challenged affidavit was from a senior corporate attorney employed by the defendant who made statements regarding the business practices of the defendant with regards to warranties. The affiant in *Moore* stated that the vehicle sold to the plaintiff by a third-party dealer was covered by no warranty from the defendant other than the new vehicle limited warranty. Although the affiant had not personally handled the sale of the vehicle, since "[b]oth of the affidavits were made upon [the senior corporate attorney's] personal

knowledge, acquired through review of his employer's business records[,]" *Moore* found the affidavits to be competent evidence. *Moore*, 129 N.C. App. at 396, 499 S.E.2d at 777.

Here, similarly, Johnson averred that she was the Director of Human Resources for John Umstead Hospital and had previously been the Assistant Director of Human Resources. Johnson stated that the Umstead Human Resources office also provided human resources functions for the Whitaker School, including distribution of pay stubs to employees. Johnson stated that on 31 January 2001, she "informed the Payroll Office of Whitaker School's decision to establish a $0.94 per hour on-call rate via facsimile[.]" A copy of the facsimile, dated "1-31-01" was attached to Johnson's affidavit as Exhibit 7, and stated "[i]t is official . . . Whitaker & Town are still .94¢/hr[,]" followed by Johnson's initials. An additional exhibit, a memorandum to Institution Human Resources Managers from the Department of Health and Human Services, dated 22 May 2000, directs the human resource managers to determine eligibility for on-call pay and report the information to the Department. Here, in addition to Johnson's clear averment that the pay rate for Whitaker was within her personal knowledge, it is apparent that Johnson's review and reporting of business records for Whitaker provides an appropriate basis for her personal knowledge of that information. *See Moore*, 129 N.C. App. at 396, 499 S.E.2d at 777.

Moreover, Rule 56(e) states that:

> 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); *see also Brown v. City of Winston-Salem*, 171 N.C. App. 266, 275, 614 S.E.2d 599, 604-05 (2005) (holding summary judgment was properly granted when the plaintiff failed to file affidavits contradicting factual matters established by the defendant's affidavits).

I note that here, plaintiff, in her own motion for summary judgment, does not contest that the correct pay rate for Whitaker school was established at $0.94 per hour. Rather, plaintiff's own affidavit

states only that she was told that she would be paid "between $0.94 and $2.00/hour for my on-call time[,]" but does not aver that she was told she would be paid at the higher $2.00 per hour rate. Further, the letter included by plaintiff in support of her motion to dismiss from Ray Newman ("Newman"), the Director of the Whitaker School, also indicates that the pay rate was not, in fact, $2.00. The letter was dated 4 September 2003, more than two years after plaintiff began being paid for on-call time. Newman implied that the School Management team, after learning of the overpayment to plaintiff, had determined that in the future all clinical on-call staff at Whitaker should be paid the same $2.00 rate as the Umstead staff. Newman also acknowledged that he had also been overpaid for his on-call hours. Newman's letter indicates an acknowledgment by the Whitaker School that the initial pay rate established for on-call employees was not $2.00 an hour. Plaintiff fails to assert any factual basis for her claim that $0.94 was not the correct rate of pay for on-call Whitaker employees.

As the evidence in support of defendant's motion for summary judgment is competent, and as no material issue of fact exists as to the correct rate of on-call pay for plaintiff's position at the Whitaker school, the trial court's grant of summary judgment should be affirmed. *See Brown*, 171 N.C. App. at 275, 614 S.E.2d at 604-05.

RANDOLPH M. JAMES, P.C., PETITIONER v. BETTY W. LEMMONS AND EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA, RESPONDENTS

No. COA05-1219

(Filed 16 May 2006)

1. Unemployment Compensation— insurance benefits—misstatement in finding of fact

The trial court did not err in an unemployment insurance benefits case by allegedly rewriting or editing an appeals referee's finding of fact in violation of N.C.G.S. § 96-15(i), because: (1) the trial judge did not find additional or different facts, but simply corrected a misstatement of the word "all" by the appeals referee; and (2) the misstatement was of no consequence to the ultimate determination that claimant's discharge from employment was not due to substantial fault or misconduct in connection with the work.

2. Unemployment Compensation— insurance benefits—sufficiency of findings of fact

The trial court did not err in an unemployment insurance benefits case by finding there was competent evidence to support the Employment Security Commission's findings that claimant's absenteeism from work was due to her medical condition, because: (1) contrary to petitioner employer's assertion, N.C.G.S. § 96-14(1) does not apply to a case where claimant's employment was terminated by employer, and instead N.C.G.S. § 96-14(2) applies; (2) there is no statutory requirement for medical testimony to support a medical basis for work absences, and a claimant's testimony has been held to be sufficient evidence; and (3) while the evidence supporting the appeals referee's findings is very sparse, it is still competent evidence.

3. Unemployment Compensation— insurance benefits—misconduct—excessive absenteeism—substantial fault—reasonable control

The trial court did not err by concluding that respondent former employee was not disqualified from receiving unemployment insurance benefits even though petitioner employer contends claimant's excessive absenteeism constituted misconduct as a matter of law under N.C.G.S. § 96-14(2) or rose to the level of substantial fault, because: (1) the employee's violation of a work rule will not rise to the level of misconduct if the evidence shows that the employee's actions were reasonable and were taken with good cause; (2) claimant had a long history of emotional and behavioral disorders for which she took prescription medication and was under a doctor's care; (3) claimant's absences from work were due to her medical condition, and while she did not give her employer intimate details about her medical condition, she did provide a doctor's excuses for the time she missed from work; and (4) claimant's actions do not qualify as substantial fault as a matter of law when an employee does not have reasonable control over failing to attend work based on serious physical or mental illness, and claimant's reasons regarding her decision to stop taking her medications was a credibility determination left for the Employment Security Commission instead of the Court of Appeals.

Appeal by petitioner from judgment entered 15 June 2005 by Judge Ronald E. Spivey in Forsyth County Superior Court. Heard in the Court of Appeals 29 March 2006.

Randolph M. James, P.C., by Randolph M. James for Petitioner-Appellant.

Betty W. Lemmons, Respondent-Appellee, no brief filed.

Camilla F. McClain for Respondent-Appellee Employment Security Commission of North Carolina.

STEPHENS, Judge.

Petitioner-Appellant, Randolph M. James, P.C. ("Employer"), appeals from judgment of Forsyth County Superior Court holding that a former employee, Betty Lemmons ("Claimant"), was not disqualified from receiving unemployment insurance benefits. For the reasons which follow, we affirm the judgment below.

I. FACTUAL AND PROCEDURAL BACKGROUND

Claimant began working for Employer on 6 November 2000 and continued working as a receptionist until the week of 12 April 2004, when Employer terminated her employment for excessive absenteeism.

Throughout her employment, Claimant's attendance record was poor. She missed work for illnesses and occasionally left to attend medical appointments. Over the course of her employment, Claimant's absenteeism grew from missing small blocks of time, to missing entire days, to missing several days in a row. When she would return to work with notes from her physicians, the notes would often include vague diagnoses, such as anxiety or malaise. Throughout her employment, these medical conditions had a negative impact on Claimant's ability to complete her job responsibilities.

Most of the time that Claimant missed from work was stress related. As early as July 2000, she experienced anxiety and occasional panic attacks. In fact, Claimant may have had this condition for most of her adult life. Due to her condition, her doctor suggested that she see a psychologist. Although Claimant visited a psychiatrist in an effort to get her condition under control, the evidence is not clear that she actually took all the medications prescribed for her condition. Claimant admitted that she did not take a medication for bipolar disorder that had been prescribed for her.

In Employer's office were notices explaining the holiday, vacation and sick time policy, as well as the procedure to make up missed time. Although Claimant was a salaried employee, when she failed to

work a forty-hour week, her checks were adjusted according to her hourly pay rate. The office manager would discuss the amount of vacation and sick time Claimant had remaining and would adjust her records based on any additional or make-up hours that Claimant worked. Regardless of the amount of time that Claimant missed from work, Employer continued to pay for Claimant's health insurance, dental insurance, disability policy and life insurance.

In addition to the attendance issues, Claimant had a history of poor working relationships with co-workers. In particular, she had a strained relationship with Ms. Daves-Brown, one of the firm's paralegals. When Ms. Daves-Brown attempted to discuss the relationship with Claimant, Claimant became defensive and difficult to talk to. Additionally, when they worked closely together, Claimant would become frustrated, angry and upset with Ms. Daves-Brown if she perceived that Ms. Daves-Brown was being rude to her. During the week of 12 April 2004, after Employer could no longer tolerate Claimant's absences, Employer terminated the employment relationship.

Claimant thereupon filed a claim with the Employment Security Commission for unemployment benefits effective 25 April 2004. The Adjudicator issued a decision holding that Claimant was not disqualified for benefits, thereby entitling her to a weekly benefit of $219.00 up to a maximum benefit amount of $5,694.00. Employer appealed, and the matter was thereafter heard before Appeals Referee James C. Lee on 24 September 2004. Present and testifying at the hearing were Claimant, and Employer witnesses Randolph M. James, Sue James, and Suzanne Daves-Brown.

On 13 October 2004, Mr. Lee filed his decision concluding that the evidence failed to show that Claimant was discharged from her job for substantial fault or misconduct connected with the work. He thus held that she was not disqualified for benefits. Employer appealed to the Full Commission of the Employment Security Commission which considered the matter upon the record compiled before the appeals referee. On 9 December 2004, Commission Chairman Harry E. Payne, Jr. filed the Commission's Decision finding, *inter alia*, that (1) there was a reasonable basis for the credibility determinations of the appeals referee, and (2) the evidence relied upon for those credibility determinations was not inherently incredible. The Commission concluded that the facts found by the appeals referee were supported by competent and credible evidence of record, and adopted them as its own. It affirmed the decision of the appeals referee and held that Claimant was not disqualified for unemployment insurance benefits.

Employer then filed a Petition for Judicial Review, and the matter came on for hearing before the Honorable Ronald E. Spivey at the 25 May 2005 civil session of Forsyth County Superior Court. On consideration of the record on appeal and arguments of the parties, Judge Spivey found that, although "very sparse," there was competent evidence of record to support the Commission's findings, and that those findings sustained the Commission's conclusion that Claimant was not discharged for substantial fault or misconduct connected with the work. He thus affirmed the Commission's decision that Claimant is not disqualified from receiving unemployment insurance benefits. From Judge Spivey's entry of Judgment in favor of Claimant on 15 June 2005, Employer appealed.

II. STANDARD OF REVIEW

North Carolina General Statute 96-15(i) governs the applicable standard of review in appeals of this type. The statute provides in relevant part that "[i]n any judicial proceeding under this section, the findings of fact by the Commission, if there is any competent evidence to support them and in the absence of fraud, shall be conclusive, and the jurisdiction of the court shall be confined to questions of law." N.C. Gen. Stat. § 96-15(i) (2005). Thus, findings of fact in an appeal from a decision of the Employment Security Commission are conclusive on both the superior court and this Court if supported by any competent evidence. *Celis v. N.C. Employment Sec. Comm'n*, 97 N.C. App. 636, 389 S.E.2d 434 (1990).

III. QUESTIONS PRESENTED

[1] In the first assignment of error, Employer contends that the superior court impermissibly rewrote and/or edited the appeals referee's finding of fact number 9.

Finding of fact 9, as found by the appeals referee, states: "The time that the claimant missed from work was disruptive to the employer's business however all the time that claimant missed from work was attributable to claimant's medical condition."

On appeal to the superior court, Judge Spivey determined that:

> The Court finds that the Commission's use of the word "all" when the claimant had also been absent due to snow, holidays or late due to a traffic accident was not a fatal error, and the medical evidence regarding the time that the claimant missed from work due to her medical condition was sufficient.

Employer contends that in making this determination, Judge Spivey violated N.C. Gen. Stat. § 96-15(i). In particular, Employer argues that in finding that the use of the word "all" was not a "fatal error," Judge Spivey essentially rewrote the finding of fact, and thereby committed error by engaging in his own fact-finding. We disagree.

Employer is correct that, as the statute plainly states, judicial fact-finding is prohibited on review of a Commission decision. We believe, however, that Judge Spivey did not find additional or different facts; he simply corrected a misstatement of the appeals referee. In *Guilford Cty. v. Holmes*, 102 N.C. App. 103, 105-06, 401 S.E.2d 135, 137 (1991), this Court determined that the use of the word "only" in a finding of fact by the Employment Security Commission was erroneous, but amounted to no more than a "misstatement," and therefore, was not "of any consequence."[1] Under this holding, the correction of misstatements is not necessarily "fact-finding" and may be performed upon judicial review without violating the statute's prohibition.

In the current case, the fact, as found by the appeals referee, mistakenly used the word "all." The referee found that "all" of Claimant's time off work was due to a medical condition, but the evidence does not support this finding. In addition to missing work for medical reasons, Claimant missed work due to snow, vacation, and an automobile accident on her way to work. Applying the rationale of *Guilford Cty. v. Holmes*, we hold that the finding of fact contained a mere misstatement of no consequence to the ultimate determination that Claimant's discharge from employment with Employer was not due to substantial fault or misconduct in connection with the work. Accordingly, we find no error in Judge Spivey's determination on this issue, and Employer's assignment of error is overruled.

[2] By the second assignment of error, Employer argues that there was no competent evidence to support the Commission's findings of fact 7, 8, and 9. Those findings are as follows:

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1. The Commission found that the claimant personally delivered telephone messages "only" when the message was an emergency, when in fact she admitted to also personally delivering messages when she felt the message was important or if the call sounded urgent to her. At issue was whether the time away from her work station which resulted from her decision to personally deliver phone messages constituted misconduct or substantial fault. In reaching its decision to affirm the Employment Security Commission's determination that the claimant's actions did not rise to the level of misconduct or substantial fault, this Court found the "misstatement" regarding the claimant's personal delivery of phone messages to be of no consequence. *Guilford Cty.*, 102 N.C. App. at 105-06, 401 S.E.2d at 137.

> 7. The claimant did not respond well to criticism. When chastised, the claimant would often leave work. On occasion claimant would remain away from work for an extended period of time after being chastised. Claimant's conduct was due to her medical condition. Although the claimant did not provide intimate details about her medical condition she did provide a doctor's excuse for the time she missed from work.
>
> 8. The claimant was also defensive when approached by her supervisor and by coworkers concerning relatively minor and mundane matters. Despite the defensiveness the claimant would do as she was told. The claimant's initial reactions to encounters was also a manifestation of her medical conditions.
>
> 9. The time that the claimant missed from work was disruptive to the employer's business however all the time that claimant missed from work was attributable to claimant's medical condition.

Noting that no medical witnesses testified at the hearing before the appeals referee, Employer contends that there is no evidence from Claimant or in her medical records, which were offered and received as documentary evidence at the hearing, to support the "medical conclusory inference" that Claimant's excessive absenteeism "was due to, a manifestation of, or attributed to [her] medical condition[s]."

To support this argument, Employer relies on the requirements established by the General Assembly in N.C. Gen. Stat. § 96-14(1), which provides in relevant part that:

> Where an individual leaves work due solely to a disability incurred or other health condition, whether or not related to the work, he shall not be disqualified for benefits if the individual shows:
>
> a. That, at the time of leaving, an adequate disability or health condition of the employee, . . . either medically diagnosed or otherwise shown by competent evidence, existed to justify the leaving and prevented the employee from doing other alternative work offered by the employer[.]

N.C. Gen. Stat. § 96-14(1) (2005). Employer's rationale is flawed in two respects. First, this statutory provision plainly applies to cases in which an employee terminates the employment relationship and then seeks unemployment benefits. In the case at bar, Claimant's employ-

ment was terminated by Employer. Therefore, the controlling statute is N.C. Gen. Stat. § 96-14(2), which is discussed below.

Second, there is no statutory requirement for medical testimony to support an award of unemployment insurance benefits. Moreover, to support a medical basis for work absences, this Court has treated a claimant's testimony as sufficient. *See Hoke v. Brinlaw Mfg. Co.*, 73 N.C. App. 553, 327 S.E.2d 254 (1985); *Milliken & Co. v. Griffin*, 65 N.C. App. 492, 309 S.E.2d 733 (1983), *disc. review denied*, 311 N.C. 402, 319 S.E.2d 272 (1984).[2]

In the case at bar, the evidence provided by Claimant's testimony and medical records is at least minimally sufficient to establish that Claimant missed work for medical reasons. Indeed, Mr. James acknowledged in his testimony that Claimant's medical records revealed that when Claimant "can't cope, . . . her reaction is to get very upset and she sets off, what the doctor's [sic] describe as a histrionic reaction . . . resulting in heart palpitations, racing heart beat, which prompts her to run off to the doctors to get some sort of treatment." Further, the medical records which Mr. James subpoenaed to the hearing and offered in evidence establish that Claimant was being treated for depression, anxiety, problems sleeping, loss of energy, problems concentrating, and difficulty functioning at work. Additionally, Claimant provided notes from her physicians which indicated the date on which she came under their care and the date on which she was released to return to work. More importantly, the medical records show that Claimant was seeking treatment for the conditions which were causing her problems at work. The absenteeism continued because the treatment had not adequately improved or alleviated her problems. While we agree with Judge Spivey that the evidence to support the appeals referee's findings is "very sparse," we also agree with him that it is competent. Thus, under N.C. Gen. Stat. § 96-15(i), we are bound by the Commission's findings, as was Judge Spivey. This assignment of error is likewise overruled.

[3] We next examine Employer's third and final assignment of error, by which Employer contends that the facts, as found by the Commission and appeals referee, entitle Employer to relief as a matter of law. Employer relies on two findings of fact in particular, as follows:

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2. In *Milliken & Co. v. Griffin*, this Court found claimant's reading of a statement from her physician to be sufficient evidence to support her medical contention. The *Hoke* Court, citing *Milliken & Co.*, allowed a claimant to testify regarding her high blood pressure, dizziness, and fainting spells.

> 4. The claimant did miss an excessive amount of time from work. The claimant's attendance became more troublesome as she neared the end of her tenure with this employer.
>
> . . . .
>
> 9. The time that the claimant missed from work was disruptive to the employer's business[.]

Citing *Intercraft Indus. Corp. v. Morrison*, 305 N.C. 373, 289 S.E.2d 357 (1982), Employer argues that these findings compel a conclusion that Claimant's excessive absenteeism constitutes misconduct as a matter of law under N.C. Gen. Stat. § 96-14(2). This statutory provision establishes the guidelines for evaluating whether an employee whose employment is terminated by her employer is disqualified for unemployment insurance benefits. The statute provides in pertinent part:

> An individual shall be disqualified for benefits:
>
> (2) For the duration of his unemployment . . . if it is determined by the Commission that such individual is, at the time such claim is filed, unemployed because he was discharged for misconduct connected with his work. Misconduct connected with the work is defined as conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer. [or]
>
> (2a) [I]f it is determined by the Commission that such individual is, at the time the claim is filed, unemployed because he was discharged for substantial fault on his part connected with his work not rising to the level of misconduct. Substantial fault is defined to include those acts or omissions of employees over which they exercised reasonable control and which violate reasonable requirements of the job but shall not include (1) minor infractions of rules unless such infractions are repeated after a warning was received by the employee, (2) inadvertent mistakes made by the employee, nor (3) failures to perform work because of insufficient skill, ability, or equipment.

N.C. Gen. Stat. § 96-14(2)(2a) (2005). Employer contends that Claimant's excessive absenteeism over a period of nearly three years mandates the conclusion, as a matter of law under the statute, that Claimant was discharged for misconduct connected with her work. Alternatively, Employer argues that Claimant's excessive absenteeism rose to the level of substantial fault because Claimant had the ability to conform her behavior to Employer's reasonable attendance policy, and failing to do so, her discharge from the job was for substantial fault.

Our Supreme Court has determined that in order to disqualify an employee from receiving unemployment compensation under N.C. Gen. Stat. § 96-14(2), there must be "conduct which shows a wanton or wilful disregard for the employer's interest, a deliberate violation of the employer's rules, or a wrongful intent." *Intercraft*, 305 N.C. at 375, 289 S.E.2d at 359 (citations omitted). The Court explained further that, "in the face of warnings, *and without good cause*[,]" excessive absenteeism may constitute willful misconduct. *Id.* (Emphasis added). On the contrary, the employee's violation of a work rule will not rise to the level of misconduct "if the evidence shows that the employee's actions were reasonable and were taken with good cause." *Id.* (Citations omitted). "Good cause" is defined as a reason "which would be deemed by reasonable men and women valid and not indicative of an unwillingness to work." *Id.* at 376, 289 S.E.2d at 359 (citations omitted). Noting that each case must be decided on its own facts, the Court affirmed the decision of the Employment Security Commission that absence because of an inability to find child care constituted good cause. *Id.* at 377, 289 S.E.2d at 360.

Misconduct can be demonstrated by persistent absences, without excuse or notice, after the employee has been warned about absences by the employer. *Butler v. J.P. Stevens & Co., Inc.*, 60 N.C. App. 563, 299 S.E.2d 672, *disc. review denied*, 308 N.C. 191, 302 S.E.2d 242 (1983). When an employee is out due to illness and does not inform the employer, misconduct is established because the employee has an "obligation to the employer to mitigate any damages an illness may cause the enterprise by giving appropriate notice." *Id.* at 567, 299 S.E.2d at 675 (citation omitted). Misconduct was established in *Butler* because the employee did not notify his employer when he was out sick and because he provided untruthful information to the employer when asked for an explanation for his absence. *Id.* at 565-66, 299 S.E.2d at 674.

In the case at bar, the Commission found that Claimant had a long history of emotional and behavioral disorders for which she took prescription medication and was under a doctor's care. The Commission further found that Claimant's absences from work were due to her medical condition and that, while she did not give Employer intimate details about her medical condition, she did provide doctor's excuses for the time she missed from work. On these findings, which are supported by the evidence, albeit sparse, the Commission concluded that Claimant was not absent from work due to misconduct. We think these facts distinguish this case from *Butler*. We agree with Respondent that the evidence was sufficient to permit the Commission to determine that Claimant's absences were for good cause, and that she did give Employer appropriate notice regarding her absences, thereby defeating Employer's argument that Claimant's absenteeism constitutes misconduct as a matter of law.

Employer next argues that Claimant's absenteeism constitutes substantial fault and that the Commission should have found her to be disqualified for unemployment benefits on this basis. This Court has determined that when an employer establishes a reasonable job policy to which an employee fails to conform, despite the ability to do so, this constitutes substantial fault. *Lindsey v. Qualex, Inc.*, 103 N.C. App. 585, 406 S.E.2d 609, *disc. review denied*, 330 N.C. 196, 412 S.E.2d 57 (1991). The reasonableness of the policy will be determined by several factors, including

> (1) how early in the employee's tenure she receives notice of the policy; (2) the degree of departure from expected conduct which warrants either a demerit or other disciplinary action under the policy; (3) the degree to which the policy accommodates an employee's need to deal with the exigencies of everyday life; (4) the employee's ability to redeem herself or make amends for rule violations; (5) the amount of counseling the employer affords the employee concerning rule violations; and (6) the degree of notice or warning an employee has that rule violations may result in her discharge.

Id. at 590, 406 S.E.2d at 612. This determination should be made on a case by case basis and by evaluating the totality of the circumstances and the employee's role within the company. *Id.*

The actions of Claimant, as found by the Commission, do not qualify as substantial fault as a matter of law. For an employee's behavior to qualify as substantial fault, the employee first has to be

able to exercise "reasonable control" over the behavior complained of by the employer. N.C. Gen. Stat. § 96-14(2a) (2005). As recognized by the Court in *Lindsey*, an employee does not have reasonable control over failing to attend work because of serious physical or mental illness. It is troubling that Claimant did not fully comply with her physicians' efforts to treat her emotional and behavioral disorders. However, there is no evidence that Claimant was medically capable of compliance.[3] Given the emotional and behavioral nature of Claimant's condition, we cannot say, in the absence of evidence, that she was capable of exercising reasonable control over her behavior. Additionally, Claimant provided reasons for her decisions to stop taking her medications, and the credibility of her explanations was for the Commission, not this Court. Accordingly, since the evidence does not establish that Claimant could exercise "reasonable control" over her actions, her behavior cannot rise to the level of substantial fault. Therefore, Employer is not entitled to relief as a matter of law.

For the reasons stated, all of Employer's assignments of error are overruled and the superior court's judgment is affirmed.

AFFIRMED.

Judges McGEE and HUNTER concur.

STATE OF NORTH CAROLINA, Plaintiff v. IAN AULDEN CAMPBELL, Defendant

No. COA05-942

(Filed 16 May 2006)

1. Constitutional Law— effective assistance of counsel—trial strategy—telling jury defendant repeatedly lied to his attorneys

Defendant did not receive ineffective assistance of counsel in a first-degree murder case based on his attorney telling the jury that defendant had repeatedly lied to his attorneys, because: (1) counsel's decision to address defendant's repeated lies was a prudent step in pulling the sting from damaging evidence; (2) any

3. In cases involving termination of employment, a claimant is presumed to be entitled to benefits and the burden is on the employer to rebut this presumption. *Williams v. Davie Cty.*, 120 N.C. App. 160, 461 S.E.2d 25 (1995).

prosecution of defendant would include his lies as incriminating evidence, including their use as evidence against his truthfulness; (3) defense counsel was attempting to turn defendant's lies into a favorable fact by showing that he was merely guilty of a lesser-included crime without premeditation or deliberation; (4) when defendant took the stand and admitted, in both direct and cross-examination, that he had lied to his attorneys, defendant himself participated in this defense strategy and thus cannot complain that defense counsel utilized the strategy in closing argument; and (5) although it is possible other counsel may have proceeded with a different strategy, it cannot be concluded that the strategy employed by defendant's counsel was unreasonable or deficient.

2. Evidence— privileged communications—attorney-client privilege—waiver

Although defendant contends defense counsel breached the attorney-client privilege in a first-degree murder case by telling the jury that defendant had lied to his attorneys, he waived any such privilege because he admitted he lied to his attorneys in both his direct and cross-examination at trial.

3. Criminal Law— prosecutor's argument—alleged improper shift of burden of proof to defendant

The trial court did not abuse its discretion in a first-degree murder case by concluding that the prosecutor did not improperly shift the burden of proof to defendant during closing arguments, because: (1) the determination of whether the remarks were improper during closing arguments is not reached if the trial court's correct jury instructions on the law cured any mistakes made in the prosecutor's closing argument; and (2) when instructing the jury on first-degree murder, second-degree murder, and voluntary manslaughter, the trial court repeatedly told the jury that the State bore the burden of proof to prove each element necessary for conviction of the crime charged and each lesser offense.

Appeal by defendant from judgment entered 13 June 2003 by Judge W. Osmond Smith in Wake County Superior Court. Heard in the Court of Appeals 10 April 2006.

Roy Cooper, Attorney General, by Amy C. Kunstling, Assistant Attorney General, for the State.

Glover & Petersen, P.A., by Ann B. Petersen, for Defendant-Appellant.

MARTIN, Chief Judge.

Ian Aulden Campbell ("defendant") appeals from a judgment entered on a jury verdict finding him guilty of first degree murder. Defendant was sentenced to life imprisonment without parole. On appeal, defendant makes two arguments. First, defendant claims he received ineffective assistance of counsel at trial because his attorney informed the jury that defendant had initially lied to everyone, including his attorneys, regarding his involvement in the victim's death. Second, defendant argues the prosecution impermissibly shifted the burden of proof to defendant during closing arguments. We find no error.

The facts of this case are not in dispute, and we provide only those facts pertinent to resolution of the issues on appeal. Defendant killed his fiancée, Heather Domenie, on the night of 25 July 2002. Defendant had been having an affair with another woman, and he argued with Domenie about his affair on the night of her death. The fight escalated, and defendant grabbed the towel around her neck and strangled her. According to the medical examiners, Domenie died from asphyxia due to strangulation.

After some time passed, defendant called the 911 emergency center, claiming his fiancée had choked herself with a tea towel and was not breathing. When the first responders arrived, he told them Domenie apparently had choked while he had been on an errand to the store. Shortly thereafter, defendant called two friends, and when they arrived, he told them Domenie had choked herself with a tea towel.

Defendant continued to give this account of Domenie's death to everyone with whom he spoke about the matter, including the emergency room doctor, the police, his life insurance agent, his family, the woman with whom he was having an affair, and his attorneys.

The police arrested defendant on 16 August 2002. He was indicted for first degree murder, and the charge was prosecuted capitally.

In April 2003, defendant admitted to his attorneys that he had strangled Domenie. At the start of the trial, on 19 May 2003, defend-

ant filed a declaration with the court admitting "he assaulted Heather Anne Domenie on July 25, 2002 and that his assault upon her proximately caused her death." The declaration indicated a defense strategy claiming defendant was not guilty of first degree murder, but rather a lesser-included homicide with a correspondingly less culpable *mens rea*:

> The Defendant consents to his trial counsel pursuing, at trial, a course of defense which admits his assault upon Heather Anne Domenie, and plans to present evidence, including testifying in his own defense, and offering other evidence which he and his trial counsel contend will dispute the State's contention that he is guilty of First Degree Murder, but which will establish that he is guilty of a lesser-included offense of homicide other than First Degree Murder.

At trial, the defendant's counsel began his opening statement by acknowledging defendant had killed Domenie. Counsel then laid out the central issue in the case, claiming defendant did not kill Domenie "with malice or premeditation or deliberation" as the State contended, but instead had killed her "as a situational crime" without planning in advance. The defense theory of the case argued the killing "was a situational crime which resulted from a domestic situation which Ian had created, and that, as it evolved, it happened so swiftly and with such unexpected and explosive suddenness that all of his reason was suspended when he killed her." According to defense counsel, defendant's alibi was so unbelievable it demonstrated defendant had not premeditated or deliberated the killing:

> Well, Ian Campbell—and I'll give you the litany in a minute—the evidence is going to show that what he constructed to avoid getting caught and avoid getting detected and to avoid responsibility for what he had done will be, we're convinced, in your opinion, the most pathetic, miserable construct of an alibi in the history of criminal law.

Counsel then explained defendant's alibi that Domenie had "gone and choked herself with a tea towel" while he was running an errand, and told the jury that as it considered the evidence in the case they should "keep in mind how miserable it is, and pathetic, and consider that when you're deciding whether this thing was premeditated and deliberated upon, whether this killing was thought out in advance and planned."

Next, defense counsel previewed the evidence showing defendant lied to the first responders, to the police, and to his brother. Defendant kept telling the same lie, and he was "lying to everybody. Everybody. Well, it goes on for months, months and months." "Everybody" included his attorneys. Five weeks before the trial started, however, defendant broke down "under enormous pressure from his family and from his lawyers and everybody else that cares anything about him," and finally "[told] us what he did and what happened." The "pathetic" lie defendant kept telling pertained to whether defendant had the mental state for first degree murder:

> And you'll be able to judge his credibility and make a decision about whether you think that this was all the work of a planning, determined, master-mind or someone who was covering for something that—something terrible had happened to him and the pathetic efforts he made to cover it up. That will be your decision.
>
> And based on your determination of that will be a lead-in into your consideration of what offense of homicide Ian Campbell's guilty of.

According to the defense theory, defendant's "pathetic" lie indicated his killing of Domenie was not premeditated or deliberated, and therefore defendant was guilty of a lesser crime than first degree murder.

During the trial, defendant testified in his own defense. During direct examination, defendant admitted he had repeatedly lied:

> Q: Well, Ian, can you tell the Court and jury how you began to and why you began to pursue the matter of the correspondence and discussions with the life insurance company about Heather's policy?
>
> A: I was telling everybody the same lie, and my family and lawyers and people around me were believing me, ...

On cross examination, defendant again admitted lying to his attorneys:

> Q: You lied to all the folks from the Cary Police Department that you have talked to, right?
>
> A: Yes, sir, I lied to everybody that night and every time after that fact that I was questioned about that event.

Q: Okay.

A: I lied to my family, my lawyers and everybody.

In his closing argument, defense counsel returned to the theme of defendant's implausible lie. Counsel argued:

> And while we're talking about that and your determination of whether this was a premeditated and deliberated killing with motive, consider this, from a guy who is supposed to be smart and a planner and all that: If you were going to do something and plan on doing it very carefully, all the way back to buying insurance and everything else, why in the world would you put yourself in the house with your intended victim, screen every call that came in, admit no one to the house and then set yourself up as the only possible suspect? And then after all that careful planning and execution of this careful plan to eliminate this person in a premeditated and a deliberate way, then the best you could do after thinking on it all the way back to June with Ron Keever and everything else, come up with that 9-1-1 call. And the—I think we've just used the word before—pathetic explanation for what happened and the persistence afterwards, all the way up to almost the beginning of the trial, in denying that you had anything to do with this or trying to create evidence to show that you just couldn't have done it, if it was so well planned.

Counsel summarized this theme: "If it had been premeditated, don't you know the story would have been better?"

The jury found defendant guilty of first degree murder on 13 June 2003, and he was sentenced to life imprisonment without parole. Defendant appealed.

I. Ineffective assistance of counsel

[1] Defendant argues he received ineffective assistance of counsel because his attorney told the jury that defendant had repeatedly lied to his attorneys. Our review of ineffective assistance of counsel claims "will be decided on the merits 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 (2002). Here, the cold record from the trial transcript shows no further investigation is required for our review.

When making an ineffective assistance of counsel claim, defendant must show (1) counsel's performance was deficient, with errors so serious that the attorney was not functioning as "counsel" guaranteed the defendant by the Sixth Amendment, and (2) the deficient performance prejudiced the defense to the extent there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different and defendant was deprived of a fair trial. *Strickland v. Washington*, 466 U.S. 668, 687, 694, 80 L. Ed. 2d 674, 693, 698 (1984); *State v. Braswell*, 312 N.C. 553, 561-63, 324 S.E.2d 241, 247-48 (1985) (expressly adopting the *Strickland v. Washington* test). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 80 L. Ed. 2d at 698; *accord Braswell*, 312 N.C. at 563, 324 S.E.2d at 248. "Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable." *Id.* at 687, 80 L. Ed. 2d at 693; *see also Braswell*, 312 N.C. at 563, 324 S.E.2d at 248-49.

The United States Supreme Court requires our restraint in second-guessing strategic decisions made by attorneys:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.

Strickland, 466 U.S. at 689-90, 80 L. Ed. 2d at 694-95 (citations omitted). "Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the

facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690, 80 L. Ed. 2d at 695.

Defendant argues his counsel was deficient because his attorney shared with the jury the fact he lied to his defense counsel. He claims "no possible trial strategy could be served" by telling the jury he lied to his attorneys, and there was "simply no tactical reason that would justify an attorney affirmatively putting before a jury in a criminal case evidence that a client had lied to the attorney repeatedly about his guilt or about his version of the events." We disagree.

In our "highly deferential" review of defense counsel's conduct in this case, *Strickland*, 466 U.S. at 689-90, 80 L. Ed. 2d at 694-95, we view counsel's decision to address defendant's repeated lies as a prudent step in pulling the sting from damaging evidence. Defendant had lied to everyone, including family, friends, the police, and medical personnel. His claim that the victim had strangled herself was suspicious from the start. Such a lie, repeated to everyone, indicated defendant sought to protect himself from liability, and therefore his lies about the circumstances of her death further incriminated him in the murder of Domenie. Any prosecution of defendant would include his lies as incriminating evidence, including their use as evidence against his truthfulness.

Since defense counsel knew defendant's lies would be an issue at trial, counsel attempted to turn defendant's lies into a favorable fact. Defense counsel was seeking to have defendant acquitted of first degree murder, and instead have defendant found guilty of a lesser-included crime such as second degree murder or voluntary manslaughter. Their hope of doing so relied on showing defendant had a less culpable mental state than premeditation or deliberation, a strategy apparent as early as defendant's 19 May 2003 declaration before trial admitting he had killed Domenie. Hence, defense counsel argued that if defendant had premeditated or deliberated Domenie's murder, he would have produced a more credible alibi than the "pathetic" one he continually provided. As counsel summarized in closing argument, "If it had been premeditated, don't you know the story would have been better?" Even the State acknowledges on appeal these arguments by defense counsel reflected a reasonable and shrewd defense strategy.

Although defense counsel noted in opening argument that defendant had lied to his attorneys, just as he had lied to everyone else, under the facts of this case we do not hold such an admission to

be deficient performance by counsel. The theme counsel was arguing indicated defendant had a pattern of lying to everyone about the circumstances of Domenie's death, and acknowledging that "everyone" included his attorneys did not exacerbate the incriminating aspect of defendant seeking to escape liability via his lies. Defense counsel's mention in the opening statement that defendant had lied to his attorneys was incidental to this theme; if anything, it merely served to further illustrate counsel's intended theme. When defendant took the stand and admitted, in both direct and cross-examination, he had lied to his attorneys, defendant himself explicitly participated in this defense strategy, and thereafter cannot complain that defense counsel utilized the strategy in closing argument.

Though it is possible other counsel may have proceeded with a different strategy, we cannot conclude the strategy employed by defendant's counsel was unreasonable nor, in our highly deferential review, deficient. Because we hold defense counsel's performance was not deficient, we need not address whether such performance prejudiced the defense and deprived defendant of a fair trial. *Id.* at 687, 80 L. Ed. 2d at 693; *see also Braswell*, 312 N.C. at 563, 324 S.E.2d at 248-49. Accordingly, we hold defendant did not receive ineffective assistance of counsel.

[2] Defendant also argues defense counsel breached attorney-client privilege by telling the jury he had lied to his attorneys. According to defendant, the lies defendant told his counsel were confidential communications, and those communications were "privileged and may not be disclosed." *In re Investigation of the Death of Miller*, 357 N.C. 316, 328, 584 S.E.2d 772, 782 (2003). But the privilege "belongs to the defendant, and may be waived by him." *State v. Bronson*, 333 N.C. 67, 76, 423 S.E.2d 772, 777 (1992). Since defendant admitted he lied to his attorneys in both his direct examination and cross-examination at trial, he therefore waived this privilege.

II. Burden of proof

[3] Defendant claims a portion of the prosecutor's closing argument improperly shifted the burden of proof to defendant. At the end of the argument, the prosecutor said:

> The defendant has tried real hard when he testified to make his story—to make what he offered to you to fit the State's evidence that he knew we would present. He had months to do that. He is an engineer.

He knows what the State reports are. He knows what those are. He has months to do that and to come in here and be able to tell you the little things that he thinks will make his story fit.

But he wants to tell you a couple of other things, and that is that he actually did administer CPR on her. Think about whether or not that is the truth and compare that to the rest of everything that he said. Think about whether when he says when he is standing face to face to her, face to face, toe to toe, and that he doesn't remember what happened after he pulled that towel tight, that he doesn't remember that. Is that the truth? Is that really the truth? Because Dr. Radisch said that it would take more, in this case was not a four-minute thing. It was hands and a towel. The evidence shows you that it could be from behind because of the way the hairs were found on the towel and because of the way the marks are on her body and the lack of marks on his.

You will have four options: First-degree murder, second-degree murder, voluntary manslaughter and the verdict form as perhaps required by law has to have not guilty on the bottom of it.

In order for you to find the defendant guilty of voluntary manslaughter, you have to say that the emotions that were going on were so high.

In order for you to find him guilty of second-degree murder, you have to say that he did not premeditate and deliberate.

What I say to you this afternoon is that for you to find him guilty of anything less than first-degree murder, you will have to have decided for yourself individually and collectively that he has been telling the truth about what happened.

Defendant objected, which the trial court overruled. The jury was excused for lunch, and defendant renewed his objection, contending the prosecutor's argument was improper and impermissibly shifted the burden of proof from the State onto the defendant. Defendant asked the trial court to instruct the jury to that effect when they returned from lunch. The trial court declined to do so, stating it would instruct the jury regarding the burden of proof pursuant to the proposed jury instructions.

During the jury instructions, the trial court instructed the jury:

The defendant in this case has entered a plea of not guilty. The fact that he has been charged is no evidence of guilt. Under

> our system of justice, when a defendant pleads not guilty he is not required to prove his innocence. He is presumed to be innocent.
>
> The State must prove to you that the defendant is guilty beyond a reasonable doubt.

When instructing the jury on first degree murder, second degree murder, and voluntary manslaughter, the trial court repeatedly told the jury that the State bore the burden of proof to prove each element necessary for conviction of this crime charged and each lesser offense about which the jury was instructed.

When counsel makes a timely objection at trial, the standard of review for improper closing arguments is whether the trial court abused its discretion by failing to sustain the objection. *State v. Jones*, 355 N.C. 117, 131, 558 S.E.2d 97, 106 (2002). We should reverse a trial court and find an abuse of discretion, however, "only upon a showing that its ruling could not have been the result of a reasoned decision." *State v. Burrus*, 344 N.C. 79, 90, 472 S.E.2d 867, 875 (1996) (citing *State v. Riddick*, 315 N.C. 749, 756, 340 S.E.2d 55, 59 (1986)). When applying the abuse of discretion standard to closing arguments, we first determine whether the "remarks were improper," and if so, whether the "remarks were of such a magnitude that their inclusion prejudiced defendant." *Jones*, 355 N.C. at 131, 558 S.E.2d at 106.

We need not make this determination, however, if the trial court's correct jury instructions on the law cured any mistakes made in the prosecutor's closing argument. "If the alleged misstatement of law was made, it was cured by the trial court's correct jury instructions on the relevant law." *State v. Price*, 344 N.C. 583, 594, 476 S.E.2d 317, 323-24 (1996) (citing *State v. Anderson*, 322 N.C. 22, 38, 366 S.E.2d 459, 468 (1988)); *see also State v. Rose*, 339 N.C. 172, 197, 451 S.E.2d 211, 225-26 (1994) (prosecutor's error in defining the term "reasonable doubt" was cured because the trial court's instruction, "which followed the complained-of statement by the prosecutor, remedied the error, if any, in the prosecutor's closing argument"), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995); *State v. Gladden*, 315 N.C. 398, 426, 340 S.E.2d 673, 690-91 (1986) ("Subsequently, the trial judge properly instructed the jury concerning the weight to be accorded prior inconsistent statements and cured any possible prejudice to the defendant which may have been caused by the prosecutor's misstatement of the law."), *cert. denied*, 479 U.S. 871, 93 L. Ed. 2d 166 (1986).

No error.

Judges HUDSON and BRYANT concur.

STATE OF NORTH CAROLINA v. DAVID CARL CARTWRIGHT

No. COA04-1688

(Filed 16 May 2006)

1. Sexual Offenses— first-degree—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of first-degree sexual offense under N.C.G.S. § 14-27.4(a)(2)(a), because: (1) in the light most favorable to the State, the seventy-six-year-old victim testified that defendant penetrated her anally; (2) the emergency room doctor testified that it was possible for a person to be penetrated anally without showing signs of trauma due to the physiology of the anus; (3) a victim may not recall anal penetration due to the fear experienced during such an assault; and (4) even though the victim presented conflicting testimony regarding whether she recalled anal penetration, there was substantial evidence that defendant engaged in a sexual act of anal penetration with the victim, against the victim's will, and by employing the knife as a dangerous or deadly weapon.

2. Kidnapping— first-degree—asportation of victim—motion to dismiss—sufficiency of evidence

The trial court erred by denying defendant's motion to dismiss the charge of first-degree kidnapping because the confinement, restraint or removal of the victim within her home constituted an inherent element of the felonies of rape and armed robbery with which defendant was also charged.

3. Rape— first-degree—instruction—knife as a dangerous weapon

The trial court did not commit plain error by instructing the jury that a knife is a dangerous or deadly weapon as a matter of law for a first-degree rape charge, because: (1) in light of the entire record, particularly the victim's testimony that she knew it

was a knife that defendant took from his pocket, that she asked him not to hurt her upon seeing the knife, and that she was scared, the jury likely would have found that the victim reasonably believed the knife to be a dangerous or deadly weapon; and (2) even if the trial court's instruction was erroneous, it did not have a probable impact on the jury's determination of guilt.

Appeal by defendant from judgments entered 18 March 2004 by Judge Jerry Braswell in Wayne County Superior Court. Heard in the Court of Appeals 21 September 2005.

Attorney General Roy A. Cooper, III, by Assistant Attorney General David J. Adinolfi, II, for the State.

Glover & Petersen, P.A., by James R. Glover, for defendant-appellant.

JACKSON, Judge.

David Carl Cartwright ("defendant") appeals from jury verdicts finding him guilty of first-degree kidnapping, armed robbery, first-degree rape, breaking and entering, and first-degree sexual offense returned 18 March 2004 in Wayne County Superior Court.

All of defendant's charges arise from an incident occurring 14 June 2003. At trial, the State's evidence tended to show that the victim, a seventy-six-year-old widow, was standing in her kitchen when she saw papers in her carport that were not present the preceding night. From her kitchen, she unlocked and opened the storm door, reached out, and started to step out of the house onto the first step. Before her foot touched the first step, defendant grabbed her arm and pushed her back into the kitchen. The victim began to scream and was extremely frightened. Defendant closed the door and pulled a knife out of his pocket. The victim testified that she did not get a good look at the knife and did not see an open blade. Defendant demanded money from the victim, and the victim told defendant that she only had one dollar. She asked him not to hurt her, and defendant put the knife back in his pocket. Defendant proceeded to attempt to choke the victim with a towel from the kitchen, and the victim resisted.

During the struggle in the kitchen, defendant ripped the victim's pajama top off of her person. The struggle continued through a hallway and into the den, where the victim was able to free herself from the towel around her neck. Defendant knocked the victim to the floor

of the den, and the victim grabbed a picture frame from a table and struck defendant in the head with it, causing the frame's glass to break. Subsequently, defendant attempted to smother her with a small pillow from the couch, and the victim struggled and prevented defendant from smothering her. While in the den, defendant pulled off the victim's pajama bottoms and inserted his penis into her vagina. Defendant asked the victim if it felt good and she responded that it did not.

After defendant assaulted the victim in the den, he demanded money from her. The victim arose from the den floor, walked down a hallway to her bedroom with defendant following, and retrieved one dollar. She gave the dollar to defendant, and defendant left the victim's house with the victim's torn pajamas, the towel and the picture frame. The victim called the police, and dressed in shorts and a t-shirt.

At trial, testimonial and physical evidence varied regarding the specifics of the sexual assault. On direct examination, the prosecutor asked the victim if defendant penetrated her anywhere besides her vagina to which she responded, "Not much." Later, during direct examination, the prosecutor asked the victim if defendant had penetrated her anally with his penis and she answered "Well, yes." The victim explained that it "didn't feel right" and stated, "So I don't know, it didn't feel right to me." In contrast, on cross-examination, the victim stated several times that defendant had not penetrated her anally.

Physical evidence from a rape kit collected at the hospital immediately following the attack showed the presence of semen on a swab taken from the victim's rectum. The doctor who conducted an examination of the victim at the emergency room immediately after the incident testified that he observed a scratch on the victim's vaginal wall, but he did not observe any indications of trauma to the victim's rectal area. The doctor testified that it was possible for a person to be penetrated anally without showing signs of trauma due to the physiology of the anus, and a sexual assault victim may not remember being penetrated anally as a result of fear during the event.

At the close of the State's evidence, and, again at the close of all evidence, defendant made motions to dismiss the charges for insufficient evidence. Both motions were denied and defendant was convicted of all charges.

On appeal defendant assigns as error: (1) the trial court's denial of his motions to dismiss the charges of first-degree sexual offense and first-degree kidnapping for insufficient evidence; (2) his conviction on both first-degree kidnapping and rape as the commission of the rape was the basis for a required element of the first-degree kidnapping charge, and therefore, double jeopardy; (3) the trial court's refusal to instruct the jury on the lesser offense of attempted first-degree sexual offense; and (4) the trial court's instruction to the jury that a knife is a dangerous or deadly weapon as a matter of law—as defendant failed to object to this instruction at trial, he argues on appeal that this alleged error constitutes plain error.

[1] Defendant first argues that the trial court erred in denying his motions to dismiss the charges of first-degree sexual offense and first-degree kidnapping for insufficiency of the evidence. In deciding a motion to dismiss for insufficient evidence, a trial court must determine whether there is substantial evidence of each required element of the offense charged and that the defendant was the perpetrator. *State v. Roddey*, 110 N.C. App. 810, 812, 431 S.E.2d 245, 247 (1993). Substantial evidence is relevant evidence that would be sufficient to persuade a rational juror to accept a particular conclusion. *State v. Frogge*, 351 N.C. 576, 584, 528 S.E.2d 893, 899 (2000), *cert. denied*, 531 U.S. 994, 148 L. Ed. 2d 459 (2000). When ruling on a motion to dismiss for insufficient evidence, a trial court must take the evidence in the light most favorable to the State and afford every reasonable inference from the evidence to the State. *Id.* at 586, 528 S.E.2d at 899.

The elements required for a conviction of first-degree sexual offense relevant to this case are: (1) engaging in a sexual act; (2) with another person by force or against the will of that person; and (3) employing or displaying a dangerous or deadly weapon or an article the other person reasonably believes to be a dangerous or deadly weapon. N.C. Gen. Stat. § 14-27.4(a)(2)(a) (2005). A sexual act is defined by statute as:

> cunnilingus, fellatio, analingus, or anal intercourse, but does not include vaginal intercourse. Sexual act also means the penetration, however slight, by any object into the genital or anal opening of another person's body[.]

N.C. Gen. Stat. § 14-27.1(4) (2005). The sexual act alleged in the indictment in the case *sub judice* was anal intercourse. In the present case, defendant argues that there was insufficient evidence that he engaged in anal intercourse with the victim.

In the light most favorable to the State, the victim testified that defendant penetrated her anally. The report from the rape kit concluded that semen was present on the swab from the victim's rectum. Furthermore, the emergency room doctor testified that it was possible for a person to be penetrated anally without showing signs of trauma due to the physiology of the anus. Moreover, the victim may not recall anal penetration due to the fear experienced during such an assault.

Although we note that the victim presented conflicting testimony regarding whether she recalled anal penetration, in viewing the evidence in the light most favorable to the State, there is substantial evidence that defendant engaged in a sexual act of anal penetration with the victim, against the victim's will, and by employing the knife as a dangerous or deadly weapon. *See State v. Hensley*, 294 N.C. 231, 237-38, 240 S.E.2d 332, 336 (1978) (conflicts in the victim's testimony go to the weight and credibility of that testimony which are for the jury to determine). Accordingly, this assignment of error is overruled.

[2] Defendant next argues that the trial court erred in denying his motion to dismiss the charge of first-degree kidnapping for insufficient evidence. The elements required for a conviction of first-degree kidnapping relevant in the present case are: (1) unlawful confinement, restraint, or removal from one place to another; (2) of any person over 16 years of age; (3) for the purpose of facilitating the commission of a felony or doing serious bodily harm to or terrorizing that person or another; and (4) that person is sexually assaulted. N.C. Gen. Stat. § 14-39 (a) and (b) (2005). To be sufficient as an element of kidnapping the confinement, restraint, or removal must not be an inherent or inevitable element of another felony with which the defendant is charged. *See State v. Fulcher*, 294 N.C. 503, 523, 243 S.E.2d 338, 351 (1978).

Our Supreme Court has held that "an asportation which is an inherent and integral part of some crime for which defendant has been convicted other than the kidnapping will not support a separate conviction for kidnapping." *State v. Tucker*, 317 N.C. 532, 535, 346 S.E.2d 417, 419 (1986), citing *State v. Irwin*, 304 N.C. 93, 102, 282 S.E.2d 439, 446 (1981). The key principle governing whether a kidnapping charge will lie is whether "[u]nder such circumstances the victim is . . . exposed to greater danger than that inherent in the armed robbery itself, . . . [or] is . . . subjected to the kind of danger and abuse the kidnapping statute was designed to prevent." *Irwin*, 304 N.C. at 103, 292 S.E.2d at 446. (holding there is mere technical

asportation when an armed robber forced the clerk from the front to the back of the store at knife point to open the safe.) *Id.* Most recently, our Supreme Court has held that:

> a trial court, in determining whether a defendant's asportation of a victim during the commission of a separate felony offense constitutes kidnapping, must consider whether the asportation was an inherent part of the separate felony offense, that is, whether the movement was "a mere technical asportation." If the asportation is a separate act independent of the originally committed criminal act, a trial court must consider additional factors such as whether the asportation facilitated the defendant's ability to commit a felony offense, or whether the asportation exposed the victim to a greater degree of danger than that which is inherent in the concurrently committed felony offense.

State v. Ripley, 360 N.C. 333, 340, 626 S.E.2d 289, 293-94 (2006). In *Ripley*, the Court concluded that the "asportation of the [victims] from one side of the motel lobby door to the other was not legally sufficient to justify defendant's convictions of second-degree kidnapping." *Id. Cf. State v. Tucker*, 317 N.C. at 536, 346 S.E.2d at 419-20 (the defendant's removal of the victim from her truck, dragging her to the river and under the bridge where he committed the sexual assaults out of the view of passersby does not constitute a mere technical asportation).

In the present case, defendant argues that there was insufficient evidence of confinement, restraint or removal of the victim beyond that which was inherent to the crimes of armed robbery and rape. At trial, the victim's relevant testimony is as follows: The victim was standing in her kitchen when she saw papers in her carport that were not present the preceding night. From her kitchen, she unlocked and opened the storm door, reached out, and started to step out of the house onto the first step. Before her foot touched the first step, defendant grabbed her arm and pushed her back into the kitchen. While in her kitchen, defendant pulled a knife out of his pocket and demanded money from the victim. She said that she did not have any money. The victim asked defendant not to hurt her, and he put the knife back in his pocket. Then, defendant pushed the victim through the heating hall and into the den. Defendant proceeded to rape the victim in the den.

After defendant raped the victim in the den, defendant asked for money again, and defendant followed the victim down the hall to her

bedroom. The victim retrieved one dollar from her billfold, which she gave to defendant. Thereafter, defendant vacated the premises.

With regards to armed robbery in the present case, defendant demanded money from the victim in the kitchen while brandishing the knife, and again in the den. After defendant's second demand, the victim walked from the den down the hallway to retrieve the money from her bedroom. The victim's movement down the hallway is a mere asportation because the armed robbery began when defendant showed the knife to the victim in the kitchen and demanded money, and defendant's movement between the kitchen, den, and bedroom did not expose the victim to a greater degree of danger. Therefore, this mere asportation constitutes insufficient evidence of confinement, restraint, or removal.

With regards to rape, defendant began and concluded the rape in the den. Because the crime of rape occurred wholly in the den, we find that there was insufficient evidence of confinement, restraint, or removal. Accordingly, we vacate the conviction of kidnapping. Thus, we remand to the trial court for resentencing according to defendant's vacated first-degree kidnapping charge.

As a result of the vacated first-degree kidnapping charge, we will not address defendant's double jeopardy argument.

[3] Finally, defendant argues that the trial court erred, or committed plain error, in instructing the jury that a knife is a dangerous or deadly weapon as a matter of law. At the charge conference, the trial judge informed the prosecutor and defense counsel that he intended to instruct the jury that a knife is a dangerous weapon on the first-degree rape charge. Neither attorney objected to that instruction. In the charge to the jury, the trial court instructed the jurors regarding the elements of the offenses and stated "a knife is a dangerous weapon" or "a knife is a dangerous or deadly weapon" in the instructions for robbery with a dangerous weapon, first-degree rape, and first-degree sexual offense. Defendant failed to object to these instructions.

No portion of a jury instruction may be assigned as error on appeal unless it was objected to prior to the jury's retiring. N.C. R. App. P., Rule 10(b)(2) (2006); *State v. McNeil*, 350 N.C. 657, 691, 518 S.E.2d 486, 507 (1999), *cert. denied*, 529 U.S. 1024, 146 L. Ed. 2d 321 (2000). In criminal cases, an issue that has not been objected to at trial, and therefore not properly preserved for appeal, still may be assigned as error on appeal if specifically alleged to constitute plain

error. N.C. R. App. P., Rule 10(c)(4) (2006); *see State v. Hartman*, 90 N.C. App. 379, 368 S.E.2d 396 (1988). Consequently, our review of this assignment of error is limited to whether or not there is plain error.

The plain error rule is applied only in those exceptional cases where a review of the whole record shows that there exists a

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

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F. 2d 995, 1002 (4th Cir. 1982) (footnotes omitted), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982)).

In the case sub judice, the victim testified that she saw defendant pull a knife from his pocket. The victim asked defendant not to hurt her, and defendant returned the knife to his pocket. The victim was unable to describe the knife, and only stated that she saw that it was a knife and she was scared. The victim further testified that, several hours after the incident, she told the investigating officer that the knife looked like a switchblade, but could not remember at the time of trial whether the knife looked like a switchblade or not.

Assuming, without deciding, the evidence regarding the knife was insufficient to establish that the knife was a dangerous weapon as a matter of law, we hold that the trial court's jury instruction did not amount to plain error. To rise to the level of plain error, a jury instruction, when viewed in light of the entire record, must have had a probable impact on the jury's determination of guilt. *Odom*, 307 N.C. at 660-61, 300 S.E.2d at 378 (stating, "even when the 'plain error' rule is applied, '[i]t is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court.' " quoting *Henderson v. Kibbe*, 431 U.S. 145, 154, 52 L. Ed. 2d 203, 212 (1977)).

The essential element of first-degree rape at issue in the instant case is the employment or display of a dangerous or deadly weapon or an article which the victim reasonably believes to be such a

weapon during the commission of the offense. In light of the entire record, particularly the victim's testimony that she knew it was a knife that defendant took from his pocket, that she asked him not hurt her upon seeing the knife, and that she was scared, we conclude that the jury likely would have found that the victim reasonably believed the knife to be a dangerous or deadly weapon. *See State v. Clemmons*, 319 N.C. 192, 200-01, 353 S.E.2d 209, 214 (1987). Accordingly, we hold, even if the trial court's instruction was erroneous, the probable impact of the instruction in question on the jury's finding of guilt was not sufficient to make this the "rare case" in which the instructional error, if such error existed, constitutes plain error absent objection by defendant.

Affirmed in part, vacated and remanded with instructions in part.

Judges McGEE and McCULLOUGH concur.

STATE OF NORTH CAROLINA v. MONTREZ DEMARIO CARTER

No. COA05-1214

(Filed 16 May 2006)

1. Robbery— conspiracy—real gun—evidence sufficient

The trial court did not err by denying defendant's motion to dismiss a charge of conspiracy to commit robbery with a dangerous weapon where the evidence was conflicting but sufficient to find that the gun was indeed real and operable.

2. Robbery— conspiracy—instructions—gun possibly not real—instructions on common law robbery required

When there is evidence suggesting that the weapon used in a robbery was inoperable or not real, the jury must be instructed on common law robbery, or as here, conspiracy to commit common law robbery. The trial court erred by not doing so.

Judge TYSON concurring in part, dissenting in part.

Appeal by defendant from judgment entered 25 August 2004 by Judge Kenneth C. Titus in Durham County Superior Court. Heard in the Court of Appeals 12 April 2006.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Robert R. Gelblum, for the State.

George E. Kelly, III, for defendant-appellant.

JACKSON, Judge.

On the morning of 8 September 2003, LeAnn Oakley ("Oakley") approached Montrez Carter ("defendant"), Willie Collins ("Collins"), and another man on the corner of Club Boulevard in Durham, North Carolina. Oakley attempted to purchase drugs from the men, but was refused based on the fact that she owed defendant money for drugs he previously had sold to her. Oakley testified that defendant and Collins suggested that Oakley have sex with the men in exchange for the drugs, and that when she refused, the men suggested she commit a robbery. Oakley agreed to commit the robbery, and the men got into her car where they drove to the R&W convenience store. On defendant's instructions, Oakley went into the store to see who was working and how many people were inside. When she returned to the car, defendant instructed her to move her car to a spot in the parking lot where it would not be visible from inside the store. Oakley did as instructed, and was then handed a gun by one of the men and told to rob the store. Oakley entered the convenience store, pointed the gun at the store owner, and demanded money which she received.

Oakley, who was arrested shortly thereafter, was identified by the store owner as being the woman who robbed her at gunpoint. Oakley confessed to Detective Brian Kilgore that she approached defendant and two other men in hopes of purchasing drugs. The men suggested that she rob a convenience store in exchange for the drugs, which she agreed to do. The men then gave her a gun, which she used during the robbery.

On 15 December 2003, defendant was indicted for robbery with a dangerous weapon and conspiracy to commit robbery with a dangerous weapon. Following a jury trial, on 25 August 2004 defendant was found guilty of conspiracy to commit robbery with a dangerous weapon, and not guilty of both robbery with a dangerous weapon and common law robbery. Defendant was sentenced to a term of imprisonment of twenty-three to thirty-seven months. His sentence was suspended and he was placed on thirty-six months of supervised probation. Defendant now appeals his conviction.

[1] Defendant first contends the trial court erred in denying his motion to dismiss the charge of conspiracy to commit robbery with a dangerous weapon based on insufficiency of the evidence to support the charge.

In order to survive a motion to dismiss, the State must offer "substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense." *State v. Crawford*, 344 N.C. 65, 73, 472 S.E.2d 920, 925 (1996). "Substantial evidence" is that which "a reasonable mind might accept as adequate to support a conclusion." *Id.* The trial court does not weigh the evidence before it; instead it is to consider the sufficiency of the evidence to support the offenses charged, and leave the determination of a witness' credibility to the jury to decide. *Id.* All contradictions and discrepancies in the evidence should be resolved in favor of the State, and the State is entitled to all reasonable inferences which may be drawn from the evidence. *Id.* at 73, 472 S.E.2d at 926. When the trial court has found substantial evidence " 'to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied.' " *State v. Golphin*, 352 N.C. 364, 458, 533 S.E.2d 168, 229 (2000) (quoting *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 383 (1988)), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001).

Defendant was charged with conspiracy to commit robbery with a dangerous weapon. Our Supreme Court has held that

> A criminal 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. To constitute a conspiracy it is not necessary that the parties should have come together and agreed in express terms to unite for a common object: A mutual, implied understanding is sufficient, so far as the combination or conspiracy is concerned, to constitute the offense.

State v. Bindyke, 288 N.C. 608, 615-16, 220 S.E.2d 521, 526 (1975) (internal quotations and citations omitted). Thus, it was not necessary for all of the parties to the conspiracy to agree expressly to the use of a dangerous weapon prior to the robbery in order for a charge of conspiracy to commit robbery with a dangerous weapon to be submitted to the jury. *State v. Johnson*, 164 N.C. App. 1, 17, 595 S.E.2d 176, 185, *appeal dismissed and disc. review denied*, 359 N.C. 194, 607 S.E.2d 658 (2004); *see also State v. Goldberg*, 261 N.C. 181, 202, 134 S.E.2d 334, 348 (1964) ("It is not essential that each conspirator

have knowledge of the details of the conspiracy or of the exact part to be performed by the other conspirators in execution thereof; nor is it necessary that the details be completely worked out in advance to bring a given act within the scope of the general plan."), *overruled on other grounds by News and Observer v. State ex rel. Starling*, 312 N.C. 276, 283, 322 S.E.2d 133, 138 (1984). Rather, there need only be evidence that defendant and the other parties "had a mutual, implied understanding to commit robbery with a dangerous weapon." *Johnson*, 164 N.C. App. at 17, 595 S.E.2d at 186.

When conflicting evidence and an uncertainty exist as to whether the weapon used during a robbery was in fact a real or functional gun, the nature of the weapon is an issue that should be left for the jury to determine. *State v. Allen*, 317 N.C. 119, 125-26, 343 S.E.2d 893, 897 (1986); *see also State v. Thompson*, 297 N.C. 285, 289, 254 S.E.2d 526, 528 (1979); *State v. Frazier*, 150 N.C. App. 416, 419, 562 S.E.2d 910, 913 (2002). Our courts have held that when the evidence tends to suggest that a weapon used during a robbery was inoperable or fake, the jury must be given an instruction on common law robbery, in addition to the instruction on robbery with a dangerous weapon. *See State v. Joyner*, 312 N.C. 779, 324 S.E.2d 841 (1985); *Frazier*, 150 N.C. App. 416, 562 S.E.2d 910; *State v. Fleming*, 148 N.C. App. 16, 557 S.E.2d 560 (2001).

In the instant case, the State presented evidence that defendant entered into an agreement with Collins, Oakley, and another individual, pursuant to which Oakley would use a gun provided to her by the three men to rob a convenience store. Oakley testified that defendant and the other men told her to rob the store in exchange for drugs, which she agreed to do. They then provided her with a gun, and she in turn committed the robbery. Oakley stated that she spoke primarily with defendant during the discussion regarding the robbery. She testified that one of the men told her that the gun was not real, but that she was uncertain whether or not it was fake. Detective Kilgore testified concerning statements Oakley made immediately after her arrest, in which she identified defendant as one of the individuals from whom she attempted to purchase drugs, and who suggested she commit a robbery in exchange for the drugs. In one of Oakley's statements to the police, she stated that defendant and the others had two guns, one real and one fake, and that she believed she had been given the fake one.

Based on the evidence presented at defendant's trial, there was sufficient evidence to suggest that defendant entered into an agree-

ment with Oakley in which she would use a gun given to her by defendant and the others to commit a robbery. As there was conflicting evidence regarding whether the gun given to Oakley was real or not, there was sufficient evidence to find that the gun given to her was indeed a real and operable weapon. Thus, the trial court did not err in denying defendant's motion to dismiss the charge of conspiracy to commit robbery with a dangerous weapon.

[2] Defendant next contends the trial court committed plain error by failing to instruct the jury on the offense of conspiracy to commit common law robbery. The trial court's charge to the jury included instructions on conspiracy to commit robbery with a dangerous weapon, robbery with a dangerous weapon, and common law robbery.

At trial, defendant failed to object to the trial court's instructions to the jury, therefore we review defendant's assignment of error to determine whether the trial court committed plain error. *See* N.C. R. App. P. 10(b)(1), 10(c)(4) (2005); *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983). In order for this Court to find that the trial court's failure to instruct the jury on the offense of conspiracy to commit common law robbery amounts to plain error, " 'defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result.' " *State v. Haselden*, 357 N.C. 1, 13, 577 S.E.2d 594, 602 (2003) (quoting *State v. Roseboro*, 351 N.C. 536, 553, 528 S.E.2d 1, 12, *cert. denied*, 531 U.S. 1019, 148 L. Ed. 2d 498 (2000)), *cert. denied*, 540 U.S. 988, 157 L. Ed. 2d 382 (2003).

As stated previously, when the evidence presented at trial suggests that the weapon used during a robbery, or in this case as a central piece of the conspiracy, is inoperable or fake, the jury must be instructed on the offense of common law robbery. In the instant case, the trial court properly instructed the jury on the offenses of robbery with a dangerous weapon and common law robbery, apparently based on the conflicting evidence regarding whether the gun used was real or fake. The same conflicting evidence directly pertained to defendant's charge of conspiracy to commit robbery with a dangerous weapon, in that the evidence regarding the agreement between defendant, Oakley, and the other parties to the conspiracy also was conflicting as to whether or not the gun Oakley was to use was in fact real. Thus, we hold the trial court erred in failing to instruct the jury on the offense of conspiracy to commit common law robbery, and in doing so the trial court improperly limited the jury's consideration of

the offenses which defendant could be found guilty of. Defendant's conviction is therefore reversed and the case is remanded for a new trial.

New trial.

Judge TYSON concurs in part, dissents in part by separate opinion.

Judge GEER concurs.

TYSON, Judge, concurring in part, dissenting in part.

I concur in that portion of the majority's opinion which holds "the trial court did not err in denying defendant's motion to dismiss the charge of conspiracy to commit robbery with a dangerous weapon." I respectfully dissent from that portion of the majority's opinion which holds the trial court committed plain error in failing to instruct the jury on the offense of conspiracy to commit common law robbery, and the award of a new trial to defendant under plain error review.

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

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982)).

In *State v. Gallimore*, our Supreme Court defined conspiracy as follows:

> A conspiracy is the unlawful concurrence of two or more persons in a wicked scheme—the combination or agreement to do an unlawful thing or to do a lawful thing in an unlawful way by unlawful means. A conspiracy to commit a felony is a felony. *The*

> *crime is complete when the agreement is made.* Many jurisdictions follow the rule that one overt act must be committed before the conspiracy becomes criminal. *Our rule does not require an overt act.*

272 N.C. 528, 532, 158 S.E.2d 505, 508 (1968) (emphasis supplied). The crime of conspiracy merely requires an agreement between two or more persons to engage in an unlawful act. *Id.* Whether or not the agreed upon offense was actually perpetrated is irrelevant to a determination of whether a conspiracy occurred. *Id.*

Here, the State presented sufficient evidence from which the jury could have found that defendant engaged in an agreement with Oakley and Collins to commit a robbery with a dangerous weapon. Oakley testified that she was not sure whether the gun she used in the robbery was real. Oakley gave a statement to police in which she stated, "I went in because they said either I go in with the fake gun, because they had a—they had a fake gun and a real one, or they want sex. So either I go in or give them sex." The agreement between Oakley, Collins, and defendant involved the use of a weapon to accomplish the robbery. The only conflicting evidence is whether the gun Oakley used in the robbery was real or "fake."

Wilma Allen ("Allen"), the store owner, whom Oakley robbed at gunpoint, was asked, "Is there any doubt in your mind that that gun was a fake gun?" Allen responded, "Huh-uh. It looked real to me." She later testified, "There was no doubt; it was real to me." Allen also testified that she knew the difference between a revolver and a semiautomatic weapon, and that the gun used by Oakley appeared to be a revolver. Police did not recover a fake gun from any of the conspirators. Both of defendant's co-conspirators pled guilty to conspiracy to commit robbery with a dangerous weapon.

Evidence was presented which tended to show a real gun was used in the robbery. Defendant has failed to show that the trial court's failure to give an instruction on conspiracy to commit common law robbery had a "probable impact on the jury's finding that the defendant was guilty" of conspiracy to commit armed robbery to warrant a new trial under plain error review. *Odom*, 307 N.C. at 660, 300 S.E.2d at 378.

The conspiracy was complete when the agreement to commit a robbery with a dangerous weapon was made. *Gallimore*, 272 N.C. at 532, 158 S.E.2d at 508. The trial court did not commit plain error

in failing *ex mero moto* to instruct the jury on conspiracy to commit common law robbery to entitle defendant to a new trial. I respectfully dissent.

ANANI AGBEMAVOR, PLAINTIFF v. KOSSIWA KETEKU, DEFENDANT

No. COA05-1213

(Filed 16 May 2006)

Process and Service— service of process—divorce—motion to dismiss—findings requested

The trial court erred in a divorce action by not making proper findings and conclusions concerning plaintiff's attempted service of process upon defendant after defendant moved to dismiss for lack of personal jurisdiction and specifically requested findings and conclusions.

Appeal by defendant from the judgment entered 22 April 2005 by Judge Alice C. Stubbs in Wake County District Court. Heard in the Court of Appeals 29 March 2006.

Anani Agbemavor, pro se, plaintiff-appellee.

Donald B. Hunt, for defendant-appellant.

JACKSON, Judge.

On 1 July 2004, Anani Agbemavor ("plaintiff") filed a complaint seeking an absolute divorce from Kossiwa Keteku ("defendant"). Service of the complaint by certified mail was attempted on defendant at the address of 2325 Strauss Street, Apartment 1F, in Brooklyn, New York. Plaintiff obtained an alias and pluries summons on 27 January 2005, and filed an amended complaint for an absolute divorce from defendant on 31 January 2005. Service of the amended complaint by certified mail was attempted on defendant at the address of 2329 Strauss Street, Apartment 1F, in Brooklyn, New York. Defendant failed to file an answer to either of plaintiff's complaints.

On 4 March 2005, plaintiff filed an affidavit of attempted service, stating that he had attempted service upon defendant by certi-

fied mail at defendant's last known address of 2329 Strauss Street, Apartment 1F, in Brooklyn, New York. Plaintiff's affidavit stated that service also was attempted by publication of a Notice of Service in the Canarsie Courier, in Brooklyn, New York, and that such notice was published on 3, 10, and 17 February 2005. Plaintiff filed a motion for summary judgment on his claim for an absolute divorce on 28 March 2005. A notice of the hearing on plaintiff's motion for summary judgment was filed and mailed to defendant at the address of 2325 Strauss Street, Apartment 1F, Brooklyn, New York on 28 March 2005.

Defendant made a limited appearance to contest personal jurisdiction, and on 15 April 2005 filed a motion to dismiss plaintiff's action based on a lack of personal jurisdiction over defendant, insufficiency of process, and insufficiency of service of process. Plaintiff's counsel filed an affidavit on the same day, alleging that she had spoken with a woman identifying herself as defendant, and stating that the woman had received documents about plaintiff's divorce action. The woman asked whether the divorce hearing was still set for 15 April 2005, and plaintiff's counsel informed her that the hearing was still going forward, and that at that time she would be asking the trial court to grant plaintiff a judgment of divorce. The affidavit states that defendant informed plaintiff's counsel that she was homeless and had no address. The hearing on plaintiff's motion for summary judgment and defendant's motions to dismiss was continued until 10:00 a.m. on 22 April 2005. At 9:22 a.m. on 22 April 2005, defendant filed an amended motion seeking to dismiss plaintiff's action for a lack of personal jurisdiction, and specifically requesting that

> In the event the court determines that the attempted service was valid, the Defendant, pursuant to North Carolina Civil Procedure Rule 52, requests the court to make specific findings of fact and conclusions of law with respect to the service of process and jurisdiction over the Defendant in this action.

On 22 April 2005, the trial court entered a Judgment of Absolute Divorce, and granted plaintiff's motion for summary judgment. The judgment stated that defendant had been served properly, and concluded as a matter of law that the trial court had jurisdiction over the parties. The trial court made no additional findings of fact concerning the service upon defendant. Defendant appeals from the denial of her motions to dismiss and the trial court's judgment granting plaintiff an absolute divorce.

In order for a court in this State to obtain personal jurisdiction over a defendant, there must be "the issuance of summons and service of process by one of the statutorily specified methods." *Fender v. Deaton*, 130 N.C. App. 657, 659, 503 S.E.2d 707, 708 (1998), *disc. review denied*, 350 N.C. 94, 527 S.E.2d 666 (1999). When a judgment is entered against a defendant for whom the trial court lacks personal jurisdiction, the judgment is void. *Freeman v. Freeman*, 155 N.C. App. 603, 606-07, 573 S.E.2d 708, 711 (2002); *see also Sink v. Easter*, 284 N.C. 555, 202 S.E.2d 138 (1974).

Rule 4(j) of the North Carolina Rules of Civil Procedure governs service of process, and provides in relevant part:

> *Process—Manner of service to exercise personal jurisdiction.*—In any action commenced in a court of this State having jurisdiction of the subject matter and grounds for personal jurisdiction as provided in G.S. 1-75.4, the manner of service of process within or without the State shall be as follows:
>
> (1) Natural Person.—Except as provided in subsection (2) below, upon a natural person by one of the following:
>
> . . . .
>
> c. By mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to the party to be served, and delivering to the addressee.

N.C. Gen. Stat. § 1A-1, Rule 4(j) (2005). Rule 4(j1), which governs service of a party by publication, provides in part:

> *Service by publication on party that cannot otherwise be served.*—A party that cannot with due diligence be served by personal delivery, registered or certified mail, or by a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) may be served by publication. . . . If the party's post-office address is known or can with reasonable diligence be ascertained, there shall be mailed to the party at or immediately prior to the first publication a copy of the notice of service of process by publication. The mailing may be omitted if the post-office address cannot be ascertained with reasonable diligence. Upon completion of such service there shall be filed with the court an affidavit showing the publication and mailing in accordance with

> the requirements of G.S. 1-75.10(2), the circumstances warranting the use of service by publication, and information, if any, regarding the location of the party served.

N.C. Gen. Stat. § 1A-1, Rule 4(j1) (2005).

"A defect in service of process by publication is jurisdictional, rendering any judgment or order obtained thereby void. . . . Therefore, statutes authorizing service of process by publication are strictly construed, both as grants of authority and in determining whether service has been made in conformity with the statute." *Fountain v. Patrick*, 44 N.C. App. 584, 586, 261 S.E.2d 514, 516 (1980) (citations omitted). "Due diligence dictates that plaintiff use all resources reasonably available to [him] in attempting to locate defendant[]. Where the information required for proper service of process is within plaintiff's knowledge or, with due diligence, can be ascertained, service of process by publication is not proper." *Id.* at 587, 261 S.E.2d at 516. Our courts have held that "[a]lthough defective service of process may sufficiently give the defending party actual notice of the proceedings, 'such actual notice does not give the court jurisdiction over the party.' " *Fulton v. Mickle*, 134 N.C. App. 620, 624, 518 S.E.2d 518, 521 (1999) (quoting *Johnson v. City of Raleigh*, 98 N.C. App. 147, 149, 389 S.E.2d 849, 851 (1990)).

Rule 52(a)(2) specifically provides that "[f]indings of fact and conclusions of law are necessary on decisions of any motion or order *ex mero motu* only when requested by a party and as provided by Rule 41(b)." N.C. Gen. Stat. § 1A-1, Rule 52(a)(2) (2005). A "trial court's compliance with the party's Rule 52(a)(2) motion is mandatory." *Andrews v. Peters*, 75 N.C. App. 252, 258, 330 S.E.2d 638, 642 (1985), *aff'd*, 318 N.C. 133, 347 S.E.2d 409 (1986). "Once requested, the findings of fact and conclusions of law on a decision of a motion, as in a judgment after a non-jury trial, must be sufficiently detailed to allow meaningful [appellate] review." *Id.*; *see also Quick v. Quick*, 305 N.C. 446, 290 S.E.2d 653 (1982). " '[W]hen the court fails to find facts so that this Court can determine that the order is adequately supported by competent evidence . . ., then the order entered must be vacated and the case remanded.' " *Quick*, 305 N.C. at 457, 290 S.E.2d at 661 (quoting *Crosby v. Crosby*, 272 N.C. 235, 238-39, 158 S.E.2d 77, 80 (1967)).

In the instant case, the trial court made no findings of fact concerning plaintiff's attempted service of process upon defendant. The trial court did not address the attempted service by publication, and

made no findings to indicate whether the attempted service complied with our statutory requirements. The record contains two versions of plaintiff's complaint, both of which plaintiff attempted to serve upon defendant by certified mail, but were mailed to two different addresses. The record also contains an affidavit of attempted service by publication, filed 4 March 2005, whereby plaintiff contends he previously attempted to serve defendant by certified mail at an address located at 2329 Strauss Street, Apartment 1F, in Brooklyn, New York. Plaintiff's affidavit then states that plaintiff attempted service of defendant by publication. An affidavit showing the publication and dates of publication also was included with plaintiff's affidavit. However, plaintiff's affidavit fails to state that plaintiff mailed a notice of service by publication to defendant prior to the first publication, as required by Rule 4(j1). The facts indicate that plaintiff had a mailing address for defendant, based on the fact that on 28 March 2005, plaintiff mailed defendant a notice of the upcoming hearing on plaintiff's motion for summary judgment divorce. However, plaintiff mailed the notice of hearing to defendant at the address located at 2325 Strauss Street, Apartment 1F, in Brooklyn, New York, which is a different address than was used during the second attempt at service of plaintiff's complaint.

Generally " 'Rule 52(a)(2) does not apply to the decision on a summary judgment motion because, if findings of fact are necessary to resolve an issue, summary judgment is improper.' " *Broughton v. McClatchy Newspapers, Inc.*, 161 N.C. App. 20, 33, 588 S.E.2d 20, 30 (2003) (quoting *Mosley v. Finance Co.*, 36 N.C. App. 109, 111, 243 S.E.2d 145, 147 (1978)). However, defendant in the instant case made a motion to dismiss plaintiff's action based on a lack of personal jurisdiction pursuant to Rules 12(b)(2), (b)(3), and (b)(5) of our Rules of Civil Procedure. Defendant also specifically requested that the trial court make findings of fact and conclusions of law regarding defendant's motion with respect to the service of process and jurisdiction over defendant. When defendant filed her motion pursuant to Rule 52(a)(2), the trial court was required to make the requested findings of fact and conclusions of law. The trial court in the instant case made the conclusory finding that defendant had been properly served and concluded as a matter of law that it had jurisdiction over defendant, without making the findings of fact necessary to support these conclusions. The trial court failed to make any findings regarding plaintiff's use of service by publication, and his "due diligence" in attempting to serve defendant by other means before resorting to service by publication. The trial court also failed to make any findings

that plaintiff was not required to mail notice of the service by publication to defendant prior to the first publication.

When the trial court failed to make the required findings of fact and conclusions of law regarding the service of process and jurisdiction over defendant, the trial court's judgment must be vacated. Based on the inconsistent facts before us, and the lack of findings of fact concerning the trial court's jurisdiction over defendant, we hold the trial court failed to comply with defendant's Rule 52(a)(2) motion, and the judgment granting a summary judgment divorce must be vacated and remanded so that the trial court may make the required findings of fact and conclusions of law regarding the trial court's jurisdiction over defendant.

Vacated and remanded.

Judges TYSON and GEER concur.

STATE OF NORTH CAROLINA v. DEXTER LEON SURRATT

No. COA05-1156

(Filed 16 May 2006)

Probation and Parole— modifications after expiration of original term—no pending violation allegations—no jurisdiction

The trial court lacked jurisdiction to revoke defendant's probation on 7 April 2005 where the five year term of probation had begun on 24 September 1995 and had expired on 23 September 2000 without pending allegations of violations. The court lacked jurisdiction to modify the probation judgment (as it did several times) after that date.

Appeal by defendant from judgment entered 7 April 2005 by Judge James W. Morgan in Catawba County Superior Court. Heard in the Court of Appeals 19 April 2006.

Attorney General Roy Cooper, by Assistant Attorney General Ann B. Wall, for the State.

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

TYSON, Judge.

Dexter Leon Surratt ("defendant") appeals from judgment entered finding him to be in violation of his probation and activating a three year sentence imposed in 1994. We reverse.

I. Background

On 14 June 1994, defendant received a suspended sentence of three years in the custody of the Department of Correction following a conviction of indecent liberties with a minor. Defendant's sentence was suspended, and he was placed on supervised probation for sixty months. This probation period was to begin at the expiration of his active sentence in companion case 93 CRS 12023.

On 24 September 1995, defendant was released from the Department of Corrections after he completed his sentence in 93 CRS 12023. On this date, defendant began to serve the five years term of probation concurrently with a ten year active sentence in a separate case, 94 CRS 011654. He was released on parole on 24 January 1999 in the later case.

On 11 February 1999, without allegations of probation violations, the trial court modified defendant's probation to waive probation supervision fees of twenty dollars per month. Defendant acknowledged receipt of this modification of the conditions of his probation.

On 22 March 2001, without allegations of probation violations, the trial court modified defendant's probation to reinstate payment of probation supervision fees. Defendant did not sign this order to acknowledge receipt of modifications of the conditions of his probation. On 13 March 2003, the trial court purportedly modified the conditions of defendant's probation to extend probation for twelve months from 23 January 2004 to 23 January 2005, to undergo sex offender treatment, and to undergo house arrest for ninety days. Defendant signed this order to acknowledge receipt of the conditions of probation.

On 1 November 2004, an order for arrest for felony probation violation was served on defendant. The order alleged defendant was: (1) suspended from his sex offender treatment program; and (2) $350.00 in arrears in his probation supervision fees.

On 6 January 2005, the trial court found defendant had been suspended from his sex offender treatment program and extended his probation with additional conditions for another eleven months and

nine days from 22 January 2005 until 31 December 2005. The trial court ordered defendant to sign a new contract for his sex offender treatment program and ordered defendant not be unsupervised in the presence of anyone under the age of eighteen years.

On 1 February 2005, an order for arrest for felony probation violation was served on defendant. The order alleged defendant: (1) missed two curfew checks; (2) was $470.00 in arrears in his probation supervision fees; and (3) had been suspended from his sex offender treatment program on 1 February 2005 and had been in the unsupervised presence of his sister, who was under eighteen years of age.

On 7 April 2005, the trial court found defendant had violated all three allegations contained in the violation report. The trial court revoked defendant's probation and activated his three year sentence imposed and suspended in 1994. Defendant appeals.

II. Issues

Defendant argues the trial court lacked jurisdiction to modify his probation.

III. Probation Supervision

Defendant contends, "the hearing court lacked jurisdiction to enter a revocation judgment against [defendant]." Defendant argues his five years term of probation began on 24 September 1995 and ended on [23] September 2000, and "all orders entered in this matter after said date are a nullity and void ab initio." We agree.

N.C. Gen. Stat. § 15A-1346 (2005) provides that "a period of probation commences on the day it is imposed and runs concurrently with any other period of probation, parole, or imprisonment to which the defendant is subject during that period."

On 24 September 1995, defendant began to serve a ten year sentence in an unrelated and separate case (94 CRS 011654). On 24 September 1995, defendant also began to serve his probationary sentence. He was released on parole on the later charge on 24 January 1999. Defendant's five year probationary period ended 23 September 2000.

The trial court, without allegations of probation violations, modified defendant's probation to waive probation supervision fees on 11 February 1999. Defendant signed to acknowledge receipt of this modification of the conditions of his probation.

On 18 March 2003, defendant consented to an one year extension of his probation "in lieu of a formal violation due to being suspended from the Sexual Abuse Intervention Program." Defendant's probationary period was purportedly extended from 23 January 2004 to 23 January 2005. The State contends, "[a] finding of a violation of probation conditions would have been grounds for revocation of probation and activation of his original three year sentence."

On 6 June 2005, the trial court found defendant had violated a valid condition of his probation when he refused to sign the new sexual offense treatment program contract. The trial court extended his probationary period an additional eleven months to 31 December 2005.

On 7 April 2005, the trial court held defendant had violated all three allegations of the 1 February 2005 violation report including: (1) missing two curfew checks; (2) being $470.00 in arrears in his probation supervision fees; and (3) being suspended from his sex offender treatment program on 1 February 2005 and being in the unsupervised presence of his sister, who was under eighteen years of age.

N.C. Gen. Stat. § 15A-1344(f) (2005) provides:

> (f) Revocation after Period of Probation.—The court may revoke probation after the expiration of the period of probation if:
>
> (1) Before the expiration of the period of probation the State has filed a written motion with the clerk indicating its intent to conduct a revocation hearing; and
>
> (2) The court finds that the State has made reasonable effort to notify the probationer and to conduct the hearing earlier.

In *State v. Camp*, our Supreme Court held a trial court that lacked jurisdiction over the defendant had no power to revoke the defendant's probation. 299 N.C. 524, 528, 263 S.E.2d 592, 595 (1980). The Court stated "probation can be revoked and the probationer made to serve a period of active imprisonment even after the period of probation has expired if a violation occurred during the period *and if the court was unable to bring the petitioner before it in order to revoke at that time*." *Id.* (internal quotations and citations omitted).

Here, defendant's term of probation expired on 23 September 2000. Both extensions of defendant's probationary period occurred long after the five years term of probation had expired without allegations of defendant's violation prior to the expiration. *Id.* Defendant

agreed to the waiver of his probationary fees within the term of probation on 11 February 1999. The trial court had jurisdiction over defendant at that time. No violations of probation were alleged or pending at the time defendant's probation expired. The trial court lacked jurisdiction to revoke defendant's probation and activate his sentence in February 2005. N.C. Gen. Stat. § 15A-1344(f).

IV. Conclusion

Defendant's five years term of probation expired on 23 September 2000. The trial court lacked jurisdiction to reinstate defendant's probation supervision fees or to make further modifications to his probation judgment after that date. *Camp*, 299 N.C. at 528, 263 S.E.2d at 595. The trial court's judgment is reversed.

Reversed.

Judges GEER and JACKSON concur.

IN THE MATTER OF: B.C.D.

No. COA05-1123

(Filed 16 May 2006)

1. Juveniles— unlawfully and willfully threatening an individual based on race—motion to dismiss—sufficiency of evidence—threat to assault

The trial court did not err by denying a juvenile's motion to dismiss the charge of unlawfully and willfully threatening an individual based on her race in violation of the Ethnic Intimidation Statute under N.C.G.S. § 14-401.14 even though the juvenile contends there was insufficient evidence that the juvenile threatened to assault or damage the property of an African-American assistant principal, because: (1) a threat constitutes an expressed intent to harm at some point in the future; and (2) the pertinent email, by its own terms, plainly and directly communicated an intent to inflict harm to the assistant principal when it was sent to an African-American person and was signed "KKK," and promised that persons would show up at her doorstep unless she refrained from suspending students who use the derogatory term for African-Americans.

2. Juveniles— unlawfully and willfully threatening an individual based on race—motion to dismiss—sufficiency of evidence—racially motivated purpose

The trial court did not err by denying a juvenile's motion to dismiss the charge of unlawfully and willfully threatening an individual based on her race in violation of the Ethnic Intimidation Statute under N.C.G.S. § 14-401.14 even though the juvenile contends there was insufficient evidence that the juvenile sent an email to an African-American assistant principal for a racially motivated purpose, because: (1) the juvenile testified that he sent the email in protest of the assistant principal's treatment against him as compared with others who were African-American; and (2) the email contained a racial epithet and stated that the KKK would retaliate against her if she suspended another student who uses the derogatory term for African-Americans.

Appeal by respondent-juvenile from an adjudication order entered 8 April 2005 by Judge Michael G. Knox in Cabarrus County District Court. Heard in the Court of Appeals 28 March 2006.

Attorney General Roy Cooper, *by Assistant Attorney General Letitia C. Echols*, *for the State.*

George Wiseman for *juvenile-respondent.*

LEVINSON, Judge.

Respondent (B.C.D.) appeals from a juvenile adjudication order adjudging him to be delinquent for violating North Carolina's Ethnic Intimidation Statute. We affirm.

The pertinent facts may be summarized as follows: On 2 August 2004, Tasha Hall, an African-American Assistant Principal at Central Cabarrus High School, checked her electronic mail box and found a message which stated, in pertinent part, that:

> You are nothing but a filthy n[——] and you need to be fired. If you ever suspend somebody for saying the verbal phrase "n[——]" the KKK will show up on your door step! This is a promise not a threat. So what are you going to do about it b[——]? Not a damn thing but follow my instructions!!!!!!! Bye, you stupid a[—] p[iece] of s[—], greasy a[—] stinky f[———] N[——]! KKK

Hall alerted the school principal of her receipt of the e-mail, and requested a transfer from the Superintendent of Cabarrus County

Schools due to safety concerns. In court, Hall testified that, as an African-American, she feared that physical harm would come to herself, her family or her property. Custodians escorted Hall to her car in the evenings. Hall stopped bringing her children to after-school games or events, and she remained especially cautious of her surroundings in the parking lot, ensuring that she parked within view of security cameras.

With the help of the Federal Bureau of Investigation, school officials traced the subject e-mail to the account of the respondent's grandmother. Hall previously suspended respondent for using racial slurs, including the word "n[——]", towards other students on the school bus.

The respondent testified that he sent the e-mail from his grandparents' computer in June 2004, but delayed its delivery until 31 July 2004. When questioned about the e-mail, respondent told his family that the e-mail was sent as a "joke" to protest a prior disciplinary action by Hall. Respondent argued that while he and his white friend were suspended for using racial epithets on the school bus, the two black girls with whom they were arguing were not. Respondent further testified that the e-mail was not intended to scare Hall, and that racial animus was not the motivation for the e-mail. Rather, according to respondent, Hall was simply the school administrator who suspended the respondent, and Hall happened to be African-American.

The trial court concluded that respondent unlawfully and willfully threatened Hall because of her race in violation of N.C. Gen. Stat. § 14-401.14, and subsequently imposed probation under the supervision of the court counselor for six months. Respondent now appeals, contending the trial court erred by denying his motion to dismiss at the close of all the evidence because there was insufficient evidence that (1) he threatened to assault or damage the property of Hall, and (2) he sent the subject e-mail to Hall because of her race.

[1] We first address respondent's argument that there was insufficient evidence that he threatened to assault or damage the property of Tasha Hall. We disagree.

When ruling on a motion to dismiss, "the trial court must determine only whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense." *State v. Crawford*, 344 N.C. 65, 73, 472 S.E.2d 920, 925 (1996).

> Evidence is substantial if it is relevant and adequate to convince a reasonable mind to accept a conclusion. In considering a motion to dismiss, the trial court must analyze the evidence in the light most favorable to the State and give the State the benefit of every reasonable inference from the evidence. The trial court must also resolve any contradictions in the evidence in the State's favor. The trial court does not weigh the evidence, consider evidence unfavorable to the State, or determine any witness' credibility.

State v. Robinson, 355 N.C. 320, 336, 561 S.E.2d 245, 255-56 (2002) (internal citations and quotation marks omitted). " '[T]he rule for determining the sufficiency of evidence is the same whether the evidence is completely circumstantial, completely direct, or both.' " *State v. Crouse*, 169 N.C. App. 382, 389, 610 S.E.2d 454, 459 (2005) (quoting *State v. Wright*, 302 N.C. 122, 126, 273 S.E.2d 699, 703 (1981)).

North Carolina's Ethnic Intimidation Statute, codified at N.C. Gen. Stat. § 14-401.14 (2005), provides, in pertinent part, that:

> (a) If a person shall, because of race, color, religion, nationality, or country of origin, assault another person, or damage or deface the property of another person, or threaten to do any such act, he shall be guilty of a Class 1 misdemeanor.

The instant case requires us to construe this statute. "Statutory interpretation properly begins with an examination of the plain words of the statute." *Correll v. Division of Social Services*, 332 N.C. 141, 144, 418 S.E.2d 232, 235 (1992). In interpreting statutory language, "it is presumed the General Assembly intended the words it used to have the meaning they have in ordinary speech[.]" *Nelson v. Battle Forest Friends Meeting*, 335 N.C. 133, 136, 436 S.E.2d 122, 124 (1993). When the plain meaning is unambiguous, a court should go no further in interpreting the statute than its ordinary meaning. *Id.*

By its terms, G.S. § 14-401.14 proscribes personal assaults, damaging or defacing property, or threatening to do either, because of an individual's race, color, religion, nationality or country of origin. The offense of assault has no statutorily prescribed definition. However, an assault is defined at common law as either "a show of violence causing a reasonable apprehension of immediate bodily harm[]" or "an intentional offer or attempt by force or violence to do injury to the person of another." *State v. Thompson*, 27 N.C. App. 576, 577, 219

S.E.2d 566, 567-68 (1975). In ordinary usage, a threat is defined as "[a] communicated intent to inflict harm or loss on another or another's property," Black's Law Dictionary 1519 (8th Ed. 2004), or "[a]n indication of an impending danger or harm[,]" Webster's II New College Dictionary 1176 (3rd Ed. 2005). Thus, a threat constitutes an expressed intent to harm at some point in the future. Accordingly, the respondent could be adjudged delinquent for a violation of G.S. § 14-401.14 if he communicated an intent to inflict bodily harm on Hall or to damage her property at some point in the future.

The subject e-mail, by its own terms, plainly and directly communicated an intent to inflict harm to Hall. The e-mail was sent to an African-American person and was signed "KKK", and promised that persons would "show up on [Hall's] door step" unless she refrained from suspending students who use the term "n[——]." Consequently, because there was sufficient evidence that the respondent threatened to assault Hall in violation of G.S. § 14-401.14, this assignment of error is overruled.

[2] We next address respondent's argument that there was insufficient evidence that the e-mail was sent for a racially motivated purpose. This argument is without merit.

Respondent testified that he sent the e-mail to Hall in protest of her alleged differing treatment against him as compared with others who were African-American. The email contained the racial epithet, "filthy n[——]", and stated that the KKK would retaliate against Hall if she suspended another student who uses the term, "n[——]." Based upon all the evidence of record, we conclude the State presented substantial evidence that respondent sent the e-mail to Hall for racially motivated reasons.

This assignment of error is overruled.

Affirmed.

Judges WYNN and ELMORE concur.

CONNER BROTHERS MACHINE COMPANY, INC., PLAINTIFF-APPELLEE v. RITA ROGERS, INDIVIDUALLY, TIM CONNER ENTERPRISES, INC. D/B/A SPENCER-PETTUS MACHINE COMPANY, AND TIM CONNER, INDIVIDUALLY, DEFENDANTS-APPELLANTS

No. COA05-1116

(Filed 16 May 2006)

Injunctions— preliminary—lack of subject matter jurisdiction

The trial court erred in a breach of fiduciary duty, conversion, tortious interference with contractual relations, conspiracy, unfair and deceptive trade practices, trade secrets act violations, and unjust enrichment case by entering a preliminary injunction, and the injunction is vacated because: (1) the action had abated based on lack of issuance or service of a civil summons; and (2) although the parties purported to agree in the record on appeal that the trial court had subject matter jurisdiction, parties cannot stipulate to give a court subject matter jurisdiction where no such jurisdiction exists.

Appeal by defendants from preliminary injunction entered 22 April 2005 and order entered 3 June 2005, *nunc pro tunc* 2 May 2005, by Judge W. Robert Bell in Superior Court, Gaston County. Heard in the Court of Appeals 19 April 2006.

McNair Law Firm, P.A., by Allan W. Singer and Marna M. Albanese, for plaintiff-appellee.

Gray, Layton, Kersh, Solomon, Sigmon, Furr & Smith, P.A., by David W. Smith, III and William E. Moore, Jr. for defendants-appellants.

McGEE, Judge.

Plaintiff filed a complaint dated 1 March 2005, alleging claims against defendants for (1) breach of fiduciary duty, (2) conversion, (3) tortious interference with contractual relations, (4) conspiracy, (5) unfair and deceptive trade practices, (6) trade secrets act violations, and (7) unjust enrichment. Plaintiff also moved for the issuance of a temporary restraining order, a preliminary injunction, and a permanent injunction against defendants. No summons was ever issued.

The trial court entered a temporary restraining order against defendants on 1 March 2005. The trial court entered a preliminary

injunction against defendants on 22 April 2005. Defendants filed a motion for relief from the preliminary injunction pursuant to Rule 60, and a motion to stay, on 10 May 2005. The trial court heard defendants' motions on 18 May 2005. The trial court entered an order denying defendants' Rule 60 motion and motion to stay on 3 June 2005, *nunc pro tunc* 2 May 2005. Defendants appeal.

Defendants argue "[t]he issuance of the preliminary injunction was beyond the lawful authority of the [trial] court because the action had abated for lack of issuance or service of a civil summons[.]" However, the parties purported to agree in the statement of jurisdiction in the record on appeal that "[t]he [trial court] had subject matter jurisdiction over all matters and things presented to the [trial] court and raised on appeal." Accordingly, defendants appear to challenge the trial court's exercise of personal jurisdiction over defendants.

However, "[s]ubject matter jurisdiction is a prerequisite to the exercise of personal jurisdiction." *Tart v. Prescott's Pharmacies, Inc.*, 118 N.C. App. 516, 519, 456 S.E.2d 121, 124 (1995). "[P]arties cannot stipulate to give a court subject matter jurisdiction where no such jurisdiction exists." *Northfield Dev. Co. v. City of Burlington*, 165 N.C. App. 885, 887, 599 S.E.2d 921, 924, *disc. review denied*, 359 N.C. 191, 607 S.E.2d 278 (2004). A "lack of jurisdiction of the subject matter may always be raised by a party, or the court may raise such defect on its own initiative." *Dale v. Lattimore*, 12 N.C. App. 348, 352, 183 S.E.2d 417, 419, *cert. denied*, 279 N.C. 619, 184 S.E.2d 113 (1971). In the present case, we raise the issue of lack of jurisdiction over the subject matter *ex mero motu*. *See In re N.R.M., T.F.M.*, 165 N.C. App. 294, 296-97, 598 S.E.2d 147, 148-49 (2004).

"A civil action is commenced by filing a complaint with the court." N.C. Gen. Stat. § 1A-1, Rule 3(a) (2005). Rule 4 of the Rules of Civil Procedure provides as follows: "Upon the filing of the complaint, summons shall be issued forthwith, and in any event within five days." N.C. Gen. Stat. § 1A-1, Rule 4(a) (2005). The comment to Rule 4(a) makes clear that "[t]he five-day period was inserted to mark the outer limits of tolerance in respect to delay in issuing the summons." N.C.G.S. § 1A-1, Rule 4(a), Comment. Our Court has held that where a summons does not issue within five days of the filing of a complaint, the action abates and is deemed never to have commenced. *Roshelli v. Sperry*, 57 N.C. App. 305, 308, 291 S.E.2d 355, 357 (1982). Where an action is deemed never to have commenced, "a trial

court necessarily lacks subject matter jurisdiction." *In re A.B.D.*, 173 N.C. App. 77, 86, 617 S.E.2d 707, 713 (2005). Our Court has also held that "[w]here no summons is issued the court acquires jurisdiction over neither the persons nor the subject matter of the action." *In re Mitchell*, 126 N.C. App. 432, 433, 485 S.E.2d 623, 624 (1997) (citing *Swenson v. Assurance Co.*, 33 N.C. App. 458, 465, 235 S.E.2d 793, 797 (1977)).

In the present case, plaintiff filed its complaint dated 1 March 2005. However, as the record shows, and as plaintiff stated during oral argument, no summons was ever issued. The action abated when no summons was issued within five days of the filing of the complaint. *See Roshelli*, 57 N.C. App. at 308, 291 S.E.2d at 357. Because no summons was issued, the action is deemed never to have commenced. *See Id.* When the trial court entered the preliminary injunction, it did not have subject matter jurisdiction over the action and, therefore, had no authority to enter a preliminary injunction. *See In re Mitchell*, 126 N.C. App. at 433-34, 485 S.E.2d at 624; *In re A.B.D.*, 173 N.C. App. at 86-87, 617 S.E.2d at 713-14. We therefore vacate the preliminary injunction. *See In re Mitchell*, 126 N.C. App. at 434, 485 S.E.2d at 624. Because we vacate the preliminary injunction, we do not address defendants' remaining arguments.

Vacated.

Judges GEER and STEPHENS concur.

OPINIONS REPORTED WITHOUT PUBLISHED OPINIONS

FILED 16 MAY 2006

ANDERSON v. MCTAGGART No. 05-792	Mecklenburg (04CVS17852)	Appeal dismissed
ANTONELLI v. ECR OF N.C. No. 05-1092	Guilford (04CVS5524)	Reversed and remanded
BERRY v. HOLIDAY INN SELECT No. 05-612	Ind. Comm. (I.C. #270126)	Affirmed
BOWEN v. PARKER No. 05-1340	Pender (04CVS317)	Affirmed
CORREA v. K-MART CORP. No. 05-926	Ind. Comm. (I.C. #139423)	Affirmed in part, reversed and remanded in part
GIBBS v. MAYO No. 05-796	Hyde (00CVS85)	Reversed and remanded
GIBBS v. MAYO No. 05-921	Hyde (00CVS85)	Affirmed
HUANG v. HUANG No. 05-1186	Wake (95CVD1078)	Appeal is dismissed
IN RE A.M. & A.L. No. 05-937	Buncombe (04J208)	Affirmed
IN RE A.M.P. No. 05-1224	Alamance (04J97)	Affirmed
IN RE J.G., M.A., W.C., JR., A.A. No. 05-503	Iredell (03J203) (03J204) (03J205) (03J206) (03J207)	Affirmed as to respondent mother; dismissed as to respondent father
IN RE J.H. No. 05-731	Cumberland (02JB772)	Affirmed
IN RE K.A.B. & T.J.B., Jr. No. 05-1209	Catawba (03J5) (03J6)	Affirmed
IN RE N.E.G. No. 05-1424	Haywood (04J88)	Affirmed
IN RE S.C.S. No. 05-1435	Alamance (03J58)	Affirmed

IN RE T.R. & T.S. No. 05-1363	Mecklenburg (04J1033) (04J1034)	Affirmed
KUDLINSKI v. NORWOOD No. 05-580	Vance (03CVS917)	Affirmed
LINCOLN v. BUECHE No. 05-970	Guilford (03CVS11607)	Dismissed
LINCOLN CTY. BD. OF EDUC. v. SAN-GRA CORP. No. 05-963	Lincoln (04CVS1140)	Appeal dismissed
PALMER v. JACKSON No. 05-1067	Sampson (00CVS1462) (I.C.# 859146)	The order of the trial court is affirmed. Plaintiff's motion for sanctions and to dismiss this appeal is denied
SCOTT v. SCOTT No. 05-803	Cumberland (02CVD3649)	Vacated and remanded
SNOW v. COUNTY OF DARE No. 05-1104	Dare (03CVS591)	Dismissed
STATE v. BATTLE No. 05-1211	Durham (02CRS15306)	Affirmed
STATE v. CASTANEDA No. 05-1254	Haywood (03CRS53115) (03CRS53116) (03CRS53077) (03CRS53078) (03CRS53079) (03CRS3736)	Dismissed
STATE v. CLONINGER No. 05-1039	Gaston (02CRS675) (02CRS2942)	No error as to defendant's conviction of involuntary manslaughter. Reversed and remanded for a new habitual felon hearing.
STATE v. CORDRAY No. 05-759	Forsyth (03CRS56794)	No error
STATE v. CROSBY No. 05-1299	Forsyth (03CRS58755)	No error
STATE v. DEREEF No. 05-560	New Hanover (03CRS13007) (03CRS13008)	No error

STATE v. ESQUIVEL-LOPEZ No. 05-1096	Forsyth (04CRS50501)	No error
STATE v. FARRAR No. 05-1081	Chatham (04CRS4266)	No error
STATE v. FRYE No. 05-1042	Durham (04CRS43268)	No error
STATE v. GLASCOE No. 05-1145	Cabarrus (02CRS18188) (02CRS18189)	No error
STATE v. HARRELL No. 05-1227	Jackson (05CRS50324) (05CRS50326)	No error
STATE v. HIGGS No. 05-1196	Pitt (04CRS50602) (04CRS50603)	No error
STATE v. HOLMES No. 05-986	Cumberland (03CRS51553)	Affirmed in part, vacated and remanded in part
STATE v. HUFFMAN No. 05-1297	Stokes (05CRS381) (05CRS382) (05CRS383) (05CRS384) (05CRS385) (05CRS386) (05CRS387) (05CRS388)	No error
STATE v. HURST No. 05-1189	Madison (04CRS50377) (05CRS624) (05CRS625) (05CRS626) (05CRS627) (05CRS50101) (05CRS50106) (05CRS50108)	No error
STATE v. JOHNSON No. 05-1085	Richmond (04CRS53023)	No error
STATE v. JONES No. 05-1264	Buncombe (04CRS52784) (04CRS52785)	No error
STATE v. JONES No. 05-959	Wake (04CRS13661) (04CRS2089)	No error

STATE v. LOCKLEAR No. 05-878	Robeson (02CRS19488) (02CRS19489)	Remanded
STATE v. MACK No. 05-1099	Orange (00CRS2108) (00CRS2109) (00CRS2110)	Dismissed
STATE v. McCULLY No. 05-1080	Gaston (03CRS61988) (03CRS61989)	No error
STATE v. MOSELY No. 05-1114	Buncombe (04CRS53803)	No error
STATE v. PARKER No. 05-1016	Lenoir (03CRS50911)	Dismissed
STATE v. PARKER No. 05-1216	Gaston (02CRS69747)	No error
STATE v. PARRISH No. 05-1130	Anson (04CRS51381)	No error
STATE v. ROSS No. 05-1256	Forsyth (03CRS57957)	No error
STATE v. RUSSELL No. 05-1215	Cabarrus (04CRS16406) (04CRS18644)	No error
STATE v. SHARPE No. 05-1273	Guilford (02CRS24814) (02CRS24815) (02CRS24816) (02CRS24817) (02CRS91631) (02CRS91632) (02CRS91633) (02CRS91634) (02CRS91635) (02CRS91636) (02CRS91637) (02CRS91638) (02CRS91639) (02CRS91640) (02CRS91641) (02CRS91642) (02CRS91643) (02CRS91644) (02CRS91645) (02CRS91646) (02CRS91647)	No error

	(02CRS91648) (02CRS91649) (02CRS91650) (02CRS91651) (02CRS91652) (02CRS91653) (02CRS91654) (02CRS91655) (02CRS91656) (02CRS91657)	
STATE v. SMITH No. 05-950	Robeson (03CRS52537) (03CRS52537)	No error
STATE v. TITUS No. 05-1195	Guilford (02CRS87990)	No prejudicial error
TERRELL v. CHATHAM CTY. No. 05-851	Chatham (04CVS705)	Dismissed
THOMPSON v. FEDERAL EXPRESS GROUND PACKAGE SYS., INC. No. 05-1154	Ind. Comm. (I.C. #125834)	Dismissed

FANNIE LEE TILLMAN AND SHIRLEY RICHARDSON, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS v. COMMERCIAL CREDIT LOANS, INC., COMMERCIAL CREDIT CORPORATION, CITIGROUP, INC., CITICORP, INC., CITIFINANCIAL, INC., AND CITIFINANCIAL SERVICES, INC., DEFENDANTS

No. COA05-924

(Filed 6 June 2006)

1. Appeal and Error— appealability—denial of motion to compel arbitration—substantial right

The denial of a motion to compel arbitration is not a final judgment but is immediately appealable because it involves a substantial right.

2. Arbitration and Mediation— unconscionability—standards

The interpretation of arbitration agreements is governed by contract principles and the parties may specify the rules under which arbitration will be conducted, but are not bound by unconscionable provisions.

3. Arbitration and Mediation— costs—not prohibitive—agreement not unconscionable

The trial court erred by concluding that the plaintiffs' arbitration costs were prohibitive and that the arbitration clause was unconscionable and unenforceable where plaintiffs did not fairly measure arbitration costs against the costs of litigation and appeal.

4. Arbitration and Mediation— class action precluded—not unconscionable

An arbitration clause was not unconscionable because it precluded a class action, and the court erred by so finding.

5. Arbitration and Mediation— mutuality—North Carolina standard

The trial court erred by finding an arbitration clause to be unconscionable based on a mutuality of obligations analysis contrary to North Carolina contract law.

Judge HUNTER dissenting.

Appeal by defendants from orders entered 28 September 2004 and 20 January 2005 by Judge Ronald L. Stephens in Vance County Superior Court. Heard in the Court of Appeals 15 March 2006.

Jones Martin Parris & Tessener Law Offices, P.L.L.C., by John Alan Jones and G. Christopher Olson, for plaintiffs-appellees.

Moore & Van Allen, PLLC, by Jeffrey M. Young, and Rogers & Hardin LLP, by Richard H. Sinkfield and Christopher J. Willis, Atlanta, Georgia, pro hac vice, for defendants-appellants.

Ellis & Winters LLP, by Matthew W. Sawchak, for Amicus Curiae American Financial Services Association.

Wallace & Graham, P.A., by Mona Lisa Wallace and John S. Hughes, and The Jackson Law Group, PLLC, by Gary W. Jackson, for Amicus Curiae The North Carolina Academy of Trial Lawyers.

Carlene McNulty, for Amicus Curiae North Carolina Justice Center.

Mallam J. Maynard, for Amicus Curiae Financial Protection Law Center.

Richard Frankel and F. Paul Bland, Jr., for Amicus Curiae Trial Lawyers for Public Justice, Washington, D.C.

TYSON, Judge.

Commercial Credit Loans, Inc., Commercial Credit Corporation, Citigroup, Inc., Citicorp, Inc., Citifinancial, Inc., and Citifinancial Services, Inc. (collectively, "defendants") appeal from order entered 20 January 2005 denying defendants' motion to compel arbitration, and from order entered 28 September 2004 denying in part defendants' motion to compel and granting in part Fannie Lee Tillman's and Shirley Richardson's, on behalf of all others similarly situated (collectively, "plaintiffs"), motion for protective order. We reverse and remand.

I. Background

Plaintiffs are North Carolina borrowers who obtained financing from or through defendant Commercial Credit Loans, Inc. ("Commercial Credit"). Plaintiffs asserted a class action suit against defendants in the Vance County Superior Court in June 2002 and alleged defendants acted unlawfully in connection with mortgage loans defendants made to plaintiffs. Plaintiffs complain Commercial Credit sold them single premium credit insurance they did not need or want without disclosing such insurance was optional, and that Commercial Credit was the beneficiary of the policies.

Credit insurance was purchased by plaintiffs in connection with their mortgage loans and benefits are paid to the lender if a covered

event occurs. Credit insurance coverages include: (1) credit life, which pays off the loan in the event of the borrower's death; (2) credit disability, which makes the monthly mortgage payments if the borrower becomes disabled; and (3) credit involuntary unemployment, which makes the monthly mortgage payments if the borrower becomes involuntarily unemployed. Single premium credit insurance requires the borrower to pay the entire expected term of coverage at the time the mortgage loan is closed. The up-front premium is financed as a part of the loan.

Plaintiffs' loan agreements contain an arbitration provision. The provision is contained in an outlined box with the heading:

> "**READ THE FOLLOWING ARBITRATION PROVISION CAREFULLY. IT LIMITS CERTAIN OF YOUR RIGHTS, INCLUDING YOUR RIGHT TO OBTAIN REDRESS THROUGH COURT ACTION.**"
>
> The arbitration provision provides:
>
> Upon written request by either party that is submitted according to the applicable rules for arbitration, any Claim, except those specified below in this Provision, shall be resolved by binding arbitration in accordance with (i) the Federal Arbitration Act; (ii) the Expedited Procedures of the Commercial Arbitration Rules of the American Arbitration Association ("Administrator"); and (iii) this Provision, unless we both agree in writing to forego arbitration.

This provision excludes two types of claims from arbitration: (1) "Any action to effect a foreclosure to transfer title to the property being foreclosed;" and (2) "Any matter where all parties seek monetary damages in the aggregate of $15,000 or less in total damages (compensatory and punitive), costs, and fees." The provision further provides:

> No Class Actions/No Joinder of Parties. You agree that any arbitration proceeding will only consider Your Claims. Claims by or on behalf of other borrowers will not be arbitrated in any proceeding that is considering Your Claims. Similarly, You may not join with other borrowers to bring Claims in the same arbitration proceeding, unless all of the borrowers are parties to the same Credit Transaction.

The arbitration provision requires the party initiating the arbitration to pay the first $125.00 toward arbitration costs. Commercial Credit agreed to pay "all other costs for the arbitration proceeding up to a max-

imum of one day (8 hours) of hearings." It further provides, "All costs of the arbitration proceeding that exceed one day of hearings will be paid by the non-prevailing party."

The arbitration agreements gives either party the right to appeal the arbitrator's award to a three-arbitrator panel "which shall reconsider de novo any aspect of the initial award requested by the appealing party." The appealing party is required to pay the costs of initiating the appeal. The non-prevailing party is required to pay all costs, fees, and expenses of the appeal and may be required to reimburse the prevailing party for the cost of initiating the appeal.

Defendants filed a motion to compel arbitration in the Vance County Superior Court and was heard on 16 December 2004. The trial court made findings of fact and conclusions of law and denied defendants' motion. Defendants appeal.

II. Issues

Defendants argue the trial court erred by: (1) concluding plaintiffs could avoid the agreements to arbitrate because of the alleged costs of arbitration; (2) concluding the parties' arbitration agreements were unenforceable because it precludes class actions; and (3) imposing a "mutuality" requirement on arbitration agreements that does not exist under North Carolina law.

III. Standard of Review

[1] An order denying defendants' motion to compel arbitration is not a final judgment and is interlocutory. However, an order denying arbitration is immediately appealable because it involves a substantial right, the right to arbitrate claims, which might be lost if appeal is delayed. *Burke v. Wilkins*, 131 N.C. App. 687, 688, 507 S.E.2d 913, 914 (1998).

> A dispute can only be settled by arbitration if a valid arbitration agreement exists. The party seeking arbitration must show that the parties mutually agreed to arbitrate their disputes. The trial court's findings regarding the existence of an arbitration agreement are conclusive on appeal where supported by competent evidence, even where the evidence might have supported findings to the contrary. However, the trial court's determination of whether a dispute is subject to arbitration is a conclusion of law that is reviewable *de novo* on appeal.

Revels v. Miss Am. Org., 165 N.C. App. 181, 188-89, 599 S.E.2d 54, 59 (quoting *Slaughter v. Swicegood*, 162 N.C. App. 457, 461, 591 S.E.2d 577,

580 (2004)) (internal citations and quotations omitted), *disc. rev. denied*, 359 N.C. 191, 605 S.E.2d 153 (2004).

IV. Enforceability of Arbitration Agreements

[2] "North Carolina has a strong public policy favoring arbitration." *Red Springs Presbyterian Church v. Terminix Co.*, 119 N.C. App. 299, 303, 458 S.E.2d 270, 273 (1995). "The essential thrust of the Federal Arbitration Act, which is in accord with the law of our state, is to require the application of contract law to determine whether a particular arbitration agreement is enforceable; thereby placing arbitration agreements 'upon the same footing as other contracts.' " *Futrelle v. Duke University*, 127 N.C. App. 244, 247-48, 488 S.E.2d 635, 638 (quoting *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687, 134 L. Ed. 2d 902, 909 (1996)), *disc. rev. denied*, 347 N.C. 398, 494 S.E.2d 412 (1997).

"The interpretation of the terms of an arbitration agreement are governed by contract principles and parties may specify by contract the rules under which arbitration will be conducted." *Trafalgar House Construction v. MSL Enterprises, Inc.*, 128 N.C. App. 252, 256, 494 S.E.2d 613, 616 (1998). As a general rule, "[p]ersons entering contracts of insurance, like other contracts, have a duty to read them and ordinarily are charged with knowledge of their contents." *Nationwide Mut. Insur. Co. v. Edwards*, 67 N.C. App. 1, 8, 312 S.E.2d 656, 661 (1984).

Plaintiffs argue they are not bound by the provisions of the agreements to arbitrate because they are unconscionable. Unconscionability is an affirmative defense and the party asserting the defense bears the burden of proof. *Rite Color Chemical Co. v. Velvet Textile Co.*, 105 N.C. App. 14, 20, 411 S.E.2d 645, 649 (1992). In assessing unconscionability, a court is to consider "all the facts and circumstances of a particular case." *Brenner v. School House, Ltd.*, 302 N.C. 207, 213, 274 S.E.2d 206, 210 (1981). This Court has previously held that "to find unconscionability there must be an absence of meaningful choice on part of one of the parties [procedural unconscionability] *together with* contract terms which are unreasonably favorable to the other [substantive unconscionability]." *Rite Color Chemical Co.*, 105 N.C. App. at 20, 411 S.E.2d at 649 (quoting *Martin v. Sheffer*, 102 N.C. App. 802, 805, 403 S.E.2d 555, 557 (1991)) (emphasis in original).

> Procedural unconscionability involves 'bargaining naughtiness' in the formation of the contract, i.e., fraud, coercion, undue influence, misrepresentation, inadequate disclosure. Substantive unconscionability . . . involves the harsh, oppressive, and one-sided terms

> of a contract, i.e., inequality of the bargain. 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.

King v. King, 114 N.C. App. 454, 458, 442 S.E.2d 154, 157 (1994) (citation omitted); *see also Brenner*, 102 N.C. App. at 805, 403 S.E.2d at 557.

The trial court found defendants' arbitration clause to be unconscionable and unenforceable due to the combination of: (1) "prohibitively high arbitration costs" and the risk of "excessive arbitration and appeal costs;" (2) its class action waiver; and (3) its "excessively one-sided" nature which "lacks mutuality."

V. Arbitration Costs

[3] Defendants argue the trial court erred by concluding plaintiffs were not bound by the arbitration agreements because of the alleged costs of arbitration. We agree.

The United States Supreme Court examined the issue of arbitration costs in *Green Tree Financial v. Randolph*, 531 U.S. 79, 148 L. Ed. 2d 373 (2000). In *Green Tree Financial*, the Court addressed "whether an arbitration agreement that does not mention arbitration costs and fees is unenforceable because it fails to affirmatively protect a party from potentially steep arbitration costs." 531 U.S. at 82, 148 L. Ed. 2d at 378. The Court acknowledged that "the existence of large arbitration costs *could* preclude a litigant . . . from effectively vindicating her federal statutory rights in the arbitral forum." *Id.* at 90, 148 L. Ed. 2d at 383 (emphasis supplied).

The respondent in *Green Tree Financial* argued she was unable to vindicate her statutory rights in arbitration because "the arbitration agreement's silence with respect to costs and fees creates a 'risk' that she will be required to bear prohibitive arbitration costs if she pursues her claims in an arbitral forum[.]" 531 U.S. at 90, 148 L. Ed. 2d at 383. The Court stated, "where . . . a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs." *Id.* at 92, 149 L. Ed. 2d at 384. The Court held that the record contains "hardly any information" regarding costs of arbitration, and the " 'risk' that Randolph will be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement." *Id.* at 91, 149 L. Ed. 2d at 384.

In *Bradford v. Rockwell Semiconductor Systems Inc.*, 238 F.3d 549, 556 (4th Cir. 2001), the United States Court of Appeals for the Fourth Circuit considered an express fee-splitting provision in an arbitration agreement and held:

> We believe that the appropriate inquiry is one that evaluates whether the arbitral forum in a particular case is an adequate and accessible substitute to litigation, i.e., a case-by-case analysis that focuses, among other things, upon the claimant's ability to pay the arbitration fees and costs, *the expected cost differential between arbitration and litigation in court, and whether that cost differential is so substantial as to deter the bringing of claims.*

Following the Supreme Court's decision in *Green Tree Financial*, the Fourth Circuit concluded the respondent "failed to demonstrate any inability to pay the arbitration fees and costs, much less prohibitive financial hardship, to support his assertion that the fee-splitting provision deterred him from arbitrating his statutory claims." *Id.* at 558. The Court further stated:

> The cost of arbitration, as far as its deterrent effect, cannot be measured in a vacuum or premised upon a claimant's abstract contention that arbitration costs are "too high." Rather, an appropriate case-by-case inquiry must focus upon a claimant's expected or actual arbitration costs and his ability to pay those costs, *measured against a baseline of the claimant's expected costs for litigation* and his ability to pay those costs.

Id. at 556, n.5 (emphasis supplied).

Here, with regard to arbitration costs, the trial court concluded:

> 4. The Commercial Credit arbitration clause, as written, exposes borrowers to prohibitively high arbitration costs. The arbitration clause exposes consumers to arbitrator fees, based upon the AAA average for North Carolina, of $1,225.00 per day *after the first eight hours of hearings*. For example, a three-day arbitration with an arbitrator charging the average AAA hourly fee in North Carolina could cost a borrower $2,450.00 plus costs and attorneys' fees. If the arbitrator charged the high end of the range in North Carolina, a borrower could face arbitration fees of $4,760.00 for a three-day arbitration, plus costs and attorneys' fees. (Emphasis supplied).
>
> 5. Defendant's arbitration clause provides for a de novo appeal from the initial arbitration proceeding. The de novo appeal would

> be to a three-arbitrator panel. The arbitration clause contains a fee-shifting provision with respect to costs of that de novo appeal. That is, *the party that loses the appeal* "shall pay all costs, fees, and expenses of the appeal proceeding" even if that party had won the initial arbitration proceeding. Thus, a consumer seeking to vindicate her rights through the arbitration process faces the prospect of paying not only arbitrator fees for the initial arbitration proceeding exceeding eight hours, but also much greater costs associated with the de novo appeal. For example, a two-day appeal could cost a borrower $7,350.00 in arbitrator fees alone, with a three-arbitrator panel charging the AAA average arbitrator fee. These appeal costs would be borne by a borrower even if the borrower had prevailed at the initial arbitration proceeding. (Emphasis supplied).

With regard to litigation costs, the trial court found:

> 15. Based upon the 1998 North Carolina Bar Association Economic Survey, the most recent survey published, the average hourly rate for attorneys working on litigation matters such as this is between $150.00-$250.00 per hour.
>
> . . . .
>
> 19. To successfully prosecute a complex case, including a class action such as this one, a law firm would likely need the assistance of expert witnesses. The hourly fees of experts in the fields of economics, lending practices, and credit insurance can range from $150.00 to $300.00 per hour, plus expenses. In complex cases, litigation costs and expenses, including deposition costs, travel expenses, and expert witness fees, can easily run into thousands of dollars. The class action mechanism allows persons with relatively small claims to pool their resources and have those litigation expenses and costs shared among all class members. . . .

The trial court concluded:

> 6. The fees and costs associated with both the initial arbitration proceeding and any appeal to a three-arbitrator panel are beyond what would be incurred by a civil litigant in the court system. These fees and costs may deter a substantial number of consumers from pursuing valid claims. The cost-shifting ("loser pays") provisions of the arbitration clause further serve as a substantial deterrent to consumers attempting to pursue claims against Defendant.

Plaintiffs' counsel filed an affidavit in which he stated, "In complex cases such as this, costs and expenses advanced by our law firm can

total more than $150,000.00." Plaintiffs argued to the trial court that the costs involved in arbitrating their claims "represent a cost that would not be incurred in civil court." Plaintiffs argued that if this case were tried in civil court it would be certified as a class action and the costs of the lawsuit, if it was successful, would be shared among the class members and taxed against defendants. This arrangement "places the risk associated with the case on the law firm." *See* North Carolian State Bar Revised Rules of Professional Conduct, Rule 1.5(c) (2006) ("A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law."). Even though plaintiffs may sign a contingency agreement with their attorneys, they are still liable for the *costs* of the litigation. The State Bar ruled in RPC 124 (January 17, 1992) ("RPC 124") that "an attorney may never ethically agree to be ultimately responsible for the costs of litigation." An attorney cannot agree with his or her client to bear all or some of the costs of litigation. Under the arbitration agreements, after paying the $125.00 initiation fee plaintiffs are only liable for the costs if the arbitration exceeds "one day (8 hours) of hearings." The costs of filing suit in the North Carolina superior courts is $95.00. N.C. Gen. Stat. § 7A-305 (2005). Plaintiffs' counsel stated in his affidavit that advanced costs and expenses could total more than $150,000.00. The costs plaintiffs would bear for litigation would likely be higher than the costs they would bear for arbitration.

Plaintiffs also failed to address or quantify the costs of litigation associated with this lawsuit if they *were not* successful in the superior court or the costs of an appeal. Their argument solely focuses on the costs of arbitration only if the arbitration exceeds "one day (8 hours) of hearings" and plaintiffs were the non-prevailing party and sought a *de novo* appeal. Plaintiffs costs comparison between arbitration and civil litigation also presumes plaintiffs would be the non-prevailing party in arbitration and would be the prevailing party in litigation. This argument is an "apples to oranges" comparison. Plaintiffs also failed to equate the time and costs between a "bench trial" and arbitration hearing, both lasting up to eight hours.

Plaintiffs' argument is premised upon the same kind of "risk" of prohibitive arbitration costs the Supreme Court addressed in *Green Tree Financial*. Plaintiffs failed to fairly measure the costs of arbitration "against a baseline of the claimant's expected costs for litigation." *Bradford*, 238 F.3d at 556, n.5. "Speculative assertions . . . do not constitute competent evidence." *MCC Outdoor, LLC v. Town of Franklinton Bd. of Comm'rs*, 169 N.C. App. 809, 815, 610 S.E.2d 794,

798, *disc. rev. denied*, 359 N.C. 634, 616 S.E.2d 540 (2005). Based on the evidence presented and the lack of equal comparisons between arbitration and trial and appeals, the trial court erred in concluding plaintiffs' costs of arbitration were "prohibitive."

VI. Preclusion of Class Actions

[4] Defendants argue the trial court erred by concluding the arbitration clause was unenforceable because it precludes class actions. We agree.

Plaintiffs conceded, and the trial court acknowledged, that a class action waiver in an arbitration agreement does not, in and of itself, render the arbitration agreements unenforceable. *See Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 503 (4th Cir. 2002) (A class action waiver "cannot by itself suffice to defeat the strong congressional preference for an arbitral forum.").

The trial court accepted plaintiffs' proposition that without the ability to join claims, they are deterred from bringing lawsuits against defendants due to the amount of money at stake being too small to justify an attorney's involvement. This proposition and the trial court's conclusion ignores the fact that the consumer protection statute underlying plaintiffs' claims provides for the recovery of plaintiffs' costs and attorney's fees if plaintiffs prevail.

Plaintiffs' complaint seeks damages against defendants for violations of N.C. Gen. Stat. § 75-1.1. N.C. Gen. Stat. § 75.16.1 (2005) provides that "[i]n any suit instituted by a person who alleges that the defendant violated G.S. 75-1.1, the presiding judge may . . . allow a reasonable attorney fee to the duly licensed attorney representing the prevailing party."

In *Snowden v. CheckPoint Check Cashing*, the United States Court of Appeals for the Fourth Circuit expressly and explicitly rejected the precise argument plaintiffs assert and the trial court accepted here:

> We also reject Snowden's argument that the Arbitration Agreement is unenforceable as unconscionable because without the class action vehicle, she will be unable to maintain her legal representation given the small amount of her individual damages. Snowden's argument is unfounded in light of: (1) the fact that attorney's fees are recoverable by a prevailing plaintiff in a TILA action, 15 U.S.C. § 1640(a)(3), and a civil RICO action, 18 U.S.C. § 1962(c); and (2) the fact that, although the Arbitration Agreement provides that each party shall bear the expense of their respective attorneys'

> fees regardless of which party prevails in the arbitration, such provision expressly *does not apply if it is "inconsistent with the applicable law . . . .*"

290 F.3d 631, 638 (4th Cir. 2002) (emphasis supplied), *cert. denied*, 537 U.S. 1087, 154 L. Ed. 2d 631 (2002). Like in *Snowden*, the arbitration agreements at bar provide, "Each party shall pay his/her own attorney . . . fees and expenses, *unless otherwise required by law*." (Emphasis supplied).

The United States Court of Appeals for the Eleventh Circuit adopted the Fourth Circuit's reasoning in *Jenkins v. First American Cash Advance of Georgia*, 400 F.3d 868 (11th Cir. 2005), *cert. denied*, —— U.S. ——, 164 L. Ed. 2d 132 (2006).

> The Arbitration Agreements expressly permit Jenkins and other consumers to recover attorneys' fees and expenses "if allowed by statute or applicable law." Under the Georgia RICO statute, a prevailing plaintiff may be awarded attorney's fees. . . . Jenkins, therefore, can presumably recover attorneys' fees and costs if she prevails in arbitration on her Georgia RICO claim.

Id. at 878.

The trial court's conclusion regarding class action waivers is contrary to the great majority of federal and state courts that have examined and ruled upon this issue. *See Snowden*, 290 F.3d at 638 (rejecting the argument "that the Arbitration Agreement is unenforceable as unconscionable because without the class action vehicle, she will be unable to maintain her legal representation given the small amount of her individual damages"); *Johnson*, 225 F.3d at 369 (holding arbitration "clauses are effective even though they may render class actions to pursue statutory claims under the TILA or the EFTA unavailable"); *Livingston v. Associates Finance, Inc.*, 339 F.3d 553, 559 (7th Cir. 2003) ("The Arbitration Agreement at issue here explicitly precludes the [borrowers] from bringing class claims or pursuing 'class action arbitration,' so we are therefore 'obliged to enforce the type of arbitration to which these parties agreed, which does not include arbitration on a class basis.' "); *Iberia Credit Bureau, Inc. v. Cingular Wireless*, 379 F.3d 159, 175 (5th Cir. 2004) (" . . . the arbitration clause does not leave the plaintiffs without remedies or so oppress them as to rise to the level of unconscionability."); *Rosen v. SCIL, LLC*, 799 N.E.2d 488, 494 (Ill. App. 2003) ("We find the arbitration provision enforceable despite its prohibition on class actions. We further note that the question of whether an

individual is entitled to participate in a class action as a matter of right is a question of public policy, which we suggest should be addressed by the legislature."); *Med Center Cars, Inc. v. Smith*, 727 So.2d 9, 20 (Ala. 1998) ("to require class-wide arbitration would alter the agreements of the parties, whose arbitration agreements do not provide for class-wide arbitration"); *Rains v. Foundation Health Systems*, 23 P.3d 1249, 1253 (Colo. App. 2001) ("arbitration clauses are not unenforceable simply because they might render a class action unavailable"); *Edelist v. MBNA America Bank*, 790 A.2d 1249, 1261 (Del. Super. Ct. 2001) (finding that, because "the surrender of [the] class action right was clearly articulated in the arbitration amendment[,] the Court finds nothing unconscionable about it and finds the bar on class actions enforceable"); *AutoNation USA Corp. v. Leroy*, 105 S.W.3d 190, 200 (Tex. App. 2003) (enforcing arbitration clause which prohibited class action claims, stating that "there is no entitlement to proceed as a class action").

These courts and others expressly recognized that class action waivers in arbitration provisions do not "necessarily choke off the supply of lawyers willing to pursue claims on behalf of debtors." *Johnson v. West Suburban Bank*, 225 F.3d 366, 374 (3rd Cir. 2000). The great majority of federal and state jurisdictions who have addressed this issue are directly contrary to the trial court's findings and conclusions. Upon *de novo* review, the trial court's conclusion that plaintiffs would be deterred from bringing their claims against defendants due to the class action waiver is erroneous in light of the express arbitration provisions and plaintiffs' assertion of claims under N.C. Gen. Stat. §§ 75-1.1 and 75.16.1.

VII. Mutuality Requirement

[5] Defendants contend the trial court erred by concluding a mutuality requirement must exist in arbitration agreements under North Carolina law. We agree.

The trial court concluded:

> 8. The Commercial Credit arbitration clause used in North Carolina since February 12, 1996 is one-sided and lacks mutuality, in that it preserves for the lender the right to pursue almost all claims it would choose to pursue in civil court while denying that right to borrowers in most instances. The arbitration clause contains exceptions for foreclosure actions and claims in which the amount sought, including costs and attorneys' fees is under $15,000.00. This portion of the clause preserves for the lender the only remedies it

> would be likely to assert against borrowers—foreclosure and collection actions.
>
> The trial court's order cites cases from the United States Court of Appeals for the Ninth Circuit, the United States District Court for the Southern District of Georgia, the Supreme Court of Tennessee, the Supreme Court of Arkansas, and the Supreme Court of Appeals of West Virginia to support its conclusion. No North Carolina or other controlling precedents or statutes were cited to support this conclusion.

"Mutuality of promises means that promises to be enforceable must each impose a legal liability upon the promisor. Each promise then becomes a consideration for the other." *Wellington v. Dize Awning & Tent Co.*, 196 N.C. 748, 751, 147 S.E. 13, 14 (1929). Under North Carolina law, "mutuality" merely requires consideration on each side of a contract. Mutuality does not require that each of the contract terms must apply equally to both parties to be enforceable. *Id.*

> Want of mutuality is merely one form of want of consideration. But a single consideration may support several promises; it is not necessary that each promise have a separate consideration. Hence, a covenant which imposes obligations upon one party only may be enforceable if it is part of an entire contract which is supported by a sufficient consideration.

Id.

Likewise, the Restatement (Second) of Contracts § 79 (1979) provides:

> If the requirement of consideration is met, there is no additional requirement of:
>
> (a) a gain, advantage, or benefit to the promisor or a loss, disadvantage, or detriment to the promisee; or
>
> (b) equivalence in the values exchanged; or
>
> (c) "mutuality of obligation."

Even under a "mutuality of obligation" analysis, we fail to see how the exclusions in the arbitration agreements are not mutual. The language of the arbitration provision states, "The following types of matters will not be arbitrated. This means that *neither one of us* can require the other to arbitrate." (Emphasis supplied). The first exclusion covers claims "where all parties seek monetary damages . . . of $15,000 or less."

This exclusion applies equally to both plaintiffs and defendants. If defendants had asserted a lawsuit in civil court for damages of $15,000.00 or more against plaintiffs on their promissory notes, plaintiffs can compel defendants into arbitration under their agreements.

The second exclusion from arbitration for "[a]ny action to effect a foreclosure to transfer title to the property being foreclosed" is also mutual. Neither party can force the other to arbitrate such a claim. Further, the fact that the North Carolina superior courts have "exclusive jurisdiction" over any action affecting title to land is a good reason to exclude foreclosure actions from arbitration agreements. N.C. Gen. Stat. § 43-1 (2005).

The Maryland Court of Appeals recently held that an arbitration agreement that excluded foreclosure proceedings was not unconscionable. *Walther v. Sovereign Bank*, 872 A.2d 735, 748-49 (Md. 2005).

> Maryland foreclosure proceedings, like those of both Kentucky and South Carolina, do not act solely to protect the interests of the mortgage lender against a defaulting debtor but instead provide protections for both sides. We agree with these other jurisdictions and their findings that the act of a mortgage lender in providing certain exceptions for itself in the arbitration agreement, such as the ability to pursue foreclosure proceedings in a judicial forum, does not in and of itself make the arbitration agreement unconscionable where the mortgage-debtor/borrower is not provided with identical exceptions to the arbitration agreement. The arbitration agreement at issue, which includes exceptions to that agreement that enable the mortgage lender, presently Sovereign Bank, to pursue certain judicial remedies including foreclosure, is not made unconscionable where petitioners are not provided with identical exceptions to the arbitration agreement.

Id. at 749 (internal citations omitted). The Maryland Court of Appeals' rationale is persuasive and applicable to the issue before us. Here, the foreclosure exception in the arbitration agreements applies equally to both parties.

Under *de novo* review, the trial court erred in applying a "mutuality of obligations" to the arbitration agreements that is contrary to North Carolina contract law. *Wellington*, 196 N.C. at 751, 147 S.E.2d at 14. Further, plaintiffs failed to show how the two exclusions contained in the arbitration agreements were not equally binding upon both parties and were not mutual obligations.

VIII. Conclusion

The trial court erred by concluding the arbitration agreements was unconscionable. Plaintiffs failed to establish the costs of arbitration are "prohibitive." The arbitration agreements are not unenforceable because they preclude class actions. The trial court erred in applying a requirement of mutuality to the arbitration agreements that is contrary to North Carolina law. Viewed separately or together, these three provisions of the arbitration agreements do not render them unconscionable.

The trial court's order denying defendants' motion to compel arbitration is reversed. This case is remanded to the trial court for entry of an order granting defendants' motion to compel arbitration.

Reversed and Remanded.

Judge McCULLOUGH concurs.

Judge HUNTER dissents by separate opinion.

HUNTER, Judge, dissenting.

Because I disagree with the majority's position that the trial court erred in finding the arbitration agreement to be unconscionable, I respectfully dissent.

The majority opinion does not include numerous and detailed findings of fact made by the trial court, most of which are uncontroverted. Because the findings are necessary for a full understanding of the issues before this Court, I recite them here:

> 1. Plaintiffs, Fannie Lee Tillman and Shirley Richardson, filed this putative class action lawsuit pursuant to Rule 23 of the North Carolina Rules of Civil Procedure on June 24, 2002. Plaintiffs seek to represent a class of borrowers who obtained loans from Defendant Commercial Credit Loans, Inc. (now known as and hereinafter referred to as "CitiFinancial Services, Inc." or "Defendant") and who were sold single-premium credit insurance by Defendant in connection with their loans.
>
> 2. Single-premium credit insurance ("SPCI") is a type of credit insurance sold by a lender to a borrower in which the borrower is charged the entire insurance premium at the time the underlying loan is originated, with the premium being financed into and over the life of the loan. As a result of the premium charge being

financed, the loan principal is increased by the amount of the premium charge, and the borrower pays interest on the increased principal, including the insurance premium, for the entire life of the loan. Furthermore, the increase in loan principal leads to a concomitant increase in certain loan costs such as origination fees and points. With the passage of the North Carolina Predatory Lending Law, N.C. Gen. Stat. § 24-1.1E, it has been unlawful to finance the premium costs of single-premium credit insurance since July 1, 2000.

3. Plaintiff Fannie Lee Tillman obtained a loan from Commercial Credit Loans, Inc. (hereafter "Commercial Credit") on September 22, 1998. Ms. Tillman's loan included single-premium credit life insurance with a premium costing $1,058.80 and single-premium credit disability insurance with a premium costing $1,005.95. The amount financed in connection with this loan was $18,253.68, with $2,064.75 attributable to single-premium credit insurance. The interest rate on the loan was over 15%. The loan proceeds were used, in part, to pay off another Commercial Credit loan which had been originated eight months earlier, in January 1998. Ms. Tillman was also sold credit insurance, with premiums costing $1,799.95, in connection with the earlier Commercial Credit loan. The interest rate on the earlier loan was over 20%.

4. Plaintiff Fannie Lee Tillman has limited financial resources. She works as a sewer at Wayne Industries in Archdale, North Carolina, and her take-home pay is approximately $258.00 per week after taxes. She has worked at Wayne Industries for roughly 18 years, and the $8.50 hourly rate she currently receives is the most she has earned at that job. Ms. Tillman receives $285.60 per month in pension benefits from her deceased husband's employer. She receives $1,063.00 per month in Social Security benefits. Ms. Tillman has no other sources of income. Ms. Tillman's most significant asset is her home in High Point, North Carolina. That home is worth approximately $60,000.00 to $65,000.00 and is encumbered by a first and second mortgage with balances which are roughly equal to the value of the home. Ms. Tillman is 66 years of age. She completed the seventh grade but then had to begin working full-time to help support her family. Ms. Tillman does not have a retirement plan or any significant savings. The balance in Ms. Tillman's checking account is typically under $100.00.

5. Plaintiff Shirley Richardson obtained a loan from Commercial Credit on 4 June 1999. The amount financed in that loan was

$20,935.57, with $4,208.75 attributable to single-premium credit insurance. The interest rate was over 15%. In connection with that loan, Ms. Richardson was charged $1,871.54 for single-premium credit life insurance, $1,109.49 for single-premium credit disability insurance, and $1,227.72 for single-premium credit involuntary unemployment insurance. Ms. Richardson had received two prior loans from Commercial Credit, and both of those loans included single-premium credit insurance. Those prior Commercial Credit loans were originated in October 1997 and April 1998; Ms. Richardson was charged $3,782.96 for credit insurance premiums in connection with those loans. With her June 4, 1999 loan, Ms. Richardson was also charged $499.95 for a "Home Security Plan." She was not told what that product or service is at the time of closing or at any point thereafter.

6. Plaintiff Shirley Richardson has few economic resources. Ms. Richardson works full-time in the medical records section at Murdock Center in Henderson, North Carolina, where she earns $12.70 per hour. She also works part-time at the Louisburg Group Home as a direct care aide, earning $12.00 per hour during the 10-15 hours per week she works that job. Ms. Richardson, who is 52 years of age, had $2,523.25 in her retirement account as of the date of the hearing of this matter. Ms. Richardson lives from paycheck to paycheck, and after paying her monthly bills often has no money in her bank account. Ms. Richardson's most significant asset is her home in Henderson, North Carolina, which is encumbered by a first and second mortgage. Ms. Richardson has substantial outstanding credit card debt.

7. CitiFinancial Services, Inc. is a subprime lender which typically loans money to borrowers, such as Plaintiffs Tillman and Richardson, with impaired credit who oftentimes would not qualify for financing at lending institutions primarily making loans in the prime, or conventional, lending market.

8. Since February 12, 1996, CitiFinancial Services, Inc. has included an arbitration clause in its loan agreements. Prior to that time, Defendant's loan agreements did not contain an arbitration clause. . . .

9. The Commercial Credit arbitration clause is a standard-form contract of adhesion. The borrower is given no opportunity to negotiate out of the arbitration provision, and CitiFinancial Services, Inc. would not make a loan if the loan agreement did not include the

arbitration provision. The loan documents, including the arbitration provision at issue, were drafted by Defendant.

10. Since the time CitiFinancial Services, Inc. began including an arbitration clause in its loan agreements, the lender has made more than 68,000 loans in North Carolina. During that time, CitiFinancial Services, Inc. has pursued lawsuits in civil court against more than 3,700 borrowers in North Carolina, including over 2,000 collection actions and more than 1,700 foreclosure actions. Defendant has been able to pursue claims in civil court by virtue of two exceptions within the arbitration clause, which Defendant drafted, for (1) foreclosure actions and (2) matters in which less than $15,000.00 in damages, including costs and fees, are sought. The average amount in dispute in matters in which CitiFinancial Services, Inc. pursued legal action against North Carolina borrowers is under $7,000.00.

11. Since the time CitiFinancial Services, Inc. began including an arbitration provision in its loan agreements, there have been no arbitration proceedings in North Carolina involving CitiFinancial Services, Inc. and any of its borrowers. Since introduction of the arbitration clause, no North Carolina borrower has requested arbitration of any dispute with CitiFinancial Services, Inc., nor has CitiFinancial Services, Inc. demanded arbitration of any dispute involving any North Carolina borrower. The only legal redress sought has been the collection and foreclosure actions pursued in civil court by Defendant against its borrowers.

12. The only persons present at the loan closings involving Plaintiffs Tillman and Richardson were Plaintiffs and a Commercial Credit loan officer. Ms. Tillman and Ms. Richardson were rushed through the loan closings, and the Commercial Credit loan officer indicated where Ms. Tillman and Ms. Richardson were to sign or initial the loan documents. There was no mention of credit insurance or the arbitration clause at the loan closings.

. . .

14. Plaintiffs Fannie Lee Tillman and Shirley Richardson entered into contingency fee contracts with the attorneys representing them. The contingency fee contract is typical of such agreements. The contingency fee agreement entered into by Plaintiffs provides that their attorneys will not be entitled to any fee unless there is some monetary recovery obtained on behalf of Plaintiffs, either by way of settlement or verdict. The agreement further pro-

vides that the law firm representing Plaintiffs shall advance the costs and expenses incurred in prosecuting the action.

15. Based upon the 1998 North Carolina Bar Association Economic Survey, the most recent survey published, the average hourly rate for attorneys working on litigation matters such as this is between $150.00-$250.00 per hour.

16. . . . . The only realistic means by which persons in the position of Plaintiffs can prosecute their claims is by entering into a contingency fee agreement with lawyers willing to advance the costs and expenses of the litigation and with the law firm assuming the risk that there might be no recovery.

. . .

19. To successfully prosecute a complex case, including a class action such as this one, a law firm would likely need the assistance of expert witnesses. The hourly fees of experts in the fields of economics, lending practices, and credit insurance can range from $150.00 to $300.00 per hour, plus expenses. In complex cases, litigation costs and expenses, including deposition costs, travel expenses, and expert witness fees, can easily run into thousands of dollars. The class action mechanism allows persons with relatively small claims to pool their resources and have those litigation expenses and costs shared among all class members. The class action device provides a means by which consumers with modest damages claims can obtain representation by competent counsel with sufficient resources to afford protracted litigation in complex cases.

The trial court also made the following findings, portions of which are disputed by defendants:

13. The compensation rates for American Arbitration Association ("AAA") arbitrators in North Carolina range from $500.00 to $2,380.00 per day. The average daily rate of AAA arbitrator compensation in North Carolina is $1,225.00.

. . .

17. Plaintiffs asserted claims for relief under Chapter 75 of the North Carolina General Statutes, contending that Defendants' sale of single-premium credit insurance in connection with real estate loans constituted an unfair or deceptive trade practice or act in or affecting commerce. Plaintiffs seek damages based upon the

amount of premiums charged for those credit insurance products. In most cases, the premium charges for single-premium credit insurance sold by CitiFinancial Services, Inc. were under $5,000.00 per loan. Plaintiff Fannie Lee Tillman was charged $2,064.75 in single-premium credit insurance premiums in connection with her September 22, 1998 loan; Plaintiff Shirley Richardson was charged $4,208.75 for single-premium credit insurance with her June 4, 1999 loan. The relatively modest damages claimed by Plaintiffs make it unlikely that any attorneys would be willing to accept the risks attendant to pursuing claims against one of the nation's largest lenders, even with the prospect of a treble damages award and statutory attorney's fees. It would not be feasible to prosecute the claims of the named Plaintiffs and of putative class members on an individual basis.

18. Defendant's arbitration clause contains features which would deter many consumers from seeking to vindicate their rights. These features include the cost-shifting ("loser pays") provision with respect to the initial arbitration proceeding to the extent it exceeds eight hours, the cost-shifting provision associated with the de novo appeal from that initial arbitration proceeding, and the prohibition on joinder of claims and class actions. The prohibition on class actions and the cap of $15,000.00 on the value of claims that can be pursued outside of the arbitration process designed by Defendant makes it unlikely that borrowers would be able to retain lawyers willing to pursue litigation against a large commercial entity, such as CitiFinancial Services, Inc.

Based on these findings, the trial court determined the arbitration clause to be unconscionable and denied defendants' motion to compel arbitration. Defendants appeal.

"Although arbitration is favored in the law, in order to be enforced, the underlying agreement must first be shown to be valid as determined by a common law contract analysis." *Howard v. Oakwood Homes Corp.*, 134 N.C. App. 116, 118, 516 S.E.2d 879, 881 (1999); *see also Routh v. Snap-On Tools Corp.*, 108 N.C. App. 268, 271, 423 S.E.2d 791, 794 (1992) (stating that "before a dispute can be settled in this manner, there must first exist a valid agreement to arbitrate"). The party seeking arbitration has the burden of showing the parties mutually agreed to arbitrate their disputes. *Routh*, 108 N.C. App. at 271-72, 423 S.E.2d at 794; *King v. Owen*, 166 N.C. App. 246, 248, 601 S.E.2d 326, 328 (2004). Arbitration clauses included in contracts of adhesion are disfavored in law. *Routh*,

108 N.C. App. at 272, 423 S.E.2d at 794; *Blow v. Shaughnessy*, 68 N.C. App. 1, 16, 313 S.E.2d 868, 876-77 (1984).

Where a contract is unconscionable, it is not valid and the court should not enforce it. *Brenner v. School House, Ltd.*, 302 N.C. 207, 213, 274 S.E.2d 206, 210 (1981). "In determining whether a contract is unconscionable, a court must consider all the facts and circumstances of a particular case. If the provisions are then viewed as so one-sided that the contracting party is denied any opportunity for a meaningful choice, the contract should be found unconscionable." *Id.* (holding that, as there was no inequality of bargaining power between the parties, the contract was not unconscionable).

In the present case, the trial court concluded the arbitration clause was unconscionable on the grounds that (1) it exposed borrowers to prohibitively high arbitration costs; (2) was excessively one-sided and lacked mutuality; and (3) prohibited class actions. Although any one of these factors, standing alone, might withstand judicial scrutiny, the trial court concluded that "[t]he combination of these factors, taken on the whole, render the Commercial Credit arbitration clause unconscionable." In separately rejecting each ground as a basis for the trial court's decision, the majority fails to recognize or address the combined impact of these three factors on the fundamental fairness of the contracts at issue.

With regard to the costs of arbitration, the majority rejects the trial court's conclusion that the costs of arbitration would be "prohibitive" as unsupported by the evidence. The majority overlooks numerous key and uncontradicted findings by the trial court, however, and misapplies the law to the case at hand.

For example, the majority complains that "[p]laintiffs . . . failed to address or quantify the costs of litigation associated with this lawsuit if they *were not* successful in the superior court or the costs of an appeal." However, as recognized by the majority and expressly found by the trial court, plaintiffs entered into a contingency fee contract with their attorneys. The contingency fee contract provides that "no attorney's fee will be charged Client at any time unless and until a recovery is obtained from Creditor." The agreement further provides that the law firm representing plaintiffs shall advance the costs and expenses incurred in prosecuting the action. Thus, under the contingency fee contract, if litigation was not successful and plaintiffs recovered nothing, they would owe no attorneys' fees. Under such a scheme, plaintiffs' attorneys bear the risk of any unsuccessful litigation.

The majority cites *Bradford v. Rockwell Semiconductor Systems, Inc.*, 238 F.3d 549, 556 n.5 (4th Cir. 2001), as authority for the proposition that "an appropriate case-by-case inquiry must focus upon a claimant's expected or actual arbitration costs *and his ability to pay those costs*, measured against a baseline of the claimant's expected costs for litigation *and his ability to pay those costs*." *Id.* (emphasis added). The majority fails to recite the extensive findings made by the trial court which were unchallenged by defendants, detailing plaintiffs' extremely limited financial resources and their inability to pay the costs associated with arbitration. Indeed, the trial court found that

> [t]he only realistic means by which persons in the position of [p]laintiffs can prosecute their claims is by entering into a contingency fee agreement with lawyers willing to advance the costs and expenses of the litigation and with the law firm assuming the risk that there might be no recovery.

In addition, the majority's selective reference to *Bradford* omits language immediately following the statement quoted above: "Another factor to consider in the cost-differential analysis is whether the arbitration agreement provides for fee-shifting, including the ability to shift forum fees based upon the inability to pay." *Id.*

The arbitration agreement here provides for no fee-shifting based on plaintiffs' inability to pay—just the opposite. It includes a cost-shifting "loser pays" provision that exposes plaintiffs to potentially substantial arbitration costs. "[I]t is undisputed that fee splitting can render an arbitration agreement unenforceable where the arbitration fees and costs are so prohibitive as to effectively deny the employee access to the arbitral forum." *Id.* at 554 (citing *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79, 148 L. Ed. 2d 373 (2000)), ("[i]t may well be that the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights in the arbitral forum").

The Court in *Bradford* ultimately rejected the plaintiff's claim because he offered "no evidence that he was unable to pay the $4,470.88 that he was billed by the [arbitration], or that the fee-splitting provision deterred him from pursuing his statutory claim or would have deterred others similarly situated." *Id.* at 558 (footnote omitted). Unlike *Bradford*, plaintiffs here presented substantial evidence, and the trial court found, that they were unable to pay the arbitration fees and costs, and that the arbitration clause contained features, such as the cost-shifting provision, that would deter many similarly-situated con-

sumers from seeking to vindicate their rights. Such deterrence is evident from the uncontradicted fact that:

> Since the time CitiFinancial Services, Inc. began including an arbitration provision in its loan agreements, there have been no arbitration proceedings in North Carolina involving CitiFinancial Services, Inc. and any of its borrowers. Since introduction of the arbitration clause, no North Carolina borrower has requested arbitration of any dispute with CitiFinancial Services, Inc., nor has CitiFinancial Services, Inc. demanded arbitration of any dispute involving any North Carolina borrower. The only legal redress sought has been the collection and foreclosure actions pursued in civil court by Defendant against its borrowers.

The trial court also found that the "average daily rate of AAA arbitrator compensation in North Carolina is $1,225.00." The trial court concluded that:

> The Commercial Credit arbitration clause, as written, exposes borrowers to prohibitively high arbitration costs. The arbitration clause exposes consumers to arbitrator fees, based upon the AAA average for North Carolina, of $1,225.00 per day after the first eight hours of hearings. For example, a three-day arbitration with an arbitrator charging the average AAA hourly fee in North Carolina could cost a borrower $2,450.00, plus costs and attorneys' fees. If the arbitrator charged the high end of the range in North Carolina, a borrower could face arbitration fees of $4,760.00 for a three-day arbitration, plus costs and attorneys' fees.

Plaintiffs also presented substantial evidence of the expected costs of litigation and their ability to pay such costs. The trial court made detailed findings therefrom which supported its conclusions of law. I therefore disagree with the majority's conclusion that the trial court erred in finding the costs of arbitration to be prohibitive for these plaintiffs.

The majority also finds fault with the trial court's conclusion regarding lack of mutuality and the one-sided nature of the arbitration clause. After the majority cites and relies upon cases from the United States Courts of Appeal of the Third, Fourth, Seventh, and Eleventh Circuits, and the appellate courts of Illinois, Alabama, Colorado, Delaware, and Texas, the majority chides the trial court for failing to cite to North Carolina precedent. The majority then applies an appellate decision from Maryland to the issue.

The majority unfairly characterizes the trial court's conclusions regarding the one-sidedness of the arbitration clause as "applying a requirement of mutuality to the arbitration agreement that is contrary to North Carolina law." The trial court, however, never concluded that the contract terms contained in the arbitration agreement had to apply equally to both parties to be enforceable. Rather, the trial court properly concluded that the one-sidedness and lack of mutuality of the arbitration clause was one factor in determining that the contract was unconscionable. As noted *supra*, where provisions in a contract are "so one-sided that the contracting party is denied any opportunity for a meaningful choice, the contract should be found unconscionable." *Brenner*, 302 N.C. at 213, 274 S.E.2d at 210.

Here, the trial court found that "CitiFinancial Services, Inc. is a sub-prime lender which typically loans money to borrowers, such as Plaintiffs Tillman and Richardson, with impaired credit who oftentimes would not qualify for financing at lending institutions primarily making loans in the prime, or conventional, lending market." The trial court made further findings detailing the inequality of the bargaining power between the parties as follows:

> 9. The Commercial Credit arbitration clause is a standard-form contract of adhesion. The borrower is given no opportunity to negotiate out of the arbitration provision, and CitiFinancial Services, Inc. would not make a loan if the loan agreement did not include the arbitration provision. The loan documents, including the arbitration provision at issue, were drafted by Defendant.
>
> 10. Since the time CitiFinancial Services, Inc. began including an arbitration clause in its loan agreements, the lender has made more than 68,000 loans in North Carolina. During that time, CitiFinancial Services has pursued lawsuits in civil court against more than 3,700 borrowers in North Carolina, including over 2,000 collection actions and more than 1,700 foreclosure actions. Defendant has been able to pursue claims in civil court by virtue of two exceptions within the arbitration clause, which Defendant drafted, for (1) foreclosure actions and (2) matters in which less than $15,000.00 in damages, including costs and fees, are sought. The average amount in dispute in matters in which CitiFinancial Services, Inc. pursued legal action against North Carolina borrowers is under $7,000.00.
>
> 11. Since the time CitiFinancial Services, Inc. began including an arbitration provision in its loan agreements, there have been no

> arbitration proceedings in North Carolina involving CitiFinancial Services, Inc. and any of its borrowers. Since introduction of the arbitration clause, no North Carolina borrower has requested arbitration of any dispute with CitiFinancial Services, Inc., nor has CitiFinancial Services, Inc. demanded arbitration of any dispute involving any North Carolina borrower. The only legal redress sought has been the collection and foreclosure actions pursued in civil court by Defendant against its borrowers.

Based in part on these uncontradicted findings, the trial court concluded that the arbitration clause was

> one-sided and lacks mutuality, in that it preserves for the lender the right to pursue almost all claims it would choose to pursue in civil court while denying that right to borrowers in most instances. The arbitration clause contains exceptions for foreclosure actions and claims in which the amount sought, including costs and attorneys' fees, is under $15,000.00. This portion of the clause preserves for the lender the only remedies it would be likely to assert against borrowers—foreclosure and collection actions. A foreclosure action, coupled with or preceding a collection action for any shortfall, is all Defendant would need to enforce its rights under the real estate secured loans against its customers. Defendant has pursued such actions more than 3,700 times against North Carolina borrowers since the arbitration clause has been included in Defendant's loan agreements.

This conclusion is fully supported by the trial court's unchallenged findings of fact and should be upheld.

The majority nevertheless asserts that the arbitration clause is perfectly mutual because the exclusions "apply equally" to plaintiffs and defendants. This assertion completely fails to acknowledge that only defendants would have any interest in pursuing most actions under the exclusions. Quite obviously, plaintiffs would never be in a position to bring an "action to effect a foreclosure." The fact that plaintiffs could not be forced to arbitrate such an action is therefore of no benefit whatsoever to plaintiffs and entirely to the benefit of defendants. Likewise, the exclusion of actions worth less than $15,000.00 is of most benefit to defendants, who have regularly used the exclusion in their collection actions. Plaintiffs meanwhile are faced with the difficulty of finding an attorney willing to pursue a claim where relatively modest damages are at stake. The "mutuality" found by the majority is therefore illusory.

Finally, the majority takes issue with the trial court's conclusion that "[a] prohibition on the right to join claims and participate in class action lawsuits is a factor to be considered in determining whether an arbitration provision is unconscionable." The majority asserts that, in accepting plaintiffs' position that the preclusion of class actions deters them from bringing claims against defendants due to the modest damages at stake, the trial court "ignore[d] the fact that the consumer protection statute underlying plaintiffs' claims provides for the recovery of plaintiffs' costs and attorney's fees[.]" The trial court, however, specifically found that "[t]he relatively modest damages claimed by Plaintiffs make it unlikely that any attorneys would be willing to accept the risks attendant to pursuing claims against one of the nation's largest lenders, *even with the prospect of a treble damages award and statutory attorney's fees*." (Emphasis added.) Thus the trial court specifically considered the possibility of the statutory recovery of costs and attorneys' fees and nevertheless found that the preclusion of class action would make it difficult for plaintiffs to enforce their rights.

The majority cites numerous cases from other jurisdictions in which the courts have upheld arbitration clauses which contained class action waivers. The majority acknowledges that these cases are not binding on this Court. Moreover, in many of the cases cited by the majority, the claimants' arguments were rejected because they failed to offer any evidence regarding the financial burden arbitration would pose. *See*, *e.g.*, *Livingston v. Associates Finance, Inc.*, 339 F.3d 553, 557 (7th Cir. 2003) (holding that, because the plaintiffs failed to offer "any specific evidence of arbitration costs that they may face in this litigation, prohibitive or otherwise, and . . . failed to provide any evidence of their inability to pay such costs," they could not avoid arbitration); *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 503 (4th Cir. 2002) (concluding that the plaintiff's failure to offer any evidence regarding the costs of arbitration "renders his further complaint about the inability to bring a class action moot"); *Bradford*, 238 F.3d at 554; *Rains v. Foundation Health Systems*, 23 P.3d 1249, 1253 (Colo. Ct. App. 2001) (same); *see also Jenkins v. First American Cash Advance of Georgia*, 400 F.3d 868, 878 n.8 (11th Cir. 2005) (noting that the plaintiff's arbitration costs would not be burdensome); *Autonation USA Corp. v. Leroy*, 105 S.W.3d 190, 200 (Tex. Ct. App. 2003) (footnote omitted) (acknowledging that "[w]hile there may be circumstances in which a prohibition on class treatment may rise to the level of fundamental unfairness, [plaintiff]'s generalizations do not satisfy her burden to demonstrate that the arbitration provision is invalid here"). In contrast to these cases, the present

plaintiffs offered substantial evidence of their limited financial resources and the prohibitive costs of arbitration.

Other cases cited by the majority never address the issue of unconscionability. *See, e.g.*, *Livingston*, 339 F.3d 553; *Johnson v. West Suburban Bank*, 225 F.3d 366 (3d Cir. 2000). The majority does not acknowledge the many decisions with remarkably similar facts holding that the presence of a class action waiver may render an arbitration agreement unenforceable. *See, e.g.*, *Kristian v. Comcast Corp.*, 2006 U.S. App. LEXIS 9881 (1st Cir. Apr. 20, 2006) ("a class mechanism bar can impermissibly frustrate the prosecution of claims in any forum, arbitral or judicial"); *Ting v. AT&T*, 319 F.3d 1126, 1150 (9th Cir. 2003) (footnote omitted) ("we affirm the district court's conclusion that the class-action ban violates California's unconscionability law"); *Luna v. Household Finance Corp. III*, 236 F. Supp. 2d 1166, 1179 (W.D. Wash. 2002) (prohibition on class actions rendered arbitration clause unconscionable); *Lozada v. Dale Baker Oldsmobile, Inc.*, 91 F. Supp. 2d 1087, 1105 (W.D. Mich. 2000) (same); *Leonard v. Terminix Intern. Co., L.P.*, 854 So. 2d 529, 539 (Ala. 2002) ("[t]his arbitration agreement is unconscionable because it is a contract of adhesion that restricts the [plaintiffs] to a forum where the expense of pursuing their claim far exceeds the amount in controversy. The arbitration agreement achieves this result by foreclosing the [plaintiffs] from an attempt to seek practical redress through a class action and restricting them to a disproportionately expensive individual arbitration"); *Powertel, Inc. v. Bexley*, 743 So. 2d 570, 576 (Fla. Dist. Ct. App. 1999); *State ex rel. Dunlap v. Berger*, 211 W. Va. 549, 567 S.E.2d 265 (W. Va. 2002). The majority's statement that "[t]he great majority of federal and state jurisdictions who have addressed this issue are directly contrary to the trial court's findings and conclusions" is therefore unsupported. I would affirm the trial court's conclusion that the arbitration clause's prohibition on class actions is one factor supporting the ultimate determination of unconscionability.

Where there is "an absence of meaningful choice on part of one of the parties together with contract terms which are unreasonably favorable to the other" a contract may be found unconscionable. *Martin v. Sheffer*, 102 N.C. App. 802, 805, 403 S.E.2d 555, 557 (1991). The trial court here found both procedural and substantive unconscionability. The trial court found as undisputed fact that plaintiffs "were rushed through the loan closings[.]" The loan officer did not mention or explain the arbitration clause, but simply indicated where plaintiffs were to sign or initial the loan documents. The arbitration clause at issue here was a standard form contract of adhesion disfavored in law, the

practical effects of which prevented plaintiffs from effectively vindicating their rights.

In their suit against defendants, plaintiffs are seeking relief from an insurance product so abusive that the General Assembly has now outlawed its sale under North Carolina's Predatory Lending Law. *See* N.C. Gen. Stat. § 24-1.1E (2005) (effective 1 July 2000). The record in this case demonstrates that the trial court considered all the relevant facts and circumstances in assessing the enforceability of the arbitration clause at issue. *Brenner*, 302 N.C. at 213, 274 S.E.2d at 210. The trial court made findings of fact detailing plaintiffs' limited financial resources, the costs that would be incurred by plaintiffs through arbitration, the effect of the arbitration provision upon plaintiffs' ability to seek redress for grievances, and the importance of class action lawsuits in cases involving relatively modest damages. Plaintiffs presented substantial evidence to support the trial court's findings. Based on the evidence and the findings, the trial court concluded that "[t]he combination of these factors, taken on the whole, render the Commercial Credit arbitration clause unconscionable. Because the arbitration provision is unconscionable, it is unenforceable." The trial court therefore denied defendants' motion to compel arbitration. The trial court's decision is supported by the law of North Carolina. *See id.* ("[i]f the provisions [of a contract] are . . . so one-sided that the contracting party is denied any opportunity for a meaningful choice, the contract should be found unconscionable"). As the trial court's decision is supported by the evidence and the law, I would affirm the decision of the trial court.

DONALD NELSON AND DINAH NELSON, PLAINTIFFS v. HARTFORD UNDERWRITERS INSURANCE COMPANY, SHARPE HOME CONCEPTS, INC. AND ARS MERGER INC., DEFENDANTS

No. COA05-1052

(Filed 6 June 2006)

1. Appeal and Error— preservation of issues—assignments of error—sufficiency

The trial court did not err in a breach of insurance contract and violation of Unfair Claims Settlement Practices statute case by concluding that plaintiffs' assignments of error do not violate N.C. R. App. P. 10(c)(1), because: (1) the assignment of error with respect to the order granting summary judgment is sufficient when the

appellate rules do not require a party against whom summary judgment has been entered to place exceptions and assignments of error in the record on appeal since the notice of appeal adequately notifies the opposing party and the appellate court of the limited issues to be reviewed; and (2) although the assignment of error regarding the trial court's granting in part defendant's motion to dismiss plaintiffs' claim is deficient, its deficiency does not prevent a review of the factual and legal conclusions made by the October 2004 order since the assignment of error regarding the summary judgment order is valid and requires a review of the factual and legal conclusions made in the motion to dismiss.

2. Appeal and Error— preservation of issues—appellate rules violations—no details in index

The Court of Appeals invoked Rule 2 to address the merits of plaintiffs' appeal in a breach of insurance contract and violation of Unfair Claims Settlement Practices statute case despite an index filled with numerous violations of N.C. R. App. P. 9(a)(1)(a), because defendant, who thoroughly responded to plaintiffs' arguments on appeal, was put on sufficient notice of the issues on appeal.

3. Insurance— homeowners—breach of insurance contract claim—mold—date of defect

The trial court did not err by granting summary judgment in favor of defendant insurance company on plaintiffs' claim for breach of a homeowners insurance contract based on a denial of coverage for a mold claim, because: (1) even in situations where damage continues over time, if the court can determine when the defect occurred from which all subsequent damages flow, the court must use the date of the defect and trigger the coverage applicable on that date; (2) the dates for the three causes of the mold occurred prior to the start of the coverage period of the pertinent insurance policy; and (3) although the harm suffered by plaintiffs in the form of mold in their home may have been discovered and continued during the policy period of defendant's policy, the manifestation of the harm is not the trigger date.

4. Insurance— unfair claims settlement practices—denial of insurance coverage for mold in home—proximate cause of injury

The trial court did not err by concluding that defendant insurance company did not commit unfair and deceptive claim settle-

ment practices with regard to their homeowners insurance claim even though plaintiffs contend defendant's actions prevented them from gaining full knowledge of the extent of the mold in their home, slowed their remediation, and precluded them from asserting a claim against their previous insurer, because: (1) defendant's denial of coverage letter did not misrepresent its insurance policy; (2) the October 2001 letter provided a reasonable explanation for defendant's denial of the claim on its mold and faulty workmanship exceptions, and the omission of a third ground for denial does not make the explanation unreasonable; (3) plaintiffs cannot show an unfair or deceptive trade practice concerning adoption and implementation of reasonable standards without providing evidence; (4) having a local engineering firm conduct an investigation and produce a report was neither unscrupulous nor unethical, and did not deceive plaintiffs as to whether mold was present in the home; (5) defendant's reinvestigation of plaintiffs' earlier mold claim was neither unfair nor deceptive, and the reinvestigation was made within a reasonable time; (6) plaintiffs cannot show how any of defendant's actions were the proximate cause of their injury from mold contamination; (7) even if defendant's actions slowed the remediation, those actions slowed only the response to the injury and did not cause the injury itself; and (8) plaintiffs' contention that defendant's actions precluded them from bringing a claim against their previous insurer is not persuasive when defendant bore no duty to instruct plaintiffs regarding whom to sue and when. N.C.G.S. § 58-63-15(11).

Appeal by plaintiffs from judgment entered 14 March 2005 by Judge Giles R. Clark in Durham County Superior Court. Heard in the Court of Appeals 10 April 2005.

Everett, Gaskins, Hancock & Stevens, LLP, by E.D. Gaskins, Jr., Ashley Matlock, and Michael J. Tadych, for plaintiffs-appellants.

Womble Carlyle Sandridge & Rice, PLLC, by Douglas W. Hanna, for defendant-appellee.

MARTIN, Chief Judge.

Plaintiffs, Donald and Dinah Nelson, brought this action against their homeowner's insurance carrier, Hartford Underwriters Insurance Company (Hartford), alleging claims for breach of an insurance contract and a violation of the Unfair Claims Settlement Practices statute. Hartford answered, denying the allegations of the complaint, and moved

to dismiss. The motion to dismiss was granted in part and denied in part. Hartford subsequently moved for summary judgment as to Hartford's remaining claims.

Evidence before the trial court showed that plaintiffs purchased a new home in September 1996. By October 1996, plaintiffs noticed an unusual odor in the house, and by March 1997, they could smell a musty odor in the master bedroom and bathroom which they now know to be mold.

Plaintiffs and Hartford agree the mold in the house had three causes. First, an oversized heating, ventilating, and air conditioning (HVAC) system was installed in the home during its construction, which failed to remove all of the humidity from the air. Second, in June 1997, plaintiffs noticed the water supply line to their Jacuzzi had a leak. The leak was caused by the homebuilder's plumbing subcontractor, who, while in the process of fixing a mistake in the hot- and cold-water lines, created a leak allowing water to seep from the water connection and wetting the floor and wall between the Jacuzzi and the master and guest bedrooms. The plumbing contractor did not replace the water damaged materials, and did not apply any chemical treatment to the wet area. Third, in late 1998 or early 1999, plaintiffs found wet carpet in their guest bedroom, which was located adjacent to the master bathroom. The plumbing subcontractor found a nail penetrating the shower boot in the master bathroom, allowing water to leak out of the shower stall. The shower boot and a small area of carpet pad were replaced, but the wet carpet, subflooring, and wall between the rooms were not replaced.

Plaintiffs terminated their insurance policy with their previous insurer in early 1999, and Hartford issued its first insurance policy to plaintiffs on 14 May 1999. The policy ran from 14 May 1999 to 14 May 2000, and for another 12-month period upon each renewal. The policy covered losses that occurred during the "policy period" and not otherwise excluded:

> SECTIONS I AND II—CONDITIONS
>
> 1. Policy Period. This policy applies only to loss in Section I . . ., which occurs during the policy period.

The policy contained an exclusion for mold:

> SECTION I—PERILS INSURED AGAINST
>
> . . . We do not, however, insure for loss:
>
> . . .

2. Caused by:

. . .

e. Any of the following:

. . .

(3) Smog, rust or other corrosion, mold, wet or dry rot[.]

The policy also contained an exclusion for faulty workmanship:

SECTION I—EXCLUSIONS

. . .

2. We do not insure for loss to property described in Coverages A and B caused by any of the following.

. . .

c. Faulty, inadequate or defective:

. . .

(2) Design, specifications, workmanship, repair, construction, renovation, remodeling, grading, compaction[.]

Plaintiffs called Hartford and made a mold claim on either 13 June 2001 or 13 September 2001. Although the date of the claim is disputed by the parties, with Hartford providing electronic records in support of the later date, the date is not material. A Hartford adjuster interviewed the plaintiffs on 18 September 2001, and then Hartford had a local engineering firm, Marshall Miller & Associates ("MMA"), inspect the Nelsons' home. MMA spoke to Dinah Nelson, and inspected the home for mold. Plaintiffs did not mention to MMA the water leaks from the shower and Jacuzzi. MMA produced a report, finding evidence of mold on the carpeting, curtains, and floor materials in the vicinity of the HVAC vents. The report concluded the mold conditions were "associated with the operation of the ventilation system and were not associated with some other event." According to the report, the home had an oversized HVAC system which might "short-cycle," causing the house to cool down very quickly and preventing it from extracting sufficient moisture out of the air during the cooling system.

After receiving the MMA report, Hartford denied coverage of the mold claim. In a letter dated 12 October 2001, defendant cited the mold exception and the faulty workmanship exception as the reasons for denial. The letter also expressly reserved Hartford's right to assert other rights or defenses to the claim.

Plaintiffs had the HVAC unit replaced in March 2002, but the mold around the HVAC vents did not immediately diminish. Also in March 2002, plaintiffs made a second claim to Hartford regarding the mold. In making this claim, Dinah Nelson called Hartford and asked whether the water leaks, which she had not previously mentioned to Hartford, could possibly change Hartford's denial of their first claim.

On 16 May 2002, the insurance carrier for the home's general contractor produced a report confirming the presence of mold in the home. The report found several types of mold, and the insurance carrier called plaintiffs and suggested they move out of the house. In late May, plaintiffs moved out.

Hartford sent MMA to conduct a second inspection of plaintiffs' home on 15 May 2002. This inspection was more extensive than the fall 2001 inspection, and included removing carpet and examining the subflooring to look for water damage. MMA produced a report on 17 July 2002, finding mold in the house and concluding that the shower leak and its subsequent repair was the likely cause of the mold, which was then circulated in the house by the HVAC system. Hartford received the report and began its review to determine whether its insurance policy covered the mold claim.

On 5 August 2002, Hartford received a letter from the Nelsons' legal counsel directing Hartford to have no further contact with plaintiffs. Plaintiffs filed suit on 6 September 2002 against several defendants, including the general contractor, several subcontractors, and Hartford. Hartford moved to dismiss, which the trial court granted, in part, on 11 October 2004, as to all claims for breach of contract "in which the event or occurrence that gave rise to the claim predates the issuance of the Policy on May 14, 1999." The trial court also granted the motion, in part, as to all claims for breach of contract excluded by the faulty workmanship exclusion in the contract.

Hartford's motion for summary judgment as to plaintiffs' remaining claims was granted. Plaintiffs settled their claims with the other defendants, and now appeal the grant of summary judgment to Hartford.

I. Motion to dismiss the appeal

[1] Hartford has moved to dismiss the appeal, asserting that plaintiffs' assignments of error violate North Carolina Rule of Appellate Procedure 10(c)(1) because they fail to "state plainly . . . the legal basis upon which error is assigned." Plaintiffs' assignments of error in the record are:

1. The Durham County Superior Court's Order Granting in Part Defendant Hartford's Motion to Dismiss, dated October 11, 2004, and filed on October 14, 2004.

2. The Durham County Superior Court's Order Granting Defendant Hartford's Motion for Summary Judgment, dated March 7, 2005, and filed March 14, 2005.

Defendant contends these assignments of error fail to raise factual or legal issues for appeal, and therefore fail to give notice to defendant and prejudice the case on appeal.

We note that a recent opinion of this Court may appear to state a new rule regarding the sufficiency of an assignment of error to an order of summary judgment. In *Hubert Jet Air, LLC v. Triad Aviation, Inc.*, 177 N.C. App. 445, —— S.E.2d —— (2006), the panel dismissed a plaintiff's appeal from an order granting partial summary judgment because it deemed the assignment of error to be insufficient. The assignment of error stated: "The trial court's partial granting of the Defendants' Motion for Summary Judgment as to Counts 3 through 8." According to the panel, such an assignment of error does not comply with Rule 10 of the North Carolina Rules of Appellate Procedure.

A contrary rule, however, is well-established by the precedents of this Court and our Supreme Court. More than twenty years ago, this Court held in *Vernon, Vernon, Wooten, Brown & Andrews, P.A. v. Miller*, 73 N.C. App. 295, 326 S.E.2d 316 (1985):

> We observe first that defendant did not set out, in the record on appeal, any exceptions or specific assignments of error as required by Rule 10(a) of the Rules of Appellate Procedure. We conclude, however, that none is required where, as here, the sole question presented in defendant's brief is whether the trial court erred in granting summary judgment in favor of the plaintiff. The appeal from the judgment is itself an exception thereto.

Id. at 297, 326 S.E.2d at 319 (citing *West v. Slick*, 60 N.C. App. 345, 299 S.E.2d 657 (1983)). Recently, this Court stated:

> An appeal from an order granting summary judgment raises only the issues of whether, on the face of the record, there is any genuine issue of material fact, and whether the prevailing party is entitled to a judgment as a matter of law. Therefore, the notice of appeal suffices as an assignment of error directed to the order of summary judgment.

Smith-Price v. Charter Behavioral Health Sys., 164 N.C. App. 349, 353, 595 S.E.2d 778, 782 (2004) (citing *Ellis v. Williams*, 319 N.C. 413, 415, 355 S.E.2d 479, 481 (1987) and *Vernon, Vernon, Wooten, Brown & Andrews, P.A. v. Miller*, 73 N.C. App. 295, 297, 326 S.E.2d 316, 319 (1985)); *see also Groves v. Cmty. Hous. Corp.*, 144 N.C. App. 79, 83, 548 S.E.2d 535, 538 (2001) ("The plaintiff does not set forth any assignments of error in the record on appeal; however, such assignments are not required where the question presented is whether summary judgment was properly granted."); *Robinson, Bradshaw & Hinson, P.A. v. Smith*, 129 N.C. App. 305, 319, 498 S.E.2d 841, 851-52 (1998) ("However, the appellate rules do not require a party against whom summary judgment has been entered to place exceptions and assignments of error into the record on appeal. On appeal, without exceptions and assignments of error, the notice of appeal to a summary judgment is necessarily limited to whether the trial court's conclusions were correct ones. Thus, notice of appeal adequately notifies the opposing party and the appellate court of the limited issues to be reviewed.") (citations omitted).

Our Supreme Court also has definitively addressed this issue. In *Ellis v. Williams*, 319 N.C. 413, 355 S.E.2d 479 (1987), the Supreme Court reversed the Court of Appeals when it dismissed an appeal because the appellant had failed to list any exceptions or assignments of error to a summary judgment order. The Supreme Court held:

> The purpose of summary judgment is to eliminate formal trial when the only questions involved are questions of law. Thus, although the enumeration of findings of fact and conclusions of law is technically unnecessary and generally inadvisable in summary judgment cases, summary judgment, by definition, is always based on two underlying questions of law: (1) whether there is a genuine issue of material fact and (2) whether the moving party is entitled to judgment. On appeal, review of summary judgment is necessarily limited to whether the trial court's conclusions as to these questions of law were correct ones. It would appear, then, that notice of appeal adequately apprises the opposing party and the appellate court of the limited issues to be reviewed. Exceptions and assignments of error add nothing.
>
> This result does not run afoul of the expressed purpose of Rule 10(a). Exceptions and assignments of error are required in most instances because they aid in sifting through the trial court record and fixing the potential scope of appellate review. We note that the appellate court must carefully examine the entire record in review-

> ing a grant of summary judgment. Because this is so, no preliminary "sifting" of the type contemplated by the rule need be performed. Also, as previously observed, the potential scope of review is already fixed; it is limited to the two questions of law automatically raised by summary judgment. Under these circumstances, exceptions and assignments of error serve no useful purpose. Were we to hold otherwise, plaintiffs would be required to submit assignments of error which merely restate the obvious; for example, "The trial court erred in concluding that no genuine issue of material fact existed and that defendants were entitled to summary judgment in their favor." At best, this is a superfluous formality.

Id. at 415-16, 355 S.E.2d at 481 (citations omitted). The Supreme Court reversed the Court of Appeals and remanded for the court to review the case on its merits. *Id.* at 417, 355 S.E.2d at 482.

This Court is required to follow the decisions of our Supreme Court, as well as our prior precedents. Although the Supreme Court's recent decision in *Viar v. N.C. DOT*, 359 N.C. 400, 610 S.E.2d 360 (2005), *reh'g denied*, 359 N.C. 643, 617 S.E.2d 662 (2005), directed this Court not to create an appeal for the appellant, and to ensure an appellee has notice of the basis upon which an appellate court might rule, we think the reasoning of *Viar* and *Ellis* are compatible. In any case, *Viar* does not address the issue of assignments of error and summary judgment, and does not overrule *Ellis*. Accordingly, we follow *Ellis* and the precedents of this Court, and determine that plaintiffs' assignment of error with respect to the order granting summary judgment is sufficient. We therefore deny Hartford's motion to dismiss the assignment of error.

Plaintiffs' assignment of error regarding the trial court's granting in part Hartford's motion to dismiss plaintiffs' claim, however, is deficient. In *Wetchin v. Ocean Side Corp.*, 167 N.C. App. 756, 758-59, 606 S.E.2d 407, 409 (2005), the trial court had granted defendant's motion to dismiss and plaintiffs appealed. Plaintiffs' assignment of error read: "The ruling of the trial court in its Order of Dismissal entered on May 13, 2003." This Court held:

> Plaintiffs' assignment of error fails to state the legal basis upon which error is assigned and is not confined to a single issue of law. Rather, the assignment is a broadside attack on the trial court's order, not specifying which of the court's three rulings was erroneous. . . . It is an improper assignment of error.

Id. at 759, 606 S.E.2d at 409.

Here, although plaintiffs' assignment of error concerning the motion to dismiss is deficient, its deficiency nevertheless does not prevent our review of the factual and legal conclusions made by the October 2004 order. The May 2005 summary judgment order was necessarily predicated, in part, on the factual and legal conclusions reached by the October 2004 order. Therefore, the summary judgment order is premised upon, and encompasses, the preceding motion to dismiss. When reviewing the summary judgment order to determine whether there were genuine issues of material fact, and whether defendant was entitled to judgment as a matter of law, we cannot refrain from reviewing the factual and legal conclusions made in the motion to dismiss.

Because the assignment of error regarding the summary judgment order is valid, it suffices to allow our review of the factual and legal issues decided in the motion to dismiss.

> [O]ne assignment of error and argument would have sufficed because the three rulings involved essentially the same question of law. . . . As Rules 10(c) and 28(b), N.C. Rules of Appellate Procedure, clearly indicate one assignment of error is enough to raise one question of law even when it questions the correctness of many rulings by the trial court . . . .

Pate v. Thomas, 89 N.C. App. 312, 314, 365 S.E.2d 704, 705 (1988). Here, the motion to dismiss and summary judgment orders both concern the scope of the insurance contract, and therefore involve essentially the same question of law. Accordingly, the assignment of error to the summary judgment order serves to raise the issues of material fact and questions of law decided by the October 2004 order granting, in part, Hartford's motion to dismiss.

II. Appellate Rule 9(a)(1)(a)

[2] Our review in this case is made more difficult because the index of the record is sparsely detailed and includes errors in pagination. Rule 9(a)(1)(a) of the North Carolina Rules of Appellate Procedure requires the record on appeal in civil actions to contain an index of the contents of the record. The index here stretches hundreds of pages without detailing the contents of the record. For example, from pages 6 to 121, the record contains plaintiffs' third amended complaint and accompanying exhibits, with no index delineating page numbers for the various exhibits. From pages 139 to 534, the record includes Hartford's exhibits to its brief in support of summary judgment, a span of nearly 400 pages without any detail in the index of where one exhibit ends and another

starts. Similarly, from pages 535 to 731 the record includes plaintiffs' exhibits to their brief opposing summary judgment, and from pages 732 to 825 the record includes Hartford's exhibits to its reply brief, a combined stretch of nearly 300 pages without any more specific delineation. An index without sufficient detail ceases to be an index. When approximately 800 pages of the record have essentially no detail in the index, the practical effect is to have no index.

Other mistakes mar the record itself. Between pages 726 and 727 in the record, and again between pages 727 and 728, at least two pages are missing from defendant's answers to plaintiffs' interrogatories. Similarly, at pages 820 and 821, a page is missing from the plaintiffs' answers to defendant's interrogatories. Elsewhere, the record itself is mispaginated. For example, pages 315-16, 317-18, 319-20, and 321-24 have reversed the order of pages in transcripts of depositions, so that a reader must read backwards through the pages.

We find these errors in violation of Appellate Rule 9(a)(1)(a). Our Supreme Court has held "[t]he North Carolina Rules of Appellate Procedure are mandatory and 'failure to follow these rules will subject an appeal to dismissal.' " *Viar*, 359 N.C. at 401, 610 S.E.2d at 360 (quoting *Steingress v. Steingress*, 350 N.C. 64, 65, 511 S.E.2d 298, 299 (1999)). Despite the faulty index, however, we can determine the issues on appeal, and note that Hartford, which thoroughly responded to plaintiffs' arguments on appeal, was put on sufficient notice of the issues on appeal. *Youse v. Duke Energy Corp.*, 171 N.C. App. 187, 192, 614 S.E.2d 396, 400 (2005). The violation of Appellate Rule 9(a)(1)(a) "is not substantive nor egregious enough to warrant dismissal of plaintiffs' appeal." *Coley v. State*, —— N.C. App. ——, 620 S.E.2d 25, 27 (2005). We therefore "invoke [Appellate] Rule 2 and address the merits of plaintiffs' appeal." *Id.* (considering *Viar* and concluding "[t]he decision by this Court not to dismiss the present case for minor rules violations does not lead us to 'create an appeal for an appellant' or to examine any issues not raised by the appellant"); *see also Youse*, 171 N.C. App. at 192, 614 S.E.2d at 400 ("Since plaintiff's Rules violations are not 'so egregious as to invoke dismissal,' . . . we elect to review the significant issues of this appeal pursuant to N.C.R. App. P. 2.") (citation omitted).

III. Breach of contract

[3] We review *de novo* a trial court's grant of both a motion to dismiss and of summary judgment. *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); *Stafford v. County of Bladen*, 163 N.C. App. 149,

151, 592 S.E.2d 711, 713 (2004), *disc. review denied*, 358 N.C. 545, 599 S.E.2d 409 (2004).

For a breach of contract claim, a plaintiff must show a valid contract existed, and a breach of its terms. *Jackson v. Carolina Hardwood Co.*, 120 N.C. App. 870, 871, 463 S.E.2d 571, 572 (1995). Here, the parties do not dispute the validity of the contract, but only whether the contract was breached.

When examining whether an insurance policy is breached, we begin with the "well-settled principle that an insurance policy is a contract and its provisions govern the rights and duties of the parties thereto." *Fid. Bankers Life Ins. Co. v. Dortch*, 318 N.C. 378, 380, 348 S.E.2d 794, 796 (1986) (citing *Harrelson v. State Farm Mut. Auto. Ins. Co.*, 272 N.C. 603, 609, 158 S.E.2d 812, 817 (1968)). The insured party "has the burden of bringing itself within the insuring language of the policy." *Hobson Constr. Co., Inc. v. Great Am. Ins. Co.*, 71 N.C. App. 586, 590, 322 S.E.2d 632, 635 (1984) (citing *Nationwide Mut. Fire Ins. Co. v. Allen*, 68 N.C. App. 184, 188, 314 S.E.2d 552, 554 (1984)), *disc. review denied*, 313 N.C. 329, 327 S.E.2d 890 (1985). To determine whether coverage exists, we compare the complaint with the policy to see if the allegations describe facts which appear to fall within the insurance coverage. *Prod. Sys., Inc. v. Amerisure Ins. Co.*, 167 N.C. App. 601, 605, 605 S.E.2d 663, 665 (2004), *disc. review denied*, 359 N.C. 322, 611 S.E.2d 416 (2005). "Once it has been determined that the insuring language embraces the particular claim or injury, the burden then shifts to the insurer to prove that a policy exclusion excepts the particular injury from coverage." *Hobson*, 71 N.C. App. at 590, 322 S.E.2d at 635.

Plaintiffs argue defendant breached its insurance contract with them when defendant denied coverage for their mold claim. Defendant responds by contending the events that caused plaintiffs' loss occurred between 1996 and early 1999, before defendant issued its insurance policy in May 1999, and therefore the policy does not cover plaintiffs' loss.

In *Gaston County Dyeing Machine Co. v. Northfield Insurance Co.*, 351 N.C. 293, 303, 524 S.E.2d 558, 564 (2000), our Supreme Court held, "where the date of the injury-in-fact can be known with certainty, the insurance policy or policies on the risk on that date are triggered." Instead of examining when the harm manifested, "we look to the *cause* of the property damage rather than to the effect." *Id.* at 303, 524 S.E.2d at 565 (emphasis added). The Supreme Court specifically overruled a previous Court of Appeals decision which held that

"for insurance purposes, property damage 'occurs' when it is manifested or discovered." *Id.*

Following *Gaston County*, this Court held that if we "can determine when the injury-in-fact occurred, the insurance policy available at the time of the injury controls." *Hutchinson v. Nationwide Mut. Fire Ins. Co.*, 163 N.C. App. 601, 604, 594 S.E.2d 61, 63 (2004). Accordingly, "even in situations where damage continues over time, if the court can determine when the defect occurred from which all subsequent damages flow, the court must use the date of the defect and trigger the coverage applicable on that date." *Id.* at 605, 594 S.E.2d at 64; *accord Harleysville Mut. Ins. Co. v. Berkley Ins. Co.*, 169 N.C. App. 556, 560, 610 S.E.2d 215, 217 (2005).

Here, the injury suffered by plaintiffs was from mold contamination. Plaintiffs testified, and Hartford agrees, the mold had three causes: (1) an oversized HVAC system, installed when the house was built in 1996; (2) a leak in the water supply line to their Jacuzzi, discovered in June 1997; and (3) a leak in the shower boot in the master bathroom, discovered in late 1998 or early 1999. The coverage period of the insurance policy issued by Hartford began in May 1999, and therefore each of these three defects occurred prior to the start of the coverage period. Although the harm suffered by plaintiffs, in the form of mold in their home, may have been discovered, and have continued, during the policy period of defendant's policy, our Supreme Court in *Gaston County* specifically disavowed using the manifestation of the harm as the trigger date. *Id.* at 303, 524 S.E.2d at 565. Instead, even though the mold damage continued over time, we can determine when the defects occurred from which all subsequent damages flowed, and we must use the dates of these defects and trigger the coverage applicable on that date. *Hutchinson*, 163 N.C. App. at 605, 594 S.E.2d at 64. Thus, Hartford's policy was not in effect on the trigger date of the injuries and therefore was not "on the risk" at that point in time. *Gaston County*, 351 N.C. at 303, 524 S.E.2d at 564.

Accordingly, since the harms suffered by the plaintiffs did not fall within the policy period of defendant's policy, plaintiffs have not brought themselves "within the insuring language of the policy." *Hobson*, 71 N.C. App. at 590, 322 S.E.2d at 635. Defendant consequently does not bear the burden of proving that "a policy exclusion excepts the particular injury from coverage," *id.*, and we need not determine whether the mold or faulty workmanship exclusions also would bar plaintiffs' mold claim. Because the injuries causing the mold in plaintiffs' home occurred prior to commencement of the insurance policy, we

hold defendant did not breach its contract when it denied plaintiffs' mold claim. Defendant was entitled to judgment as a matter of law, and we affirm the trial court's grant of summary judgment.

IV. Unfair Claims Settlement Practices

[4] Trade practices in the insurance business are regulated by Chapter 58, Article 63 of the North Carolina General Statutes. N.C. Gen. Stat. § 58-63-1 (2005). Unfair and deceptive trade practices are prohibited generally, N.C.G.S. § 58-63-10 (2005), and unfair and deceptive claim settlement practices are prohibited specifically, N.C.G.S. § 58-63-15(11) (2005).

Plaintiffs claim Hartford committed several unfair and deceptive claim settlement practices, including: misrepresenting pertinent facts or insurance policy provisions relating to coverages at issue, N.C.G.S. § 58-63-15(11)(a); failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies, N.C.G.S. § 58-63-15(11)(c); refusing to pay claims without conducting a reasonable investigation based upon all available information, N.C.G.S. § 58-63-15(11)(d); failing to affirm or deny coverage of claims within a reasonable time after proof-of-loss statements have been completed, N.C.G.S. § 58-63-15(11)(e); and, failing to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or the offer of a compromise settlement, N.C.G.S. § 58-63-15(11)(n). Plaintiffs argue that Hartford's actions in this case prevented them from gaining full knowledge of the extent of the mold in their home and therefore slowed their remediation, and also precluded them from asserting a claim against their previous insurer.

Although N.C.G.S. § 58-63-15(11) states "no violation of this subsection shall of itself create any cause of action in favor of any person," a plaintiff's remedy for violation of the unfair claim settlement practices statute is the filing of a claim pursuant to N.C.G.S § 75-1.1, the unfair or deceptive practices statute. *Gray v. N.C. Ins. Underwriting Ass'n*, 352 N.C. 61, 71, 529 S.E.2d 676, 683 (2000) (holding "conduct that violates subsection (f) of N.C.G.S. § 58-63-15(11) constitutes a violation of N.C.G.S. § 75-1.1, as a matter of law"); *Country Club of Johnston County, Inc. v. U.S. Fid. & Guar. Co.*, 150 N.C. App. 231, 246, 563 S.E.2d 269, 279 (2002) ("It follows that the other prohibited acts listed in N.C. Gen. Stat. § 58-63-15(11) are also acts which are unfair, unscrupulous, and injurious to consumers, and that such acts therefore fall within the 'broader standards' of N.C. Gen. Stat. § 75-1.1."). "[*T*]*he* remedy for a vio-

lation of section 58-63-15 is the filing of a section 75-1.1 claim." *Country Club of Johnston County, Inc.*, 150 N.C. App. at 244, 563 S.E.2d at 278 (emphasis in original) (quoting *Lee v. Mut. Cmty. Sav. Bank*, 136 N.C. App. 808, 811 n.2, 525 S.E.2d 854, 857 n.2 (2000)). Plaintiffs pursuing an unfair claim settlement practices violation under N.C.G.S. § 75-1.1 need only show a single violation affecting them, and do not need to make an additional showing of a defendant's frequency of violations indicating a general business practice. *Gray*, 352 N.C. at 71, 529 S.E.2d at 683.

Causes of action for unfair or deceptive practices are distinct from breach of contract actions. *Boyd v. Drum*, 129 N.C. App. 586, 593, 501 S.E.2d 91, 97 (1998), *aff'd per curiam*, 350 N.C. 90, 511 S.E.2d 304 (1999). An action for unfair or deceptive practices is a creation of statute, and therefore *sui generis*, so the cause of action exists independently, regardless of whether a contract was breached. *Bernard v. Cent. Carolina Truck Sales, Inc.*, 68 N.C. App. 228, 230, 314 S.E.2d 582, 584 (1984), *disc. review denied*, 311 N.C. 751, 321 S.E.2d 126-27 (1984). Thus, even if an insurance company rightly denies an insured's claim, and therefore does not breach its contract, as here, the insurance company nevertheless must employ good business practices which are neither unfair nor deceptive.

To establish a violation of N.C.G.S. § 75-1.1, plaintiffs "must show: (1) an unfair or deceptive act or practice, (2) in or affecting commerce, and (3) which proximately caused injury to plaintiffs." *Gray*, 352 N.C. at 68, 529 S.E.2d at 681 (citing N.C. Gen. Stat. § 75-1.1 and *First Atl. Mgmt. Co. v. Dunlea Realty Co.*, 131 N.C. App. 242, 252, 507 S.E.2d 56, 63 (1998)). The second element, that the act or practice be "in or affecting commerce," is not at issue in this case.

"A practice is unfair if it is unethical or unscrupulous." *Dalton v. Camp*, 353 N.C. 647, 656, 548 S.E.2d 704, 711 (2001); *see also Marshall v. Miller*, 302 N.C. 539, 548, 276 S.E.2d 397, 403 (1981) ("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."). A practice is deceptive "if it has a tendency to deceive," *Dalton*, 353 N.C. at 656, 548 S.E.2d at 711, but "proof of actual deception is not required," *Marshall*, 302 N.C. at 548, 276 S.E.2d at 403. The question of what constitutes an unfair or deceptive trade practice is an issue of law. *Eastover Ridge, L.L.C. v. Metric Constructors, Inc.*, 139 N.C. App. 360, 363, 533 S.E.2d 827, 830 (2000), *disc. review denied*, 353 N.C. 262, 546 S.E.2d 93 (2000). If the material facts are not disputed, the court should determine whether the defendant's conduct constituted an unfair or deceptive trade practice. *Id.*

Plaintiffs first argue, under N.C.G.S. § 58-63-15(11)(a), that Hartford misrepresented pertinent facts or insurance policy provisions relating to coverages at issue. Specifically, plaintiffs contend Hartford denied coverage of the mold claim only under Section I, Coverages A and B of the policy, and failed to address liability under Section I, Coverages C and D. Plaintiffs also contend Hartford did not state in its denial letter that it based its denial on the fact that the events giving rise to the mold contamination occurred before the effective date of the policy. For these reasons, plaintiffs argue Hartford misrepresented the insurance policy provisions relating to coverages.

Hartford's October 2001 letter denying coverage of plaintiffs' mold claim focused on Coverages A and B of the policy. In pertinent part, the letter stated:

> Please refer to your Homeowner's policy under Section 1—Perils Insured Against, which states:
>
> We insure against risk of direct loss to property described in Coverages A and B only if that loss is a physical loss to property. We do not, however, insure for loss:
>
> 2. Caused by:
>
> e. Any of the following:
>
> (3) Smog, rust or other corrosion, mold, wet or dry rot;
>
> The policy goes on to state under Section 1—Exclusions:
>
> 2. We do not insure for loss to property described in Coverages A and B caused by any of the following. However, any ensuing loss to property described in Coverages A and B not excluded or excepted in this policy is covered.
>
> c. Faulty, inadequate, or defective:
>
> (2) Design, specifications, workmanship, repair, construction, renovation, remodeling, grading, compaction.
>
> As a result, we will be therefore, be unable [*sic*] to honor your claim. We expressly reserve our right to assert all other rights or defenses that we may have to this claim even though not enumerated above. We are neither waiving nor relinquishing any of our rights under the policy of insurance.

This denial of coverage letter did not misrepresent Hartford's insurance policy. Coverage C under Section I of the insurance policy concerns

claims submitted for damage of personal property, but it requires a "peril" that triggers such coverage, such as an explosion, theft, volcanic eruption, aircraft crash, or windstorm. Mold was not listed as a peril, and thus Coverage C was not applicable. Coverage D concerns "loss of use" of the home. At the time plaintiffs made the claim, and at the time Hartford denied the claim, plaintiffs resided in the home and had not made a claim for loss of use. Thus, Coverage D was not applicable. Finally, Hartford made no misrepresentation of its policy when the denial letter did not mention denial based upon events occurring before the effective date of the policy. Hartford's letter expressly reserved the right to assert other rights or defenses it had to the claim. The October 2001 denial letter was not unethical or unscrupulous, nor did it have the tendency to deceive plaintiffs, and therefore it was neither unfair nor deceptive.

Second, similar to their claim under N.C.G.S. § 58-63-15(11)(a), plaintiffs contend Hartford failed to provide a reasonable explanation of the basis in the policy for denial of the claim pursuant to N.C.G.S. § 58-63-15(11)(n), because Hartford did not base its denial on the fact that the events causing the mold occurred before the effective date of the policy. But Hartford's denial of the claim on its mold and faulty workmanship exceptions were reasonable, and the omission of a third ground for denial does not make the explanation unreasonable. The October 2001 letter provided a reasonable explanation for the denial of coverage, and was not unfair or deceptive.

Third, plaintiffs argue Hartford failed to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies, pursuant to N.C.G.S. § 58-63-15(11)(c). Plaintiffs produced no evidence regarding Hartford's adoption or implementation of standards for investigation of claims other than a two-sentence answer Hartford provided to plaintiffs' interrogatories: "All residential property damage claims are handled in the same manner. The defendant confirms coverage, conducts an investigation, evaluates the claim, and takes appropriate action on the claim." With no further evidence provided on this claim, plaintiffs cannot show an unfair or deceptive trade practice concerning adoption and implementation of reasonable standards.

Fourth, plaintiffs argue Hartford failed to conduct a reasonable investigation based upon all available information, pursuant to N.C.G.S. § 58-63-15(11)(d). Plaintiffs contend the investigation of their 2001 claim was unreasonable because it did not discover the water leaks, and because MMA did not submit the mold samples for identification of the

type of mold present. The investigation, conducted by MMA on behalf of Hartford, determined that the mold was caused by an oversized HVAC system. Hartford's purpose in having MMA perform an investigation, and produce a report, was to determine whether mold was present in the house, and if so, whether the policy covered the mold contamination. The purpose of the report was not, however, to determine all the possible causes of the mold contamination, or to determine the types of mold present. Thus, the MMA report served Hartford as a reasonable investigation of whether mold existed in the home, as plaintiffs claimed; in deciding whether the policy covered the mold, the causes and types of mold were irrelevant. Having MMA conduct an investigation and produce a report was neither unscrupulous nor unethical, and did not deceive plaintiffs as to whether mold was present in the home.

Finally, plaintiffs argue Hartford failed to affirm or deny coverage of the second mold claim within a reasonable time, pursuant to N.C.G.S. § 58-63-15(11)(e). Plaintiffs resubmitted their mold claim in March 2002, making the same claim as in 2001 but adding the information about the water leaks, which they had neglected to share with MMA in its earlier inspection. Hartford sent MMA back to the plaintiffs' home for a second inspection, and received MMA's report on 17 July 2002, again finding mold in the house. On 5 August 2002, before Hartford had made its determination of whether the mold claim was covered by the policy, plaintiffs' counsel sent Hartford a letter directing it to have no further contact with plaintiffs, and plaintiffs then filed suit on 6 September 2002. Hartford's re-investigation of plaintiffs' earlier mold claim was neither unfair nor deceptive. The re-investigation was made within a reasonable time. The report from the second investigation, more thorough than the first, was provided to Hartford only a few weeks before Hartford was warned not to have any contact with plaintiffs, providing little time for Hartford to determine whether it should cover a claim it had previously denied. The 2002 investigation was not unethical or unscrupulous, and had no tendency to deceive plaintiffs, and thus it was neither unfair nor deceptive.

We conclude that none of the actions taken by Hartford in investigating and deciding the mold claim violated N.C.G.S. § 58-63-15(11)(a), (c), (d), (e), or (n). Therefore, we conclude that plaintiffs have shown no unfair or deceptive practices on the part of Hartford which would support a claim under N.C.G.S. § 75-1.1.

Plaintiffs also cannot show how any of the actions taken by Hartford were the proximate cause of their injury from mold contamination. North Carolina case law defines proximate cause as "a cause

which in natural and continuous sequence, unbroken by any new and independent cause, produced the plaintiff's injuries, and without which the injuries would not have occurred." *Lynn v. Overlook Dev.*, 328 N.C. 689, 696, 403 S.E.2d 469, 473 (1991) (quoting *Adams v. Mills*, 312 N.C. 181, 192, 322 S.E.2d 164, 171 (1984)); *accord Loftis v. Little League Baseball, Inc.*, 169 N.C. App. 219, 222, 609 S.E.2d 481, 484 (2005); *see also Black's Law Dictionary* 234 (8th ed. 2004) (proximate cause is "a cause that directly produces an event and without which the event would not have occurred").

The injury suffered by plaintiffs in this case was the mold contamination of their home. Both parties agree the mold was caused by three events: the installation of the oversized HVAC system, and the two separate water leaks. Those events took place between 1996 and early 1999, prior to Hartford's appearance on the scene. Although the injury, in the form of mold contamination, continued after 1999, the contamination had been ongoing for several years before Hartford became plaintiffs' insurer, and continued for another two years before Hartford was even made aware of the contamination in 2001. Thus, the injury suffered by plaintiffs had been ongoing for approximately five years before Hartford took any of the actions which plaintiffs contend proximately caused them harm.

Keeping in mind the ongoing injury from mold contamination, Hartford's actions are related to the *response* by the parties to the injury. A response to an injury is, by its nature, not the cause of the injury itself; the injury happens first, and the response to the injury follows. The response is thus not the cause of the injury, but rather a reaction to it. Hartford's actions, in the form of the investigation and denial of plaintiffs' mold claim, based on the 2001 report from MMA, were reactions to the ongoing injury suffered by plaintiffs, and not a cause of the injury itself. Furthermore, plaintiffs suffered no new injury from Hartford's actions. Instead, plaintiffs' ongoing mold contamination simply proceeded unabated, as a continuation of the already-existing injury. Accordingly, we hold that Hartford's actions in response to the mold contamination were not a proximate cause of plaintiffs' injury.

Plaintiffs also contend that Hartford's actions harmed them by slowing their remediation of the home. This argument similarly fails, however, because remediation is the response to the injury. Even if Hartford's actions slowed the remediation, those actions slowed only the response to the injury, and did not cause the injury itself. A lack of abatement of an injury is not equivalent to causing the injury itself. In any case, none of Hartford's actions prevented plaintiffs from eliminat-

ing the mold from their home, regardless of the type of mold. The 2001 report from MMA did not specify the type of mold present in the house, and if it had, perhaps plaintiffs would have been more quickly spurred to remediation. But the slower remediation was not the proximate cause of the mold contamination, which had begun in 1996 and continued until after plaintiffs filed suit.

Plaintiffs' final contention, that Hartford's actions precluded them from bringing a claim against their previous insurer, is not persuasive, because Hartford bore no duty to instruct plaintiffs regarding whom to sue, and when. In any event, since plaintiffs did not make this argument to the trial court, we do not consider it on appeal. N.C.R. App. P. 10(b) (2005).

Because plaintiffs cannot produce evidence to show any genuine issue of material fact that Hartford proximately caused their injury from mold contamination, or that Hartford's actions were unfair or deceptive practices, they cannot sustain two essential elements of an unfair or deceptive trade practices claim. Accordingly, Hartford is entitled to summary judgment as a matter of law.

Affirmed.

Judges HUDSON and BRYANT concur.

STATE OF NORTH CAROLINA v. TOBY OFIELD LOVE

STATE OF NORTH CAROLINA v. RONNIE LOVE

STATE OF NORTH CAROLINA v. TINO LOVE

No. COA05-1237

(Filed 6 June 2006)

1. Appeal and Error— preservation of issues—joint motion to adopt argument as to all defendants

Defendants' joint motion to adopt codefendants' arguments on appeal under N.C. R. App. P. 2 is allowed and each issue is addressed as to all defendants.

2. Criminal Law— joinder of defendants—abuse of discretion standard

The trial court did not abuse its discretion in a robbery with a firearm, felonious breaking or entering, and multiple first-degree kidnapping case by granting the State's motion for joinder over defendants' objections, because: (1) the State did not stand by and rely on the testimony of the respective defendants to convict them, but instead offered plenary evidence of the three defendants' guilt; and (2) the conflict between closing arguments for defendants was not of such a magnitude when considered in the context of the other evidence that the jury was likely to infer from that conflict alone that all three were guilty.

3. Jury— selection—deviation from mandatory statutory guidelines—failure to show bias

The trial court did not commit prejudicial error in a robbery with a firearm, felonious breaking or entering, and multiple first-degree kidnapping case by imposing a jury selection procedure which deviated from mandatory statutory guidelines under N.C.G.S. § 15A-1214, because: (1) although defendants assert a claim of prejudice, they fail to show jury bias, the inability to question prospective jurors, inability to assert peremptory challenges, or any other defect which had the likelihood to affect the outcome of the trial; and (2) not a single defendant used each and every one of his peremptory challenges, and defendants failed to do anything more than make a blanket assertion that statutory violation of mandated jury selection procedures prejudiced them.

4. Witnesses— motion to sequester—failure to show abuse of discretion

The trial court did not err in a robbery with a firearm, felonious breaking or entering, and multiple first-degree kidnapping case by failing to grant defendants' motion to sequester the State's witnesses, because defendants failed to bring forth any evidence that the trial court's judgment was so arbitrary that it would constitute an abuse of discretion.

5. Constitutional Law— right to fair trial—impartiality—redaction of defendants' statements

The trial court did not abandon its role of impartiality by personally redacting defendants' statements for introduction at trial and did not admit the statements in violation of *Bruton v. United States*, 391 U.S. 123 (1968), because: (1) the trial court went through

each and every statement with the State and defendants; and (2) the trial court instructed both parties to object to any portion that they felt was improperly included or excluded.

6. Kidnapping— second-degree—failure to submit instruction— not released in a safe place

There was no evidence in a first-degree kidnapping case that the victim were released in a safe place so as to require the trial court to submit the charge of second-degree kidnapping to the jury, because: (1) defendants bound and gagged all four victims, defendants subsequently bound all four victims together, defendants checked the bindings of the victims before departure, and defendants placed further bindings on the victims and stated they would return; (2) there was no affirmative or willful action on the part of defendants to release the victims, and although defendants may have physically left the premises, they left the victims with a constructive presence through their active intimidation; and (3) an instruction on this lesser-included offense requires an affirmative action other than the mere departing of the premises.

7. Sentencing— mitigating factors—balancing

The trial court did not abuse its discretion in a robbery with a firearm, felonious breaking or entering, and multiple first-degree kidnapping case by allegedly failing to properly consider mitigating factors, including that defendant voluntarily acknowledged wrongdoing in connection with the offense to a law enforcement officer at an early stage of the criminal process, because the trial court considered this mitigating factor but was unpersuaded by any argument that the factor was not outweighed by numerous aggravating factors.

8. Sentencing— aggravating factors—motion to dismiss—waiver

The trial court did not err in a robbery with a firearm, felonious breaking or entering, and multiple first-degree kidnapping case by denying defendants' motion to dismiss the aggravating factor that defendant joined with more than one other person in committing the offense of first-degree kidnapping and that defendant was not charged with committing a conspiracy, where defendants stipulated this factor and also waived a jury trial on this issue.

9. Appeal and Error— preservation of issues—failure to object or make motion at trial

Although defendant contends the trial judge erred in a robbery with a firearm, felonious breaking or entering, and multiple first-

degree kidnapping case by failing to recuse herself based on alleged bias against defense counsel, this assignment of error is overruled because: (1) defendant did not seek recusal of the trial judge from the case under the standards for recusal or disqualification of a judge in a criminal trial set out in N.C.G.S. § 15A-1223 and Canon 3(C)(1) of the Code of Judicial Conduct; (2) the question was not properly preserved for appeal since there was no request, objection or motion made; and (3) defendant presented no evidence of bias, prejudice, or impartiality on the part of the trial judge.

10. Constitutional Law— right to confrontation—failure to meet burden to show usefulness of presence

The trial court did not err in a robbery with a firearm, felonious breaking or entering, and multiple first-degree kidnapping case by making findings as to mitigating factors when defendant was not present in the courtroom, because: (1) the findings as to the mitigating factors in no way changed the sentence which had previously been given to defendant; and (2) defendant failed to meet his burden requiring him to show the usefulness of his presence at the time the findings were made as to these mitigating factors.

Appeal by defendants from judgments entered 16 December 2004 by Judge Evelyn W. Hill in Alamance County Superior Court. Heard in the Court of Appeals 13 April 2006.

Attorney General Roy Cooper, by Assistant Attorney General Iain M. Stauffer, Assistant Attorney General Judith Tillman, and Special Deputy Attorney General Mabel Y. Bullock, for the State.

Peter Wood for Toby Love defendant appellant.

Irving Joyner for Ronnie Love defendant appellant.

Cheshire Parker Schneider Bryan & Vitale, by John Keating Wiles, for Tino Love defendant appellant.

McCULLOUGH, Judge.

Defendants appeal from judgments entered after a jury verdict of guilty of four counts of first-degree kidnapping, one count of robbery with a firearm, and one count of felonious breaking or entering charges. We find no error.

FACTS

An Alamance County grand jury indicted defendants on four counts of first-degree kidnapping, assault on a child under the age of 12, rob-

bery with a dangerous weapon, breaking and entering, larceny, possession of stolen goods, and certain aggravating factors. On 3 December 2004, the State made a motion to join Toby Love, Tino Love, and Ronnie Love as defendants which was allowed by the trial judge. The case against the three defendants proceeded to trial on 6 December 2004. Defendants filed a motion to sequester the State's witnesses which was adopted at trial by all defendants and subsequently denied by the trial judge. After granting the motion for joinder of all issues and all defendants, the trial judge addressed the issue of redaction of each defendants' statement. In doing such, the judge went line by line through each defendant's statement and informed all parties what should be deleted allowing them an opportunity to object after each suggested redaction, resulting in a redacted version of all three defendants' statements.

Before jury selection ensued, the trial judge informed defendants of the procedure for *voir dire* after the State passed the panel to defendants as follows:

> The State passes 12 to you. You question. You excuse any, it goes back to the State. State fills up those seats. Passes 12 to you. You excuse any, it goes back to the State. Where there's 12 that you've passed and the State has passed, then it goes to Ms. Harris. We'll keep doing that until we're done and we're going to have to keep up with it because I probably will have some trouble remembering how many each person gets to question.

The State presented evidence at trial tending to show the following: On 2 June 2004, the Petersen family, Martin ("Mr. Petersen"), Tammy ("Mrs. Petersen"), and their sons Matt and Grant were at their home in Burlington, North Carolina. Matt was the first family member to leave the house for work that morning, and as he stepped out of the door of the house, he noticed defendants leaning against the wall of his house. One of the defendants immediately pointed a gun in Matt's face, pushed him on the ground outside of his house, bound his hands with tape, and placed tape over his mouth. While Matt was being bound and gagged, two of the men ran into the house while the other two men remained with Matt and later took him inside. Upstairs in the house, one of the men wearing baggy pants, a wig, and face paint approached Mr. Petersen pointing a gun at his face and was followed by a second man who also pointed his gun in Mr. Petersen's face. While Mr. Petersen was held at gunpoint upstairs, Matt was forcibly pushed up the stairs with a gun in his back. The armed men then forcibly pushed Mr. Petersen's face into the couch where they bound his hands and ankles with duct tape.

Mrs. Petersen was then directed to sit on the couch next to her husband at which time duct tape was placed over her mouth, around her head, and around her hands which were placed behind her back. Mrs. Petersen was then pulled off the couch and placed in the same position as her husband.

While the armed men were binding and gagging Mr. and Mrs. Petersen, another armed man led Matt down the hall to wake his younger brother Grant. The men then wrapped duct tape around Grant's head and hands and placed him beside Mrs. Petersen. Matt was then blindfolded, placed in a chair and his hands and feet were bound. The intruders then asked Mr. Petersen where he kept his money and he directed them to his wallet containing $500.00. The men then forced Mr. Petersen downstairs and directed him to open two safes. The first safe contained a 20-gauge shotgun belonging to Matt which was taken by one of the intruders who stated, "I'm going to shell up and go upstairs and take care of some business. If you don't open the other safe in five minutes I'm going to come back down and take care of some more." Two armed intruders remained downstairs with Mr. Petersen and one held a gun to the back of his head and ordered him to open the second safe. Mrs. Petersen testified that while her husband was downstairs she heard someone come upstairs and felt them touch her breast.

After both safes had been opened, the intruders inquired as to where the rest of his money was kept and Mr. Petersen responded that he kept his money in the bank. Mr. Petersen was then taken back upstairs at gunpoint where he showed the intruders where he kept another $400.00. Mr. Petersen was then returned to the couch where his hands and ankles were re-bound, his arms were taped to his chest, and tape was placed around his face and mouth. The intruders directed each of the members of the Petersen family to sit in dining room chairs where they proceeded to bind each person directly to the chair. After binding each person to their chair, the intruders placed the chairs of Mr. and Mrs. Petersen back to back as well as the chairs of Matt and Grant back to back and bound the chairs together and then placed a plastic bag over Matt's head. One of the intruders asked Mr. Petersen for the keys to his van which Mr. Petersen gave him and the intruders proceeded to remove items from the Peterson home. Before leaving, the armed men rechecked the bindings and further wrapped duct tape around all four dining room chairs several times in order to bind the entire family together. One of the intruders remained in the home with the family pointing a gun at them until the Petersen's van was ready to leave, and as he left the home he stated, "we'll be back."

Once the intruders were gone, Mr. Petersen was able to chew through his bindings until he could break them loose allowing him to release himself and the rest of his family members. It was determined that the intruders had stolen a shotgun, cash, Mrs. Petersen's jewelry, a video recorder, cell phone, digital camera, memory card, surround sound system, and other items. On 5 June 2004, defendant Ronnie Love gave officers at the Alamance County Sheriff's Department a statement which implicated himself, defendants Tino and Toby Love, and Willie Moore in the Petersen home invasion. A search was thereafter conducted of the property where defendant Tino Love was residing which revealed wig pieces, face cream, a wig, blue and white bandana, and other miscellaneous items. After the search was conducted, Tino Love was taken to the Alamance County Sheriff's Department where he gave a taped statement implicating defendants Ronnie and Toby Love and Willie Moore in the home invasion. On 7 June 2004, defendant Toby Love gave a statement to police officers which implicated Willie Moore and defendants Ronnie and Tino Love in the Petersen home invasion.

One of defendants' girlfriends turned over surround sound speakers, video tape, and film from a camera to police. Subsequently her house was searched revealing assorted gold and silver jewelry, two-way radios, and two handguns. During trial the seized property was identified and admitted into evidence showing that some of the property bore the initials of Mr. Petersen. Certain property and jewelry were identified by Mr. and Mrs. Petersen as items that were taken from their home.

At the conclusion of the evidence, defendants made a motion to submit the charge of second-degree kidnapping to the jury on the basis that the victims were released into a safe place. The motion to submit the lesser included offense to the jury was denied by the trial judge citing the Webster dictionary definition of release as " 'one, to set free from restraint, confinement for servitude; to let go.' " The jury returned guilty verdicts as to all defendants on the charges of four counts of first-degree kidnapping, robbery with a firearm, and felonious breaking or entering.

After the jury returned guilty verdicts, the trial judge proceeded to the sentencing phase of the trial and prepared for jury consideration of aggravating factors. In preparing for the jury consideration all three defendants stipulated that they acted in concert with the other defendants and were not charged with conspiracy and waived a jury trial on that issue. The trial judge then went on to the consideration of mitigating factors and sentencing. In considering the offering of a confession as a mitigating factor, the trial judge stated:

I'd like to point out that you gave the most self-serving statements you could have given. You said the guns weren't loaded. You said all the things that you thought might help you.

And if you don't think they would have found you without that statement then you're a bigger fool than I think you are because the property was showing up at your girlfriends' houses, your daddy knew something was going on. It wouldn't have been any time at all before they would have found you, tested that physical evidence for fingerprints and you still would have been here. But I'm going to give you credit for making that statement. I'm going to find that you did volunteer.

The trial judge then found that the aggravating factors outweighed the mitigating factors and sentenced defendant Tino Love, who was then removed from the courtroom. While sentencing the other two defendants, the trial judge entered findings of mitigating factors as to defendant Tino Love. Defendants then gave oral notice of appeal.

Defendants now appeal.

ANALYSIS

[1] On 28 March 2006 all three defendants made a joint motion to adopt the codefendants' arguments on appeal pursuant to Rule 2 of the North Carolina Rules of Appellate Procedure. This Court can find no reason for disallowance and therefore we address each applicable issue in this opinion as to all defendants.

I

[2] We first address defendants' contention on appeal that the trial court erred in granting the State's motion for joinder over defendants' objections. We disagree.

The decision of whether to grant or deny a motion for joinder of codefendants lies within the sound discretion of the trial judge and that decision will not be disturbed absent a showing that the "joinder deprived the defendant of a fair trial." *State v. Golphin*, 352 N.C. 364, 399, 533 S.E.2d 168, 195 (2000), *certs. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001), *cert. denied*, 358 N.C. 157, 593 S.E.2d 84 (2004). The law is clear in stating that "the presence of antagonistic defenses does not, standing alone, warrant severance." *Id.* at 400, 533 S.E.2d at 195. Rather, " 'the test is whether the conflict in defendants' respective positions at trial is of such a nature that, considering all of the other evidence in the case, defendants were denied a fair trial.' " *State v. Lowery*, 318 N.C. 54, 59, 347 S.E.2d 729, 734 (1986) (citation omitted).

In determining whether the antagonistic positions of the defendants were such that joinder amounted to prejudice, this Court must look to whether the trial court became an evidentiary battlefield "where the state simply stands by and witnesses 'a combat in which the defendants [attempt] to destroy each other.' " *State v. Nelson*, 298 N.C. 573, 587, 260 S.E.2d 629, 640 (1979) (citation omitted), *cert. denied*, 446 U.S. 929, 64 L. Ed. 2d 282 (1980). In applying this test to facts, the courts have looked to whether the State relied on the codefendants' statements alone to prove their case or whether there was evidence independent of such statements. *Golphin*, 352 N.C. at 400-01, 533 S.E.2d at 195-96.

In the instant case, we conclude that defendants were not denied a fair trial by the joinder notwithstanding the conflicts in their testimony. This is not a case where the State simply stood by and relied on the testimony of the respective defendants to convict them. The State itself offered plenary evidence of the three defendants' guilt. On appeal defendants attempt to prove prejudice by pointing to conflicting statements made by each defendant's counsel in closing statements. However, the conflict between closing arguments for defendants was not of such a magnitude when considered in the context of other evidence that the jury was likely to infer from that conflict alone that all three were guilty.

Therefore, the corresponding assignments of error are overruled.

II

[3] We next address defendants' contention on appeal that the trial judge erred in imposing a jury selection procedure which deviated from mandatory statutory guidelines under N.C. Gen. Stat. § 15A-1214. We disagree.

The North Carolina General Statutes set forth a mandatory procedure for jury selection to be followed by the trial court in § 15A-1214:

> (d) The prosecutor **must** conduct his examination of the first 12 jurors seated and make his challenges for cause and exercise his peremptory challenges. If the judge allows a challenge for cause, or if a peremptory challenge is exercised, the clerk must immediately call a replacement into the box. When the prosecutor is satisfied with the 12 in the box, they must then be tendered to the defendant. Until the prosecutor indicates his satisfaction, he may make a challenge for cause or exercise a peremptory challenge to strike any juror, whether an original or replacement juror.

> (e) Each defendant **must** then conduct his examination of the jurors tendered him, making his challenges for cause and his peremptory challenges. If a juror is excused, no replacement may be called until all defendants have indicated satisfaction with those remaining, at which time the clerk must call replacements for the jurors excused. The judge in his discretion must determine order of examination among multiple defendants.

N.C. Gen. Stat. § 15A-1214(d)-(e) (2005) (emphasis added). Defendants now argue that the trial court deviated from these procedures by alternating between the State and each defendant rather than each defendant questioning and passing on the jury panel before it was sent back to the State. However, defendants did not object to these deviations at trial. Nonetheless, " 'when a trial court acts contrary to a statutory mandate . . . the right to appeal the court's action is preserved.' " *State v. Jaynes*, 353 N.C. 534, 544-45, 549 S.E.2d 179, 189 (2001) (citation omitted), *cert. denied*, 535 U.S. 934, 152 L. Ed. 2d 220 (2002). Therefore, defendants' statutory error is preserved for appellate review by this Court.

It is evident from the record on appeal that the trial court violated the mandatory statutory procedure for jury selection. However, a new trial does not necessarily follow a violation of statutory mandate. *State v. Garcia*, 358 N.C. 382, 406, 597 S.E.2d 724, 742-43 (2004), *cert. denied*, 543 U.S. 1156, 161 L. Ed. 2d 122 (2005). Defendants must show not only that a statutory violation occurred, but also that they were prejudiced by this violation. *Id.*

The purpose underlying jury selection is to ensure the empanelment of an "impartial and unbiased jury." *Id.* at 407, 597 S.E.2d at 743. Defendants assert a claim of prejudice by the jury selection procedure imposed; however, they fail to show jury bias, the inability to question prospective jurors, inability to assert peremptory challenges, nor any other defect which had the likelihood to affect the outcome of the trial. Instead, the gravamen of defendants' argument is that they were prejudiced by an inability to engage in equal amounts of "face time" with the prospective jurors and were thereby deprived of an equal opportunity to create a rapport with the jurors.

Moreover, this Court has looked, in similar cases, to whether all peremptory challenges were exercised by the defendant in determining prejudice. *State v. Lawrence*, 352 N.C. 1, 12-13, 530 S.E.2d 807, 814-15 (2000), *cert. denied*, 531 U.S. 1083, 148 L. Ed. 2d 684 (2001). If peremptory challenges are unused and the defendant makes no challenge for

cause, then he cannot say he was forced to accept an undesirable juror. *Id.* at 13, 530 S.E.2d at 815.

In the instant case, not a single defendant used each and every one of their peremptory challenges. Further, they have failed to do anything more than make a blanket assertion that statutory violation of mandated jury selection procedures prejudiced them. Therefore, the corresponding assignments of error are overruled.

III

[4] We now address defendants' contention that the trial court erred in failing to grant defendants' motion to sequester the State's witnesses. We disagree.

" 'A ruling on a motion to sequester witnesses rests within the sound discretion of the trial court, and the court's denial of the motion will not be disturbed in the absence of a showing that the ruling was so arbitrary that it could not have been the result of a reasoned decision.' " *State v. Hyde*, 352 N.C. 37, 43, 530 S.E.2d 281, 286 (2000) (citation omitted), *cert. denied*, 531 U.S. 1114, 148 L. Ed. 2d 775 (2001), *disc. review denied*, 360 N.C. 72, 623 S.E.2d 779 (2005). Defendants have failed to bring forth any evidence of indicia that the trial court's judgment was so arbitrary that it would constitute an abuse of discretion. Therefore, the corresponding assignments of error are overruled.

IV

[5] Next, defendants contend on appeal that the trial judge erred in abandoning her role of impartiality where she personally redacted defendants' statements for introduction at trial and admitted the statements in violation of *Bruton v. United States*. We disagree.

"Every person charged with crime has an absolute right to a fair trial. By this it is meant that he is entitled to a trial before an impartial judge and an unprejudiced jury in an atmosphere of judicial calm." *State v. Carter*, 233 N.C. 581, 583, 65 S.E.2d 9, 10 (1951).

In *Bruton v. United States*, 391 U.S. 123, 20 L. Ed. 2d 476 (1968), the Supreme Court held that a defendant's rights under the Confrontation Clause are violated when his nontestifying codefendant's confession is introduced at their joint trial, and the confession names the defendant as a participant in the crime. In the instant case, the trial judge, in accordance with the progeny of *Bruton*, took the statements of the three defendants and redacted portions of the statements which were inadmissible at trial. Defendants failed to raise any objection to

the trial judge's decision to personally redact the statements at trial and now argue that this action was a violation of the requirement of absolute impartiality.

However, the trial judge went through each and every statement with the State and defendants, instructing them to object to any portion that they felt was improperly included or excluded. It is evident from the transcript that during this pretrial phase, the trial judge conducted the proceeding in an impartial manner and made every effort to ensure that defendants received a fair trial. Therefore, the corresponding assignments of error are overruled.

V

[6] Defendants further contend that the trial court erred in failing to submit the charge of second-degree kidnapping to the jury where there was evidence that the victims were released into a safe place. We disagree.

"The law is well settled that the trial court must submit and instruct the jury on a lesser included offense when, and only when, there is evidence from which the jury could find that defendant committed the lesser included offense." *State v. Boykin*, 310 N.C. 118, 121, 310 S.E.2d 315, 317 (1984). " 'The determining factor is the presence of evidence to support a conviction of the lesser included offense.' " *State v. Kyle*, 333 N.C. 687, 703, 430 S.E.2d 412, 421 (1993) (citation omitted).

The North Carolina General Statutes set forth two degrees of the offense of kidnapping, in which second-degree kidnapping is considered a lesser included offense:

> If the person kidnapped either was not released by the defendant in a safe place or had been seriously injured or sexually assaulted, the offense is kidnapping in the first degree and is punishable as a Class C felony. If the person kidnapped was **released** in a safe place by the defendant and had not been seriously injured or sexually assaulted, the offense is kidnapping in the second degree and is punishable as a Class E felony.

N.C. Gen. Stat. § 14-39(b) (2005).

On appeal defendants contend that there was evidence that the victims were "released" into a safe place requiring the submission of the offense of second-degree kidnapping to the jury. Defendants argue that the victims were "released" into a safe place when they were left bound and gagged in their home by defendants on a theory that "release"

merely requires a relinquishment of dominion or control over a person. However, this Court is in no way persuaded by this argument and holds that "release" inherently contemplates an affirmative or willful action on the part of a defendant.

In the instant case, defendants bound each of their four victims to chairs and gagged them. After binding each individual to a chair, they bound the mother and father together as well as the two sons. Defendants subsequently bound all four chairs and victims together. The record also reveals that defendants checked the bindings of the victims before departure, placed further bindings on the victims, and stated that they would return. We find no affirmative or willful action on the part of defendants to release the victims, in fact defendants may have physically left the premises, but through their active intimidation, they left the victims with a constructive presence. An instruction on the lesser included offense of second-degree kidnapping certainly requires an affirmative action other than the mere departing of a premise. We find no merit in defendants' contention on appeal and, therefore, the corresponding assignments of error are overruled.

VI

[7] We next address defendants' contention that the trial court erred in failing to properly consider mitigating factors. We disagree.

Although the trial court must consider all statutory aggravating and mitigating factors that are supported by the evidence, the judge weighs the credibility of the evidence and determines by the preponderance of the evidence whether such factors exist. *See State v. Jones*, 314 N.C. 644, 336 S.E.2d 385 (1985). It is also well established that " '[t]he balancing of the properly found factors in aggravation and mitigation is left to the sound discretion of the trial judge.' " *State v. Baldwin*, 139 N.C. App. 65, 70, 532 S.E.2d 808, 812 (citation omitted), *disc. review improvidently allowed*, 354 N.C. 208, 552 S.E.2d 141 (2001). The trial court's discretionary ruling on sentencing factors " 'will be upset only upon a showing that it could not have been the result of a reasoned decision.' " *State v. Canty*, 321 N.C. 520, 524, 364 S.E.2d 410, 413 (1988) (citation omitted).

In the instant case, defendants contend that the trial judge failed to properly consider that defendants voluntarily acknowledged wrongdoing in connection with the offense to a law enforcement officer at an early stage of the criminal process as a mitigating factor. However, this contention has no merit. It is clear from the record that

the trial judge considered this as a mitigating factor;[1] however, she was unpersuaded by any argument that this mitigating factor was not outweighed by numerous aggravating factors. It cannot be said that this was an abuse of discretion and, therefore, the corresponding assignments of error are overruled.

VII

[8] Moreover, defendants contend that the trial court erred in denying the motion to dismiss aggravating factors. We find no merit in this contention.

The argument by defendant is an attempt to escape stipulation and waiver of jury trial as to certain aggravating factors by couching the argument under the guise of a properly granted motion to dismiss. Defendants' counsel made a bare assertion for a motion to dismiss all aggravating factors at the trial level, however, no further arguments were made. On appeal, defendants only address the aggravating factor "that the defendant joined with more than one other person in committing the offense of first degree kidnapping . . . and that the defendant was not charged with committing a conspiracy."

Shortly after the trial court's denial of the motions to dismiss, the trial judge began reviewing the verdict sheet to be submitted to the jury for a determination of the existence of certain aggravating factors. One such aggravating factor was "that the defendant joined with more than one other person in committing the offense of first degree kidnapping . . . and that the defendant was not charged with committing a conspiracy." During this discussion, counsel for each of the three defendants stated that they stipulated to the existence of the aforementioned aggravating factor and further waived a jury trial on the issue. Where this issue was waived at the trial court level, we decline to now address it on appeal. Therefore, the corresponding assignments of error are overruled.

VIII

[9] Defendant Toby Love further argues that the trial judge erred in failing to recuse herself based on her bias against his counsel, Craig Thompson. This issue is not properly before the Court on appeal.

Defendant did not seek recusal of the trial judge from his case under the standards for recusal or disqualification of a judge in a crimi-

1. After a discussion regarding defendants' statements, the trial judge stated "I'm going to give you credit for that statement. I'm going to find that you did volunteer."

nal trial set out in section 15A-1223 of the North Carolina General Statutes and Canon 3(C)(1) of the Code of Judicial Conduct. N.C. Gen. Stat. § 15A-1223(b) (2005) (providing that "[a] judge, on motion of the State or the defendant, must disqualify himself from presiding over a criminal trial or other criminal proceeding if he is: (1) Prejudiced against the moving party or in favor of the adverse party"); Canon 3(C) of the Code of Judicial Conduct, (providing that "[o]n a motion of any party, a judge should disqualify himself in a proceeding in which his impartiality may reasonably be questioned . . ."). There was no request, objection or motion made by defendant at trial and therefore the question was not properly preserved for appeal. N.C. R. App. P. 10(b)(1) (2005). Furthermore, on appeal defendant has presented no evidence whatsoever of bias, prejudice or impartiality on the part of the trial judge. Therefore, this assignment of error is overruled.

IX

[10] Last, we address defendant Tino Love's contention that the trial court erred in making findings as to mitigating factors when defendant was not present in the courtroom. We disagree.

"The Confrontation Clause in Article I, Section 23 of the North Carolina Constitution 'guarantees an accused the right to be present in person at every stage of his trial.' " *State v. Daniels*, 337 N.C. 243, 256, 446 S.E.2d 298, 307 (1994) (citation omitted), *cert. denied*, 513 U.S. 1135, 130 L. Ed. 2d 895 (1995). This right to be present extends to all times during the trial when anything is said or done which materially affects defendant as to the charge against him. *State v. Chapman*, 342 N.C. 330, 337-38, 464 S.E.2d 661, 665 (1995), *cert. denied*, 518 U.S. 1023, 135 L. Ed. 2d 1077 (1996). Moreover, "[d]efendant bears the burden 'to show the usefulness of his presence in order to prove a violation of his right to presence.' " *State v. Murillo*, 349 N.C. 573, 596, 509 S.E.2d 752, 766 (1998) (citation omitted), *cert. denied*, 528 U.S. 838, 145 L. Ed. 2d 87 (1999).

In the instant case, the trial judge sentenced defendant Tino Love first. Having been found guilty by a jury on the charges and upon finding that the aggravating factors outweighed the mitigating factors, defendant Tino Love was sentenced and removed from the courtroom. The trial judge proceeded to sentence defendants Ronnie and Toby Love, and during this time made specific findings as to whether certain mitigating factors were or were not supported by the evidence. The trial judge stated, "With regard to Tino Love, even though he's not here, 9B

was submitted . . . 11A was found. 15 was not found. 18 was not found and 19 was not found as not being supported by the evidence." The findings as to these mitigating factors in no way changed the sentence which had previously been given to defendant Tino Love. On appeal, defendant has failed to meet his burden requiring him to show the usefulness of his presence at the time the findings were made as to these mitigating factors and, therefore, this assignment of error is overruled.

Accordingly, for the reasons stated above, we conclude that the trial court did not commit error. Furthermore, this Court finds no merit in the remaining assignments of error and they are therefore overruled.

No prejudicial error.

Judges CALABRIA and STEELMAN concur.

DURHAM LAND OWNERS ASSOCIATION, AN UNINCORPORATED ASSOCIATION, ANDERSON HOMES, INC., CIMARRON CAPITAL, INC., D/B/A CIMARRON HOMES, THE DRESS COMPANY D/B/A THE DRESS HOMES COMPANY, M/I HOMES OF RALEIGH, LLC, OLDE SOUTH HOMES, INC., RANDALL H. STEWART, ST. LAWRENCE HOMES, INC., SUN RIVER BUILDERS, INC., THOMAS HUGH MULLEN, 3-D BUILDERS, INC., VANCE CRABTREE BUILDERS, LLC, WESTFIELD HOMES OF THE CAROLINAS, LLC., PLAINTIFFS v. COUNTY OF DURHAM, DEFENDANT

No. COA05-736

(Filed 6 June 2006)

1. Schools and Education— school impact fee—absence of enabling legislation

The statute allowing a county board of commissioners to fix "fees" charged by county officers and employees for performing services or duties permitted or required by law, N.C.G.S. § 153A-102, did not authorize a county to levy a school impact fee upon developers, homebuilders and new homeowners, because: (1) the language of N.C.G.S. § 153A-102 intimates a "fee" more in line with a fixed cost to a recipient for an over-the-counter type service provided by a county officer or employee who is performing that service, processing, or transaction pursuant to law; (2) while "fee" may be susceptible to multiple interpretations, several other aspects of the statute are unambiguous and guide the decision that it does not include a school impact fee when the duty

of providing adequate school facilities is a duty of the county itself and not a duty of the county's officers and employees; (3) giving meaningful effect to the textual limitations on the power to charge fees yields a determination that the services covered are more routine document-oriented tasks that require the assistance of a person within county government; (4) nothing about the statute's context or language suggests it was intended to be used as the county suggests; and (5) the statute is in an article which addresses county administration.

2. Schools and Education— school impact fee—absence of enabling legislation

Statutes pertaining to the general police powers of counties and authorizing counties to adopt zoning ordinances, N.C.G.S. §§ 153A-121 and 153A-340, did not provide enabling legislation for a county to impose school impact fees.

3. Schools and Education— school impact fee—common law

The common law did not provide authority for a county to impose school impact fees because counties cannot act, in particular generate revenue from the public, without some form of statutory authority.

4. Schools and Education; Immunity— school impact fee—sovereign immunity—refunds—interest

An action by plaintiff developers and homebuilders against a county for a declaratory judgment that a school impact fee is unlawful and for a refund of collected fees was not barred by sovereign immunity, and the trial court properly ordered that the unlawfully collected fees be refunded. However, the trial court erred by ordering that the county pay interest on the refunded fees.

Appeal by defendant from orders entered 3 June 2004 and 25 January 2005 by Judges Donald W. Stephens and Orlando F. Hudson, Jr., respectively, in Durham County Superior Court. Heard in the Court of Appeals 7 February 2006.

Stam, Fordham & Danchi, P.A., by Henry C. Fordham, Jr., for plantiffs-appellees.

Durham County Attorney S. C. Kitchen for defendant-appellant.

Tharrington Smith, L.L.P., by Michael Crowell and Kathleen P. Tanner, and the North Carolina Schools Boards Association by

Allison B. Schafer, for Amicus Curiae North Carolina Schools Boards Association.

Camden County Attorney Herbert T. Mullen, Jr. for Amicus Curiae Camden County.

Currituck County Attorney Katherine McKenzie for Amicus Curiae Currituck County.

Pasquotank County Attorney Michael Cox for Amicus Curiae Pasquotank County.

ELMORE, Judge.

Plaintiffs, all developers and home builders, sued Durham County (the County) alleging that the County's "school impact fee" was imposed without proper enabling legislation from the General Assembly, and therefore illegal. The trial court agreed, ordered summary judgment in favor of plaintiffs, and mandated that the County refund plaintiffs their payments with interest. The County appealed to this Court arguing that: it possessed the necessary enabling legislation; the trial court erred in awarding plaintiffs summary judgment, repayment of the fees, and interest; and that plaintiffs should not have been allowed to maintain a class action against the County. We affirm in part and reverse in part.

After many years of rejected petitions to the General Assembly requesting enabling legislation to impose a school impact fee, Durham County passed its "Ordinance Adopting Impact Fee Procedures for the Imposition . . . of School Impact Fees to be Imposed on New Residential Construction" (the ordinance). The ordinance is a comprehensive piece of legislation covering all aspects of imposing the fee, including exemptions, waivers, collection, and appeals. It creates a local fund for the fees, an overall cap of fifty percent of necessary facilities spending, and calls for a review every three years. The ordinance's opening recital notes that the County is authorized to impose the impact fee "pursuant to G.S. §§ 153A-102, 153A-121, 153A-340ff, Article IX, Sec. 2(2) of the North Carolina Constitution, and the common law powers of the County[.]" The fee, which is either $2,000.00 or $1,155.00 depending on whether the new home construction is single-family or multi-family units, respectively, is assessed at the time a building permit application is submitted. It must be paid prior to the home's final inspection or issuance of a certificate of occupancy.

While Durham is the first county to pass an impact fee ordinance without specific authority from the General Assembly, each North

Carolina county is facing an intensifying need for funds associated with school construction. "Education is a governmental function so fundamental in this state that our constitution contains a separate article entitled 'Education.' " *Rowan County Bd. of Education v. U.S. Gypsum Co.*, 332 N.C. 1, 10, 418 S.E.2d 648, 655 (1992). And within that article, the General Assembly is vested with the power to "assign to units of local government such responsibility for the financial support of the free public schools as it may deem appropriate." N.C. Const. art. IX, § 2(2). Acting on that authority, the General Assembly has stated: "[i]t 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(b) (2005). In an endeavor to meet that policy requirement in the face of continued local growth, the County passed the school impact fee ordinance designed to generate the estimated hundreds of millions in expanding capital expenditures necessary for school improvements and construction.

While a laudable goal, the County must have statutory authority to pass the ordinance requiring the fee. "Counties are creatures of the General Assembly and have no inherent legislative powers. . . . They are instrumentalities of state government and possess only those powers the General Assembly has conferred upon them." *Craig v. County of Chatham*, 356 N.C. 40, 44, 565 S.E.2d 172, 175 (2002) (citations omitted). The County contends that despite lacking specific enabling legislation from the General Assembly, it nevertheless has the authority to issue this type of ordinance.

While plaintiffs disagree with that conclusion, there is no dispute as to any genuine issues of material fact in this appeal. Accordingly then, our standard of review of the trial court's conclusion in favor of plaintiffs is *de novo*. *See Bellsouth Telecomms., Inc. v. City of Laurinburg*, 168 N.C. App. 75, 80, 606 S.E.2d 721, 724 (2005) (review of a trial court's summary judgment order based solely on issues of law is *de novo*).

I.

[1] First, the County argues that section 153A-102 authorizes it to levy school impact fees against plaintiffs and new homeowners. This statute does authorize the County, through its board of commissioners, to set "fees and commissions."

> The board of commissioners may fix the fees and commissions charged by county officers and employees for performing services or duties permitted or required by law. The board may not, however, fix fees in the General Court of Justice or modify the fees of the reg-

> ister of deeds prescribed by G.S. 161-10 or the fees of the board of elections prescribed by G.S. 163-107.

N.C. Gen. Stat. § 153A-102 (2005). The issue here is whether the County's school impact fee is a contemplated "fee" authorized by this legislation. In support of an affirmative response, the County notes that any ordinance is presumed valid, *see McNeill v. Harnett County*, 327 N.C. 552, 564-65, 398 S.E.2d 475, 482 (1990) (quotations and citations omitted), and its enabling legislation is to be read broadly, *see* N.C. Gen. Stat. § 153A-4 (2005).

Determining whether the County's impact fees are supported by the authority granted to it in N.C. Gen. Stat. § 153A-102 requires us to ascertain the General Assembly's intent. "In so doing, the context of the Act and the spirit and reason of the law must be considered, for it is the intention of the Legislature, as expressed in the statute, which controls." *Mullen v. Louisburg*, 225 N.C. 53, 58, 33 S.E.2d 484, 487 (1945); *see also Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 518, 597 S.E.2d 717, 722 (2004) ("The foremost task in statutory interpretation is 'to determine legislative intent while giving the language of the statute its natural and ordinary meaning unless the context requires otherwise.' " (citations omitted)). And if the language of a statute is clear and unambiguous when applying ordinary meaning and grammar to its text, the legislative intent behind it is readily apparent. *See Smith Chapel Baptist Church v. City of Durham*, 350 N.C. 805, 811, 517 S.E.2d 874, 878 (1999). But if the language is ambiguous, or susceptible to multiple interpretations, judicial construction must be grounded in the statute's perceived intent or purpose.

> It is the universal rule that in seeking the intent it is the duty of the Court, where the language of a statute is susceptible of more than one interpretation, to adopt the construction and practical interpretation which best expresses the intention of the Legislature, . . . for 'the heart of a statute is the intention of the lawmaking body.'

Mullen, 225 N.C. at 58, 33 S.E.2d at 487 (internal citations omitted).

Amid these general rules, this Court has expressed a specific formulation of judicial construction when dealing with statutes in chapters 153A and 160A of our General Statutes. Section 153A-4 does state that any legislative act affecting counties should be "broadly construed and grants of power shall be construed to include any powers that are reasonably expedient to the exercise of the power." N.C. Gen. Stat. § 153A-4 (2005). And the clear legislative policy and purpose in the

broad construction is so "that the counties of this State . . . [can] have adequate authority to exercise the powers, rights, duties, functions, privileges, and immunities conferred upon them by law." *Id.* But, in conjunction with our general rules of statutory construction, only if there is an ambiguity in a statute found in chapter 153A should section 153A-4 be part of the courts' interpretative process. If, however, the statute is clear on its face, the plain language of the statute controls and section 153A-4 remains idle.

> Though not without nuances and distinguishing factors, we find *Homebuilders*, *Bowers*, and *Smith Chapel* to be consistent statements of the law and in accord with N.C. Gen. Stat. § 160A-4. The narrow Dillon's Rule of statutory construction used when interpreting municipal powers has been replaced by N.C. Gen. Stat. § 160A-4's mandate that the language of Chapter 160A be construed in favor of extending powers to a municipality where there is an ambiguity in the authorizing language, or the powers clearly authorized reasonably necessitate "*additional and supplementary powers*" "*to carry them into execution and effect*[.]" N.C. Gen. Stat. § 160A-4 (emphasis added); *see Homebuilders Assn. of Charlotte*, 336 N.C. at 45, 442 S.E.2d at 50. However, where the plain meaning of the statute is without ambiguity, it "must be enforced as written." *Bowers*, 339 N.C. at 419-20, 451 S.E.2d at 289; *see also Smith Chapel Baptist*, 350 N.C. at 812, 517 S.E.2d at 879.

BellSouth, 168 N.C. App. at 82-83, 606 S.E.2d at 726.

Despite the County's argument that section 153A-102 supports a broad grant of power to levy fees in compensation for virtually any duty of the County, there is little case law or legislative action surrounding the statute. In fact, the County has not offered any example of the fees it currently charges pursuant to section 153A-102, save for these impact fees. Even so, we hold that section 153A-102 fails to support the County's argument that it is authorized to charge school impact fees. The language of section 153A-102 intimates a "fee" in this context is more in line with a fixed cost to a recipient for an over-the-counter type service provided by a county officer or employee who is performing that service, processing, or transaction pursuant to law. And, while "fee" may indeed be susceptible to multiple interpretations, several other aspects of the statute are unambiguous and guide our decision that it does not include the fee here.

Foremost, the duty of providing adequate school facilities is a duty of the County itself, not a duty of the County's "officers and employees."

The plain language of the statute limits the board of commissioners' power to fix only those fees "charged by county officers and employees for performing services or duties permitted or required by law." N.C. Gen. Stat. § 153A-102 (2005). Although "their" is not found between "performing" and "services," the statute's design and language imply it. Unlike processing a permit, reviewing an application, or maintaining records, the County's officers or employees are not actually going out and building schools. In other words, section 153A-102 is not a broad based, revenue generating provision designed to offset the cost of any service *the County* provides, but only those services that its officers or employees provide pursuant to their position within county government.

The statute's second sentence discussing limitations on the power to fix fees substantially favors this interpretation as well. The County may not fix the fees "in the General Court of Justice or modify the fees of the register of deeds prescribed by G.S. 161-10 or the fees of the board of elections prescribed by G.S. 163-107." N.C. Gen. Stat. § 153A-102 (2005). The fees found in N.C. Gen. Stat. § 161-10 (2005) are those associated with doing business in the register of deeds office—interacting with the personnel. The highest listed fee is $50.00 for issuance and processing of a marriage license. The fees located in N.C. Gen. Stat. § 163-107 are filing fees for elected office; the current fee is set at 1% of the annual salary of the office sought. *See* N.C. Gen. Stat. § 163-107 (2005). The court system also has fees set for filing, docketing, processing, and maintaining a multitude of documents and records. Interpreting the County's ability to set school impact fees—designed to offset the cost of building school facilities throughout the county—under this statute would leave the clear legislative limitations on this power rather perfunctory or arbitrary. Instead, giving meaningful effect to the textual limitations on the power to charge fees yields a determination that the services covered are more routine, document-oriented tasks, that require the assistance of a person within county government.

Also, the statute is located in Article 5 of Chapter 153A, which addresses county administration. Section 153A-102's origin is a 1953 act by the General Assembly entitled "AN ACT TO AUTHORIZE THE COUNTY COMMISSIONERS OF EACH COUNTY IN THIS STATE TO FIX THE SALARIES OR OTHER COMPENSATION OF ALL ELECTIVE AND APPOINTIVE COUNTY OFFICIALS AND EMPLOYEES DRAWING COMPENSATION FROM SAID COUNTIES." 1953 N.C. Sess. Laws ch. 1227, §§ 1-3. Later, in 1969, the General Assembly modified the Board's ability to "fix salaries, fees, and number of employees." *See* 1969 N.C.

Sess. Laws ch. 358, § 1. Although the statute's section has been renumbered, its language has not been altered since 1973. *See* 1973 N.C. Sess. Laws ch. 822, § 1. Nothing about the statute's context or language suggest it was intended to be used as the County suggests here. Indeed, Articles 7 and 9, addressing taxation and special assessments, contain powers more in line with what the County maintains this section provides it with.

In sum, we do not agree with the County that *its* constitutional and legislative duty—as opposed to the duties of its officers and employees—to provide facilities for public schools is the type of service or duty contemplated by section 153A-102 for which a "fee" can be charged.

II.

[2] The County argues that several other statutes provide enabling legislation for the school impact fees including N.C. Gen. Stat. §§ 153A-121 and 153A-340. We disagree.

Section 153A-121 establishes that counties have general police powers and, pursuant to that power, "may by ordinance, define, regulate, prohibit, or abate acts, omissions, or conditions detrimental to the health, safety, or welfare of its citizens and the peace and dignity of the county[.]" N.C. Gen. Stat. § 153A-121(a) (2005). And section 153A-340 authorizes the County to "adopt zoning and development regulation ordinances" for the purpose of "promoting health, safety, morals, or the general welfare[.]" N.C. Gen. Stat. § 153A-340(a) (2005). Pursuant to section 153A-341, the County's aforementioned ordinances "shall be made in accordance with a comprehensive plan and designed . . . to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements." N.C. Gen. Stat. § 153A-341 (2003).

Relying in part on *Homebuilders Assn. of Charlotte v. City of Charlotte*, 336 N.C. 37, 442 S.E.2d 45 (1994), which interprets mirrored county regulatory provisions in city government, the County argues it has the ability to charge the school impact fee "as an additional and supplementary power that is reasonably necessary or expedient to carry a regulatory program into execution and effect." *Id.* at 45, 442 S.E.2d at 50. In *Homebuilders*, the plaintiffs filed suit to keep the City of Charlotte from instituting "user fees" for certain government services, all of which were related to using public facilities or the local government's regulatory function. *Id.* at 39-40, 442 S.E.2d at 47-48. The Supreme Court held that applying section 160A-4's broad construction

to the regulatory and police powers of cities supported a determination that Charlotte's user fee schedule was "reasonably necessary or expedient to the execution of the City's power to regulate the activities for which the services are provided." *Id.* at 45, 442 S.E.2d at 50. Since counties have almost identical police and regulatory powers, as well as a legislative mandate according to section 153A-4 to have any powers "reasonably expedient to the exercise of the power," the County argues *Homebuilders* recognizes its authority to charge the fee.

While perhaps not stating it explicitly, we do not believe the Supreme Court intended to allow a city or county's zoning power to authorize it to charge a fee for providing *its* actual governmental services to the public. Instead, the Court recognized that cities, unlike counties, did not have a specific "fee" statute (like section 153A-102) and charging fees for document reviews and approvals was expedient to the cities' given power to control zoning and development. The user fees listed in *Homebuilders* are all for permit reviews and application-processing type services. *See Homebuilders*, 336 N.C. at 40-41, 442 S.E.2d at 48 (listing, for example: commercial permit review, floodplain analysis, and final plat review). We do not read *Homebuilders* to allow counties to charge a fee for, again, its own services such as school construction.

The County argues that *Home Builders and Contractors Assoc. of Palm Beach County v. Board of County Commissioners of Palm Beach County*, 446 So. 2d 140 (Fla. Ct. App. 1983) is persuasive authority for its position. There, the appellate court determined that the county's road impact fee was a regulation, not a tax, and was supported by the broad regulatory powers given to Florida counties.

> The appropriate framework for determining whether an impact fee is a regulation or a tax is one of public policy in which a number of factors should be weighed. The home rule powers granted local governments in Florida, the legislative mandate that local governments must plan comprehensively for future growth, and the additional broad powers given them to make those plans work effectively, indicate that properly limited impact fees for educational or recreational purposes should be construed as regulations. Characterization as a regulation is particularly appropriate where an impact fee is used to complement other land use measures such as in lieu fees or dedications. If an impact fee is characterized as a regulation, its validity should then be determined by reference to the dual rational nexi police power standard.

Id. at 145 (quoting Julian C. Juergensmeyer & Robert M. Blake, *Impact Fees: An Answer to Local Governments' Capital Funding Dilemma*, 9 Fla. St. U. L. Rev. 415, 440-41 (1981)). Although the Florida appellate court found impact fees a permissible regulation within the power of its counties, we do not find this logic persuasive. That far reaching determination is more appropriate for legislative drafting than this Court's judicial construction.

Accordingly then, we can find no authority to support a determination that pursuant to the County's zoning and general police powers that it has the necessary statutory authority to impose a school impact fee.

III.

[3] Although plaintiffs bring forth several other claims regarding the County's lack of statutory authority to impose an impact fee, we do not need to address them here. But since the County contends that this state's common law provides the authority to impose the school impact fee, we will address that.

The County argues that when "there is a constitutional mandate to provide an adequate education combined with the constitutional guarantee to use revenues to fund these constitutional mandates, the common law provides the authority to raise funds to meet the constitutional requirements imposed on counties." We cannot agree. Considering that counties cannot act, in particular generate revenue from the public, without some form of *statutory* authority, the County's common law argument is plagued with shortcomings.

IV.

[4] Since we have determined there is no authority for the County to collect its school impact fee, we must now determine whether the trial court's remedy of a refund plus interest is appropriate. The County argues several theories in support of the contention that it is not required to refund the fees.

First, the County argues that since N.C. Gen. Stat. § 1A-1, Rule 23 (2005) (allowing class actions), does not mention the state or counties specifically, and because counties enjoy sovereign immunity unless waived by statute, then all class actions against the state or its counties are barred by sovereign immunity. Although perhaps accurately stated in its parts, we do not agree with the legal sum of those parts: that the absence of "state" or "counties" in Rule 23 means that neither can be sued in a class action. Indeed, the County can cite us no North Carolina

case holding as such. In fact, although not precisely addressed, our appellate courts have allowed class action declaratory judgment suits that seek injunctive and payment relief against the State. *See Faulkenbury v. Teachers' and State Employees' Ret. Sys.*, 345 N.C. 683, 696-99, 483 S.E.2d 422, 430-32 (1997) (class action case against the State in which the Court dismissed a sovereign immunity challenge to a part of the suit, but affirmed the award in favor of class action plaintiffs); *Faulkenbury v. Teachers' & State Employees' Retirement System*, 108 N.C. App. 357, 376, 424 S.E.2d 420, 430 (1993) ("The North Carolina Supreme Court has emphasized that class actions are appropriate and should be permitted when they can 'serve useful purposes' such as preventing a multiplicity of suits or inconsistent results."). Furthermore, when determining whether sovereign immunity bars a suit, the manner in which the case is brought, whether by class action or individually, is not necessarily as important as the actual claims and violations alleged. *See Peverall v. County of Alamance*, 154 N.C. App. 426, 429-30, 573 S.E.2d 517, 519 (2002) (allowing a class action against a county on some claims, but barring other specific claims due to sovereign immunity), *disc. review denied*, 356 N.C. 676, 577 S.E.2d 632 (2003).

Second, and in step with that determination, the County argues that plaintiffs' declaratory judgment action and action for a refund are barred by sovereign immunity. We disagree. In a comparable case to ours, the North Carolina Supreme Court awarded the plaintiffs a refund of fees paid pursuant to a city ordinance enacted without proper enabling legislation. *See Smith Chapel Baptist Church*, 350 N.C. at 819, 517 S.E.2d at 883.

> In the instant case, because we have already held that the City's SWU ordinance and the fees charged thereunder are invalid as a matter of law, we further hold that plaintiffs are entitled to a full refund of the illegally collected fees from the City, plus interest on those fees to the date of judgment.

Id. In so doing, the Court likened the action to the common law doctrine of "an action for money had and received." *Id.* at 818, 517 S.E.2d at 882-83. Although any sovereign immunity defense to this type of action was tacitly rejected by our Supreme Court, we are further persuaded by *Charlotte-Mecklenburg Hospital Auth. v. N.C. Industrial Comm.*, 336 N.C. 200, 443 S.E.2d 716 (1994), in which the Court rejected the defense of sovereign immunity to a declaratory judgment action alleging that the Industrial Commission created a regulation beyond its statutory authority. In so doing, the Court minimized the distinction in these actions

between naming defendants as public officers enforcing an allegedly invalid regulation, an action not cloaked in sovereign immunity, and directly naming the body that passed the regulation or ordinance, an action that was long considered shielded.

There is no difference in principle between an attempt to enforce an invalid regulation and the initial adoption or enactment of such a regulation; both are in excess of the authority granted the agency under the statute and invade or threaten to invade personal or property rights of a citizen in disregard of the law. We therefore hold that the doctrine of sovereign immunity does not authorize the dismissal of plaintiff hospitals' complaint alleging that defendant Commission and its members, in excess of their statutory authority, adopted an invalid regulation.

Id. at 208, 443 S.E.2d at 721.

Third, the County argues that if it is subject to a declaratory judgment action and an action for a refund of the fees, then it should not be required to pay interest on the refunded fees. We agree with this contention. For more than sixty years our Supreme Court has held that post-judgment interest "may not be awarded against the State unless the State has manifested its willingness to pay interest by an Act of the General Assembly or by a lawful contract to do so." *Yancey v. Highway Commission*, 222 N.C. 106, 109, 22 S.E.2d 256, 259 (1942). That rule has been applied in numerous cases of this Court as well. *See, e.g.*, *McGee v. N.C. Dep't of Revenue*, 135 N.C. App. 319, 520 S.E.2d 84 (1999); *Faulkenbury v. Teachers' and State Employees' Ret. Sys.*, 132 N.C. App. 137, 510 S.E.2d 675, *disc. review denied*, 350 N.C. 379, 536 S.E.2d 620 (1999); *Myers v. Dept. of Crime Control*, 67 N.C. App. 553, 313 S.E.2d 276 (1984). Despite the County's unauthorized actions here, there is no statutory authority for the award of interest in this circumstance, nor is there evidence of a contract. Thus, the trial court erred as a matter of law in ordering the County to award plaintiffs interest on the money collected and to be refunded. *See Shavitz v. City of High Point*, 177 N.C. App. 465, 486, 630 S.E.2d 4, 18 (2006) (in an action for a refund of fines, post-judgment interest could not be awarded against a city).

Plaintiffs cite to *Smith Chapel* for authority that the County's refund is subject to an award of interest. Plaintiffs are correct in that the Supreme Court in *Smith Chapel* did award "a full refund of the illegally collected fees from the City, *plus interest* on those fees to the date of judgment." *Smith Chapel Baptist Church*, 350 N.C. at 819, 517 S.E.2d at 883 (emphasis added). Yet, there is nothing to suggest that in doing so

the Supreme Court was changing an otherwise long standing rule that the State—and vicariously its political subdivisions—does not pay interest under N.C. Gen. Stat. § 24-5 on judgments against it. In fact, although not stated, the Supreme Court in *Smith Chapel* was dealing with a city's fixed fee for providing storm water removal, a public enterprise. "[O]ur courts have clearly stated that in setting rates for public enterprise services, municipalities act in a proprietary role." *Pulliam v. City of Greensboro*, 103 N.C. App. 748, 753, 407 S.E.2d 567, 569-70, *disc. review denied*, 330 N.C. 197, 412 S.E.2d 59 (1991). And when a municipality is engaged in a proprietary function, it operates without governmental immunity. *See id.* at 751, 407 S.E.2d at 568 (quoting *McCombs v. City of Asheboro*, 6 N.C. App. 234, 238, 170 S.E.2d 169, 172 (1969)). That is not the case here concerning a county's imposition of a school construction fee without appropriate authority.

V.

In conclusion, after reviewing the authority and reasoning on each side, we have determined that the trial court did not err in deciding that the County's school impact fee was unlawful, void, and without legal effect. It also did not err in ordering that a refund of the collected and separately maintained school impact fees is an appropriate remedy for the County's actions. We have determined, however, that the trial court did err in awarding interest on those refunded fees.

We have further reviewed the County's remaining assignments of error briefed and found them to be without merit. Accordingly, we affirm the trial court's order of summary judgment in favor of plaintiffs in all respects save for the award of interest, which we reverse.

Affirmed in part, reversed in part.

Judges McCULLOUGH and LEVINSON concur.

WALLACE JOHN DIEHL, PLAINTIFF v. JANE HALL DIEHL, DEFENDANT

No. COA05-416

(Filed 6 June 2006)

1. Child Support, Custody, and Visitation— joint legal custody—decision-making authority

The trial court abused its discretion in a child custody and support case by awarding the parties joint legal custody while simultaneously granting defendant wife primary decision making authority, and the case is remanded for further proceedings regarding the issue of joint legal custody because: (1) the findings that the parties are currently unable to effectively communicate regarding the needs of the minor children and regarding defendant's occasional troubles obtaining plaintiff's consent are not alone sufficient to support an order abrogating all decision-making authority that plaintiff would have otherwise enjoyed under the trial court's award of joint legal custody; and (2) the trial court needs to identify specific areas in which defendant is granted decision-making authority upon finding appropriate facts to justify the allocation.

2. Child Support, Custody, and Visitation— stipulation on visitation—as agreed upon by parties

The trial court did not err by awarding plaintiff father visitation only as agreed upon by the parties, because: (1) at the beginning of its order the trial court specifically found that plaintiff stipulated to a physical custody arrangement with defendant mother having permanent primary physical custody and plaintiff having visitation rights as agreed upon by the parties; and (2) contrary to plaintiff's assertion, nothing in *In re Custody of Stancil*, 10 N.C. App. 545 (1971), or its progeny suggests that parties may not stipulate to such an arrangement.

3. Child Support, Custody, and Visitation— support—recalculation of obligation—equitable distribution

The trial court was not required to recalculate plaintiff father's child support obligation in light of any equitable distribution, because: (1) an equitable distribution is done via a court proceeding and not by agreement between the parties; and (2) even assuming arguendo that the parties' settlement agreement was an equitable distribution, a prior child support award following an equitable dis-

tribution need only be reconsidered upon the request of a party, and no such request was made.

4. Child Support, Custody, and Visitation— support—average monthly gross income

The trial court did not err in a child support case by using an average of plaintiff father's monthly gross incomes in 2001 and 2002 as a basis for finding his monthly gross income for 2003 to be $19,791.50, because: (1) plaintiff failed to preserve this issue for appellate review; (2) even if it is presumed that plaintiff preserved this issue for review, plaintiff argues on appeal only that the trial court erred when it found he had not presented adequate information as to his actual 2003 income and that the trial court's decision to average his 2001 and 2002 income improperly imputed income to him; (3) given the unreliability of plaintiff's document, it cannot be concluded under the circumstances that the trial court abused its discretion by averaging plaintiff's income from his two prior tax returns to arrive at his 2003 income; and (4) the trial court did not impute income to plaintiff as a result of voluntary unemployment or underemployment, but rather was merely attempting to determine what plaintiff actually earned in 2003.

5. Child Support, Custody, and Visitation— support obligations—insufficient findings of fact

Although the trial court did not err by failing to use or refer to the North Carolina Child Support Guidelines for determining plaintiff father's various child support obligations, it did err by failing to provide adequate findings of fact to support its calculation of support, because: (1) the Guidelines did not apply since the parties' combined monthly incomes in 2000, 2001, 2002, and 2003 exceeded the $20,000 monthly maximum; (2) even if the Court of Appeals adopted plaintiff's proposed 2001 and 2003 monthly income figures, he does not contest the trial court's finding as to defendant's monthly income, and combined, the two exceed the $20,000 monthly maximum; (3) when the monthly maximum contemplated by the Guidelines is exceeded, the trial court is required to order a child support based on the particular facts and circumstances of the case and not merely to extrapolate from the Guidelines; (4) although the order contains certain historical costs associated with the children, it includes no findings as to the individual costs and expenses the trial court expected to be associated with each child in the future; and (5) although the trial court did make findings regarding the parties' particular estates,

earnings, conditions, and accustomed standard of living, they were insufficient to remedy the absence of findings explaining the reasonable needs of the children.

6. Costs— attorney fees—failure to make findings of fact

The trial court erred by declining to award defendant mother attorney fees in a child support and custody case, and the case is remanded for entry of proper findings of fact, because the trial court made no findings related to its denial as to whether defendant acted in good faith or whether she had insufficient means to defray the expense of the suit.

Appeal by plaintiff and cross-appeal by defendant from order entered 27 September 2004, *nunc pro tunc* 29 April 2004, by Judge Alonzo Coleman in Orange County District Court. Heard in the Court of Appeals 16 November 2005.

Lewis, Anderson, Phillips, Greene & Hinkle, PLLC, by Susan H. Lewis, for plaintiff.

Burton & Ellis, PLLC, by Alyscia G. Ellis, for defendant.

GEER, Judge.

Plaintiff Wallace John Diehl appeals from a child custody and support order, arguing primarily that the trial court erred (1) by awarding the parties joint legal custody while simultaneously granting defendant Jane Hall Diehl "primary decision making authority," and (2) by making insufficient findings to justify its child support order. Defendant Jane Hall Diehl has cross-appealed from the trial court's denial of her request for attorneys' fees. We hold that the trial court's ruling regarding joint legal custody as well as its findings of fact regarding child support and attorneys' fees are insufficient and, therefore, we remand for further proceedings.

Facts

The Diehls were married in 1986 and separated in 1997. During their marriage, the couple had three children: Michael, born in 1989; Benjamin, born in 1991; and John, born in 1993. On 14 July 1998, Mr. Diehl filed a complaint for absolute divorce and joint legal custody of the minor children. Ms. Diehl filed an answer and counterclaim on 6 October 1998, seeking temporary and permanent custody and support of the minor children. The couple was granted a divorce on 21 December 1998.

Through 13 October 2000, the parties executed multiple temporary agreements that settled all claims between them relating to their divorce except for prospective child support and child custody. With respect to temporary child support, the 13 October 2000 agreement required that Mr. Diehl pay $2,547.00 per month until a final order or agreement of the parties was obtained. Additionally, the agreement provided that any future permanent child support order or agreement would relate back to September 2000.

The issues of permanent child support and child custody were heard by the trial court on 27 and 29 April 2004. On 27 September 2004, the court entered an order granting primary physical custody to Ms. Diehl. With respect to legal custody, the court ordered the following:

> The parties shall share permanent joint legal custody of the minor children with [Ms. Diehl] having primary decision making authority. If a particular decision will have a substantial financial effect on [Mr. Diehl] either party may petition the Court to make the decision, if necessary.

Regarding child support, the trial court made findings as to each party's monthly gross income for 2000 through 2003, as well as to the lump sum monthly amount necessary to meet the needs of the children in each of these years. Based on these findings, the trial court ordered Mr. Diehl to begin making permanent child support payments in the amount of $4,500.00 per month and to pay $66,960.00 in back child support for the period from September 2000 through April 2003. The court also ordered that the parties pay their own costs, apparently denying Ms. Diehl's request for attorneys' fees. Both parties timely appealed to this Court.

Custody

A. Primary Decision-Making Authority

[1] Mr. Diehl first argues that the trial court erred by awarding Ms. Diehl "primary decision making authority," a concept not formally recognized in statutes or case law, after it had already awarded joint legal custody to both parties. The decision of a trial court as to child custody should not be upset on appeal absent a showing that the trial court abused its discretion. *Evans v. Evans*, 169 N.C. App. 358, 360, 610 S.E.2d 264, 267 (2005). Nevertheless, "the findings and conclusions of the trial court must comport with our case law regarding child custody matters." *Cantrell v. Wishon*, 141 N.C. App. 340, 342, 540 S.E.2d 804, 806 (2000).

Although not defined in the North Carolina General Statutes, our case law employs the term "legal custody" to refer generally to the right and responsibility to make decisions with important and long-term implications for a child's best interest and welfare. *See Patterson v. Taylor*, 140 N.C. App. 91, 96, 535 S.E.2d 374, 378 (2000) (Legal custody refers to the right to make decisions regarding "the child's education, health care, religious training, and the like."); 3 Suzanne Reynolds, *Lee's North Carolina Family Law* § 13.2b, at 13-16 (5th ed. 2002) (Legal custody includes "the rights and obligations associated with making major decisions affecting the child's life."). This comports with the understanding of legal custody that has been adopted in other states. *See*, *e.g.*, *In re Paternity of Joe*, 486 N.E.2d 1052, 1057 (Ind. Ct. App. 1985) (noting "legal custody" provided mother with right and responsibility to determine such things as the child's "education, health care, and religious training" (internal quotation marks omitted)); *Taylor v. Taylor*, 306 Md. 290, 296, 508 A.2d 964, 967 (1986) ("Legal custody carries with it the right and obligation to make long range decisions involving education, religious training, discipline, medical care, and other matters of major significance concerning the child's life and welfare."). *See also*, *e.g.*, Ga. Code Ann. § 19-9-6 (2004) (" 'Joint legal custody' means both parents have equal rights and responsibilities for major decisions concerning the child, including the child's education, health care, and religious training . . . ."); Ind. Code § 31-9-2-67 (2003) (" 'Joint legal custody', . . . means that the persons awarded joint custody will share authority and responsibility for the major decisions concerning the child's upbringing, including the child's education, health care, and religious training.").

Here, although the trial court awarded the parties joint legal custody, the court went on to award "primary decision making authority" on all issues to Ms. Diehl unless "a particular decision will have a substantial financial effect on [Mr. Diehl] . . . ." In the event of a substantial financial effect, however, the order still does not provide Mr. Diehl with any decision-making authority, but rather states that the parties may "petition the Court to make the decision . . . ." Thus, the trial court simultaneously awarded both parties joint legal custody, but stripped Mr. Diehl of all decision-making authority beyond the right to petition the court to make decisions that significantly impact his finances. We conclude that this approach suggests an award of "sole legal custody" to Ms. Diehl, as opposed to an award of joint legal custody to the parties. *See* Reynolds, *supra* § 13.2b, at 13-16 ("If one custodian has the right to make all major decisions for the child, that person has sole 'legal custody.' ").

This Court has acknowledged that the General Assembly's choice to leave "joint legal custody" undefined implies a legislative intent to allow a trial court "substantial latitude in fashioning a 'joint [legal] custody' arrangement." *Patterson*, 140 N.C. App. at 96, 535 S.E.2d at 378. This grant of latitude refers to a trial court's discretion to distribute certain decision-making authority that would normally fall within the ambit of joint legal custody to one party rather than another based upon the specifics of the case. *See, e.g.*, *MacLagan v. Klein*, 123 N.C. App. 557, 565, 473 S.E.2d 778, 784 (1996) (awarding parties joint legal custody, but granting father exclusive control over child's religious upbringing), *overruled on other grounds by Pulliam v. Smith*, 348 N.C. 616, 501 S.E.2d 898 (1998). A trial court's decision to exercise this discretion must, however, be accompanied by sufficient findings of fact to show that such a decision was warranted. *See id.* at 564, 473 S.E.2d at 784 (finding that parties had agreed to raise child in father's Jewish faith, that the child had been so raised since birth and derived considerable mental well-being therefrom, and that the mother had recently begun pressuring the child to become Christian).

In the present case, the trial court found that "[t]he parties are currently unable to effectively communicate regarding the needs of the minor children." As Mr. Diehl did not assign error to this finding, it is binding on appeal. *Holland v. Holland*, 169 N.C. App. 564, 569, 610 S.E.2d 231, 235 (2005). Moreover, the trial court also found that since the parties' separation: the children have resided only with Ms. Diehl, and Mr. Diehl has exercised only sporadic visitation; Mr. Diehl has had very little participation in the children's educational and extra-curricular activities; Ms. Diehl has occasionally found it difficult to enroll the children in activities or obtain services for the children when Mr. Diehl's consent was required, as his consent is sometimes difficult to obtain; and when John's school recommended he be evaluated to determine whether he suffered from any learning disabilities, Mr. Diehl refused to consent to the evaluation unless it would be completely covered by insurance. These findings are supported by competent evidence in the record and are, therefore, also binding on appeal. *See Evans*, 169 N.C. App. at 360, 610 S.E.2d at 267.

These findings, however, predominantly address the trial court's reasons for awarding Ms. Diehl primary physical custody of the children. *See* Reynolds, *supra* § 13.2c, at 13-16 ("[D]ecisions exercised with physical custody involve the child's routine, not matters with long-range consequences . . . ."). Given the trial court's determination that "[b]oth parties are fit and proper to have joint legal custody of the minor chil-

dren," only the court's findings regarding the parties' difficulty communicating and Ms. Diehl's occasional troubles obtaining Mr. Diehl's consent could be construed to indicate that anything other than traditional joint legal custody would be appropriate. We cannot see, however, how those findings alone are sufficient to support an order abrogating all decision-making authority that Mr. Diehl would have otherwise enjoyed under the trial court's award of joint legal custody. We, therefore, reverse the trial court's ruling awarding primary decision-making authority to Ms. Diehl and remand for further proceedings regarding the issue of joint legal custody. On remand, the trial court may identify specific areas in which Ms. Diehl is granted decision-making authority upon finding appropriate facts to justify the allocation.

B. Visitation

[2] Mr. Diehl next argues that the trial court's order awarding him visitation only "as agreed upon by the parties" is at odds with this Court's decision in *In re Custody of Stancil*, 10 N.C. App. 545, 551-52, 179 S.E.2d 844, 849 (1971) ("The court should not assign the granting of . . . visitation to the discretion of the party awarded custody of the child."). At the beginning of its order, however, the trial court specifically found that "[Mr. Diehl] stipulated to a physical custody arrangement with [Ms. Diehl] having permanent primary physical custody and [Mr. Diehl] *having visitation rights as agreed upon by the parties* . . . ." (Emphasis added.)

Mr. Diehl has not assigned error to this finding, and it is, therefore, binding on appeal. *Holland*, 169 N.C. App. at 569, 610 S.E.2d at 235. As nothing in *Stancil* or its progeny suggests that parties may not stipulate to such an arrangement, *see*, *e.g.*, *Sloop v. Friberg*, 70 N.C. App. 690, 694, 320 S.E.2d 921, 924 (1984) (concluding trial court's order that "visitation . . . occur[] at times and places agreeable to, and under such terms and conditions as set by, the [persons with custody]" was improper partly because parties had not stipulated to such an order), the trial court's finding adequately supports its conclusion on this issue, and this assignment of error is, therefore, overruled.

Child Support

A. Mr. Diehl's 2000 Child Support Obligation

[3] With respect to child support, Mr. Diehl first argues that once the parties entered into their 13 October 2000 settlement agreement, the trial court was obligated to make its child support determinations for October through December 2000 based upon Mr. Diehl's income in light

of the "equitable distribution" effectuated by the agreement. *See* N.C. Gen. Stat. § 50-20(f) (2005) ("After the determination of an equitable distribution, the court, upon request of either party, shall consider whether an order for alimony or child support should be modified or vacated . . . ."); *Capps v. Capps*, 69 N.C. App. 755, 757, 318 S.E.2d 346, 348 (1984) ("[I]f alimony or child support has already been awarded, the awards must be reconsidered upon request after the marital property has been equitably distributed."). This argument presumes the 13 October 2000 settlement agreement was in fact an "equitable distribution," which it was not.

An equitable distribution is done via a court proceeding and not by agreement between the parties. *See Brenenstuhl v. Brenenstuhl*, 169 N.C. App. 433, 435, 610 S.E.2d 301, 303 (2005) ("By executing a written separation agreement, married parties forego their statutory rights to equitable distribution and decide between themselves how to divide their marital estate following divorce."); *Blount v. Blount*, 72 N.C. App. 193, 195, 323 S.E.2d 738, 740 (1984) (stating that when a prior separation agreement fully disposes of the spouses' property rights arising out of the marriage, it acts as a bar to equitable distribution), *disc. review denied*, 313 N.C. 506, 329 S.E.2d 389 (1985). *See also* Black's Law Dictionary 578 (8th ed. 2004) (defining "equitable distribution" as "[t]he division of marital property *by a court* in a divorce proceeding" (emphasis added)).

Even assuming *arguendo* that the parties' settlement agreement was an equitable distribution, a prior child support award, following an equitable distribution, need only be reconsidered "upon [the] request" of a party. N.C. Gen. Stat. § 50-20(f); *Capps*, 69 N.C. App. at 757, 318 S.E.2d at 348. Mr. Diehl made no such request, and, consequently, the trial court was not required to recalculate Mr. Diehl's child support obligation in light of any equitable distribution.

B. Mr. Diehl's 2003 Income

[4] Mr. Diehl next challenges the trial court's use of an average of his monthly gross incomes in 2001 and 2002 as a basis for finding his monthly gross income for 2003 to be $19,791.50. Mr. Diehl's own proposed findings of fact, however, urged the trial court to find that his 2003 monthly income, based upon his 2002 tax return, was $22,435.00. In other words, the trial court's finding as to Mr. Diehl's 2003 monthly income was nearly $3,000.00 less than Mr. Diehl's own proposed findings of fact had suggested. We conclude, therefore, that Mr. Diehl has failed to preserve this issue for appellate review. 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."). *See also In re Petition of Utils., Inc.*, 147 N.C. App. 182, 194, 555 S.E.2d 333, 341-42 (2001) (concluding North Carolina Utilities Commission did not err in ordering reduction in utility rates petitioner could charge when petitioner acquiesced to such a reduction in its proposed order).

Even if we assume this issue had been preserved for our review, Mr. Diehl argues on appeal only that the trial court erred when it found Mr. Diehl had not presented adequate information as to his actual 2003 income and that the trial court's decision to average his 2001 and 2002 income improperly imputed income to him. As to Mr. Diehl's evidence of his 2003 income, the trial court found that Mr. Diehl's tax returns were "highly unreliable" and that Mr. Diehl had not "present[ed] adequate information as to his 2003 income." These findings are supported by competent evidence indicating that several deductions on the 2003 return were improper, and that the return contained at least one incident of "major incorrect reporting." Indeed, Mr. Diehl's proposed order even states that "[n]either party presented sufficient income information about the parties' respective 2003 tax returns, as the 2003 tax returns were not completed by either party until immediately before the trial." Thus, the trial court's findings with respect to the reliability of Mr. Diehl's evidence of his 2003 income are supported by competent evidence, and, consequently, are binding on appeal. *Evans*, 169 N.C. App. at 360, 610 S.E.2d at 267. Given the unreliability of Mr. Diehl's documentation, we cannot conclude under the circumstances of this case that the trial court abused its discretion by averaging Mr. Diehl's income from his two prior tax returns to arrive at his 2003 income.

We disagree with Mr. Diehl's characterization of this methodology as "imputation" of income. Imputation is used to determine a parent's child support obligation based upon earning capacity, rather than actual income, when the parent is "voluntarily unemployed or underemployed . . ., and the court finds that the parent's voluntary unemployment or underemployment is the result of . . . bad faith or deliberate suppression of income to avoid or minimize his or her child support obligation." N.C. Child Support Guidelines, 2006 Ann. R. N.C. at 49. In the present case, the trial court did not impute income to Mr. Diehl as a result of voluntary unemployment or underemployment, but rather was merely attempting to determine what Mr. Diehl actually earned in 2003. Consequently, the law of imputation is inapplicable. *See Burnett v.*

Wheeler, 128 N.C. App. 174, 177, 493 S.E.2d 804, 806 (1997) (finding no imputation of income where trial judge computed defendant's actual gross income to be $77,000.00 per year, despite defendant's reported income of $29,000.00 per year, based on defendant's other sources of funds). This assignment of error is overruled.

C. Sufficiency of Findings of Fact

[5] Finally, Mr. Diehl argues that the trial court should have either used or referred to the North Carolina Child Support Guidelines (the "Guidelines") for determining his various child support obligations and that, in any event, the trial court's findings of fact were inadequate to support its calculation of support. Under N.C. Gen. Stat. § 50-13.4(c) (2005), trial courts "shall determine the amount of child support payments by applying the presumptive [G]uidelines . . . ." These Guidelines, however, state that "[i]n cases in which the parents' combined adjusted gross income is more than $20,000 per month ($240,000 per year), the supporting parent's basic child support obligation cannot be determined by using the child support schedule [contained in these Guidelines]." N.C. Child Support Guidelines, 2006 Ann. R. N.C. at 48.

The trial court in this case concluded that the Guidelines did not apply because it found the parties' combined monthly incomes in 2000, 2001, 2002, and 2003 exceeded the $20,000.00 monthly maximum. On appeal, however, Mr. Diehl argues that in both 2001 and 2003, the parties' combined gross income was below $20,000.00 per month.

As to the applicability of the Guidelines in 2001, Mr. Diehl's arguments focus solely on his own income and not on the combined income of the parties, as required by the Guidelines. Even if we adopt Mr. Diehl's proposed 2001 monthly income figure of $14,687.00, he does not contest the trial court's finding that Ms. Diehl's monthly income in 2001 was $6,124.00. When combined, the two amount to $20,811.00, which exceeds the $20,000.00 monthly maximum contemplated by the Guidelines. Regarding the applicability of the Guidelines in 2003, we have already upheld the trial court's finding that Mr. Diehl's monthly income in 2003 was $19,791.50. As Mr. Diehl does not contest the trial court's finding that Ms. Diehl's monthly income in 2003 was $5,355.00, this brings the parties' combined monthly income in 2003 to $25,146.50, a figure well in excess of the Guidelines' $20,000.00 monthly maximum.

Mr. Diehl alternatively argues that even if the parties' combined incomes did exceed the amount covered by the Guidelines, the

Guidelines should still have been considered. According to Mr. Diehl, the trial court was required to "mathematically extrapolat[e]" Mr. Diehl's child support obligations from the amounts provided for in the Guidelines. The Guidelines provide to the contrary, stating that "[i]n cases in which the parents' combined income is above $20,000 per month, *the court should on a case by case basis, consider the reasonable needs of the child(ren) and the relative ability of each parent to provide support*." N.C. Child Support Guidelines, 2006 Ann. R. N.C. at 48 (emphasis added). To accept Mr. Diehl's position would render the Guidelines binding even when, by their terms, they are not.

Moreover, our case law is explicit, in accordance with the Guidelines, that when the monthly maximum contemplated by the Guidelines is exceeded, the trial court is required to order a child support award based on the particular facts and circumstances of the case and not merely to extrapolate from the Guidelines. *See, e.g.*, *Meehan v. Lawrance*, 166 N.C. App. 369, 383-84, 602 S.E.2d 21, 30 (2004) ("The Guidelines are inapplicable [when the combined monthly adjusted gross income of the parties exceeds $20,000.00] . . . and the trial court [i]s required to make a case-by-case determination."). Consequently, we hold that the trial court was not bound by the Guidelines in determining Mr. Diehl's child support obligations.

Regarding the adequacy of the trial court's findings of fact as to the child support actually ordered, this Court stated in *Meehan*:

> "[A]n order for child support must be based upon the interplay of the trial court's conclusions of law as to (1) the amount of support necessary to 'meet the reasonable needs of the child' and (2) the relative ability of the parties to provide that amount. These conclusions must themselves be based upon factual *findings* specific enough to indicate to the appellate court that the judge below took 'due regard' of the particular 'estates, earnings, conditions, [and] accustomed standard of living' of both the child and the parents. It is a question of fairness and justice to all concerned."

Id. at 383, 602 S.E.2d at 30 (quoting *Coble v. Coble*, 300 N.C. 708, 712, 268 S.E.2d 185, 189 (1980)) (alteration in original); *see also* N.C. Gen. Stat. § 50-13.4(c) ("Payments ordered for the support of a minor child shall be in such amount as to meet the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties . . . and other facts of the particular case.").

The only findings in this case regarding the reasonable needs of the children simply state, without any itemization, a lump sum amount for the reasonable needs of the children in 2000, 2001, 2002, and 2003. They give no indication of what methodology or facts the trial court considered to determine what was necessary "to meet the reasonable needs of the child[ren] for [their] health, education, and maintenance . . . ." N.C. Gen. Stat. § 50-13.4(c). Ms. Diehl admits that "[c]learly, the trial court did not use all of the expenses listed" in the parties' financial affidavits. Without more explanation, it is impossible to determine on appeal where the figures used by the trial court came from at all. Moreover, although the order does contain certain historical costs associated with the children, it includes no findings as to the individual costs and expenses the trial court expects to be associated with each child in the future. While the trial court did make findings regarding the parties' particular " 'estates, earnings, conditions, [and] accustomed standard of living,' " *Meehan*, 166 N.C. App. at 383, 602 S.E.2d at 30 (quoting *Coble*, 300 N.C. at 712, 268 S.E.2d at 189), we conclude these are insufficient to remedy the absence of findings explaining the reasonable needs of the children. Accordingly, we remand for further findings of fact regarding the amount of child support awarded.

Attorneys' Fees

[6] In her cross-appeal, Ms. Diehl argues that the trial court erred in declining to award her attorneys' fees. An award of attorneys' fees in actions for custody and support of minor children requires the trial court to find (1) that the party seeking the award of fees was acting in good faith, and (2) the party has insufficient means to defray the expense of the suit. N.C. Gen. Stat. § 50-13.6 (2005); *Burr v. Burr*, 153 N.C. App. 504, 506, 570 S.E.2d 222, 224 (2002).[1]

"Where an award of attorney's fees is prayed for, but denied, the trial court must provide adequate findings of fact for this Court to review its decision." *Gowing v. Gowing*, 111 N.C. App. 613, 620, 432 S.E.2d 911, 915 (1993). Although the trial court denied Ms. Diehl's request for attorneys' fees, it made no findings relating to that denial, such as whether Ms. Diehl acted in good faith or whether she had insufficient means to defray the expense of the suit. Consequently, we must remand for entry of proper factual findings to support the trial court's decision regarding Ms. Diehl's request for attorneys' fees. *Id.*

1. We note that, because this was an action for both custody and support rather than an action solely for support, Ms. Diehl's arguments on appeal regarding the alleged unreasonableness of the child support paid by Mr. Diehl prior to the trial court's order are irrelevant. *Hudson v. Hudson*, 299 N.C. 465, 472-73, 263 S.E.2d 719, 724 (1980).

Affirmed in part, reversed in part, and remanded in part.

Judges HUNTER and McCULLOUGH concur.

MARIE T. FORMYDUVAL, AS ADMINISTRATRIX OF THE ESTATE OF HARTWELL B. FORMYDUVAL AND JOEY FORMYDUVAL, PLAINTIFFS v. WILLIAM S. BRITT, INDIVIDUALLY AND D/B/A BRITT & BRITT; AND BRITT & BRITT, PLLC, DEFENDANTS

No. COA05-584

(Filed 6 June 2006)

Attorneys— malpractice in claim against doctor—Rule 9(j) not applicable to legal malpractice claim

The trial court erred by dismissing plaintiffs' legal malpractice action against defendants for failure of the complaint to include the certification required by to N.C.G.S. § 1A-1, Rule 9(j). The clear and unambiguous language of the statute and precedents establish that Rule 9(j) applies solely to medical malpractice actions and not to legal malpractice actions.

Judge BRYANT dissenting.

Appeal by plaintiffs from order entered 3 November 2003 by Judge B. Craig Ellis in Columbus County Superior Court. Heard in the Court of Appeals 30 November 2005.

The Odom Law Firm, PLLC, by Thomas L. Odom, Jr. and T. LaFontine Odom, Sr., and Williamson & Walton, LLP, by Benton H. Walton, III, for plaintiffs-appellants.

Mitchell, Brewer & Richardson, by Ronnie M. Mitchell and Coy E. Brewer, Jr., for defendants-appellees.

TYSON, Judge.

Marie T. Formyduval, Administratrix of the Estate of Hartwell B. Formyduval, and son, Joey Formyduval (collectively, "plaintiffs") appeal from order entered denying plaintiffs' motion to amend their complaint and dismissing plaintiffs' legal malpractice actions against William S. Britt and Britt & Britt, PLLC (collectively, "defendants"). We reverse and remand.

I. Background

In June 1995, plaintiffs retained attorney William S. Britt ("Britt") to represent the Estate of Hartwell B. Formyduval against Dr. David G. Bunn ("Dr. Bunn") in a medical malpractice action seeking damages for the alleged wrongful death of Hartwell B. Formyduval. On 31 August 1995, Britt filed a complaint alleging medical malpractice by Dr. Bunn (the "First Action"). Over the next year and a half, Britt retained expert medical witnesses to testify at trial, took depositions of defense witnesses, and conducted other discovery and evidentiary matters. Britt's primary expert medical witness withdrew prior to the scheduled trial. Britt determined plaintiffs' case was likely to be unsuccessful. Britt voluntarily dismissed this First Action without prejudice on 21 February 1997.

A. The Underlying Action

Britt filed a summons and a second complaint (the "Second Action") on 19 August 1997. The complaint in the Second Action alleged medical malpractice and again sought damages from Dr. Bunn for the alleged wrongful death of Hartwell Formyduval. Britt retained new expert medical witnesses to testify. The trial was scheduled for 12 April 1999. Prior to trial, Dr. Bunn moved to exclude plaintiffs' proposed experts alleging they failed to qualify under N.C. Gen. Stat. § 8C-1, Rule 702(c) ("[I]f the party against whom or on whose behalf the testimony is offered is a general practitioner, the expert witness, during the year immediately preceding the date of the occurrence that is the basis for the action, must have devoted a majority of his or her professional time to either or both of the following: (1) Active clinical practice as a general practitioner; or (2) Instruction of students in an accredited health professional school or accredited residency or clinical research program in the general practice of medicine.").

After hearing counsel's arguments, the trial court allowed Dr. Bunn's motion and excluded all testimony of plaintiffs' medical experts. After these rulings, Britt announced his intention to rest plaintiffs' case in the absence of expert testimony. Dr. Bunn thereafter moved for a directed verdict pursuant to Rule 50 of the Rules of Civil Procedure. The trial court granted the motion.

Britt appealed to this Court from the trial court's rulings excluding plaintiffs' medical expert witnesses and granting Dr. Bunn's motion for directed verdict. This Court affirmed the ruling to exclude plaintiffs' experts under the 1995 amendments to N.C. Gen. Stat. § 8C-1, Rule 702.

The North Carolina Supreme Court denied plaintiffs' petition for discretionary review. *See Formyduval v. Bunn*, 138 N.C. App. 381, 389, 530 S.E.2d 96, 101, *disc. rev. denied*, 353 N.C. 262, 546 S.E.2d 93 (2000) ("We hold that all three of plaintiff's witnesses are specialists as that term is used in the statute. Thus, they are all disqualified from testifying against defendant pursuant to Rule 702(c).").

B. The Present Action

On 10 April 2002, plaintiffs instituted this action for legal malpractice, alleging Britt was negligent in handling the First and Second Action, and that he breached his fiduciary duty to plaintiffs. In their amended answer, defendants denied liability and moved to dismiss plaintiffs' claims alleging failure to comply with Rule 9(j) of the North Carolina Rules of Civil Procedure.

Defendants filed a counterclaim seeking to recover costs and expenses incurred by them during the original representation of plaintiffs in the medical malpractice action. Defendants moved to dismiss the action and maintained plaintiffs failed to allege with specificity in their legal malpractice complaint that pursuant to Rule 9(j) that the medical care had been reviewed by a person qualified as an expert witness who was willing to testify to a deviation from the applicable standard of care.

The date for designation of expert witnesses was set for 17 July 2003. Plaintiffs served their request for the trial court to peremptorily set this matter for trial on 15 September 2003, then 3 November 2003. On 22 August 2003, the parties agreed to require designation of expert witnesses by 2 September 2003 and provided that discovery was to be completed and dispositive motions were to be filed and heard by 17 October 2003. Defendants calendared their motion to dismiss for hearing on 15 September 2003, the date originally set for trial. On 5 September 2003, plaintiffs filed a motion to amend their complaint to allege certification pursuant to Rule 9(j) and to raise the unconstitutionality of Rule 9(j).

C. Procedural Rulings

On 15 September 2003, a hearing was held on plaintiffs' motion to amend and defendants' motion to dismiss. The trial court acknowledged the action had been pending for seventeen months, that defendants' motion to dismiss had been pending for fourteen months, and the case was forty-five days away from plaintiffs' peremptory setting on 3 November 2003.

On 3 November 2003, the trial court entered an order denying plaintiffs' motion to amend, finding, *inter alia*, undue delay in filing the motion and that granting the motion would be futile because the complaint alleging medical malpractice by a health care provider failed to include the Rule 9(j) certification. The trial court further granted defendants' motion to dismiss. Plaintiffs sought to appeal from the order. That appeal was dismissed as interlocutory. On 12 August 2004, the North Carolina Supreme Court declined to review this Court's order dismissing the appeal. *See Formyduval v. Britt*, 601 S.E.2d 530 (No. 303P04) (Aug. 12, 2004) (Unpublished) (order denying writ of *certiorari* to review order of the Court of Appeals). On 14 February 2005, defendants filed a voluntary dismissal without prejudice of their counterclaim. Plaintiffs appeal the trial court's order dismissing all claims against defendants.

II. Issues

Plaintiffs argue the trial court erred by: (1) dismissing plaintiffs' complaint for failing to include a Rule 9(j) certification of expert witnesses in a medical malpractice action; (2) denying plaintiffs' motion to amend their complaint; and (3) taxing the costs of the action to plaintiffs.

III. Standard of Review

The trial court specifically dismissed plaintiffs' action for violation of Rule 9(j). Rule 9(j) provides that any action alleging *medical malpractice by a health care provider shall* be dismissed if the complaint does not follow the requirements set forth in the statute. N.C. Gen. Stat. § 1A-1, Rule 9(j) (2005) (effective 1 January 1996).

> 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, *disc. rev. denied*, 355 N.C. 748, 565 S.E.2d 665 (2002).

IV. Dismissal of Plaintiffs' Legal Malpractice Action

Plaintiffs argue the trial court erred by dismissing their legal malpractice action against defendants pursuant to Rule 9(j). We agree.

Plaintiffs' legal malpractice complaint alleges defendants-attorneys were negligent in representing plaintiffs in two prior medical malpractice claims against Dr. Bunn. The trial court dismissed plaintiffs' legal malpractice action against defendants due to the omission of a Rule 9(j) certification and concluded:

> 4. The Complaint in this action alleges medical malpractice by a health care provider.
>
> 5. Plaintiff's Complaint in this action fails to include the certification required by G.S. § 1A-1, Rule 9(j).

A plaintiff in a legal malpractice action "must establish that the loss would not have occurred but for the attorney's conduct." *Rorrer v. Cooke*, 313 N.C. 338, 361, 329 S.E.2d 355, 369 (1985) (citation omitted). A plaintiff must prove: "(1) The original claim was valid; (2) It would have resulted in a judgment in his favor; and (3) The judgment would have been collectible." *Id.* (citations omitted). A plaintiff alleging a legal malpractice action must prove a "case within a case," meaning a showing of the viability and likelihood of success of the underlying action. *Kearns v. Horsley*, 144 N.C. App. 200, 211, 552 S.E.2d 1, 8, *disc. rev. denied*, 354 N.C. 573, 559 S.E.2d 179 (2001). Plaintiffs' complaint alleged a likelihood of success in their medical malpractice action against Dr. Bunn but for defendants' legal malpractice. *Id.*

Defendants argue: "[t]he plain language of the statute makes rule 9(j)'s certification or pleading requirements applicable to *any complaint* alleging medical malpractice by a health care provider." Rule 9(j) provides in pertinent:

> Medical malpractice.—Any complaint alleging medical malpractice by a health care provider as defined in G.S. 90-21.11 in failing to comply with the applicable standard of care under G.S. 90-21.12 shall be dismissed unless:
>
> (1) The pleading specifically asserts that the medical care has been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care;

> (2) The pleading specifically asserts that the medical care has been reviewed by a person that the complainant will seek to have qualified as an expert witness by motion under Rule 702(e) of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care, and the motion is filed with the complaint; or
>
> (3) The pleading alleges facts establishing negligence under the existing common-law doctrine of res ipsa loquitur.

N.C. Gen. Stat. § 1A-1, Rule 9(j). The statute clearly and unambiguously applies only to "any complaint alleging medical malpractice by a health care provider." *Id.*

In *Thigpen v. Ngo*, our Supreme Court discussed the legislative intent of Rule 9(j) and held, "our analysis reveals the legislature intended Rule 9(j) to *control pleadings in medical malpractice claims*." 355 N.C. 198, 203, 558 S.E.2d 162, 166 (2001) (emphasis supplied). The Court further held:

> The legislature specifically drafted Rule 9(j) to govern the initiation of *medical malpractice actions* and to require physician review *as a condition for filing the action*. The legislature's intent was to provide a more specialized and stringent procedure *for plaintiffs in medical malpractice claims* through Rule 9(j)'s requirement of expert certification prior to the filing of a complaint.

Id. (Emphasis supplied).

In *Hummer v. Pulley*, Judge Bryant writing for this Court stated:

> Under the case within a case method of proof, the plaintiff in a legal malpractice action presents the evidence in support of the underlying claim before the jury (or fact-finder) in the malpractice action. The malpractice jury, in essence, then determines the outcome of the underlying case and from that determination reaches the malpractice verdict.

157 N.C. App. 60, 66, 577 S.E.2d 918, 923, *disc. rev. denied*, 357 N.C. 459; 585 S.E.2d 758 (2003) (citation omitted).

The complaint at issue does not seek damages for medical malpractice from a health care provider. Instead, it alleges legal malpractice by attorneys who caused plaintiffs to lose viable medical malpractice actions. Defendants' negligence arises out of their alleged failure to procure expert medical witnesses who could qualify to testify pursuant to

Rule 702. Nothing in Rule 9(j) requires any special pleading for a complaint alleging legal malpractice against an attorney. *State ex rel. Util. Comm'n v. Edmisten*, 291 N.C. 451, 465, 232 S.E.2d 184, 192 (1977) ("When the language of a statute is clear and unambiguous, it must be given effect and its clear meaning may not be evaded by an administrative body or a court under the guise of construction.").

Rule 9(j) is a special pleading requirement that solely applies to plaintiffs who file complaints alleging medical malpractice by a health care provider. Under the clear language of the statute and our Supreme Court's precedents, Rule 9(j) does not apply to a plaintiff alleging legal malpractice against an attorney.

The trial court erred in ruling plaintiffs' legal malpractice action must be dismissed for failure to contain a Rule 9(j) medical malpractice certification. Plaintiffs are only required to proffer sufficient evidence to the jury tending to show Dr. Bunn's alleged negligence to establish their "case within a case."

The trial court also erred in taxing the costs of the action to plaintiffs. Because Rule 9(j) does not apply to plaintiffs' legal malpractice claims against defendants, it is unnecessary to consider plaintiffs' remaining assignments of error.

Our standard of review of defendants' motion to dismiss requires us to: (1) accept all of plaintiffs' allegations as true; (2) review those allegations in a light most favorable to plaintiffs; and (3) deny defendants' motion to dismiss if plaintiffs' complaint states a claim under some legally viable theory. *Harrelson*, 149 N.C. App. at 864, 561 S.E.2d at 353. We do not address the merits of any of plaintiffs' claims under the standard of review applicable for a motion for summary judgment or for a directed verdict. Our holding solely addresses the legal sufficiency of plaintiffs' complaint when challenged by defendants' motion to dismiss.

V. Conclusion

The trial court erred by dismissing plaintiffs' legal malpractice action against defendants pursuant to Rule 9(j). The clear and unambiguous language of the statute and precedents establish that Rule 9(j) applies solely to medical malpractice actions and not legal malpractice actions. The trial court's order dismissing plaintiffs' complaint is reversed and this case is remanded for further proceedings consistent with this opinion.

Reversed and Remanded.

Judge CALABRIA concurs.

Judge BRYANT dissents by separate opinion.

BRYANT, Judge. Dissenting in a separate opinion.

I respectfully disagree with the majority's holding that the trial court erred in dismissing plaintiffs' complaint for failing to include Rule 9(j) certification of expert witnesses in a medical malpractice action.

"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." *Brandis v. Lightmotive Fatman*, 115 N.C. App. 59, 62, 443 S.E.2d 887, 888 (1994). When determining whether a complaint is sufficient to withstand a Rule 12(b)(6) motion to dismiss, the trial court must discern "whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory." *Shell Island Homeowners Ass'n. Inc. v. Tomlinson*, 134 N.C. App. 217, 225, 517 S.E.2d 406, 413 (1999). A motion to dismiss under Rule 12(b)(6) is an appropriate method of determining whether procedural bars to a plaintiffs' claims exist. *See Horton v. Carolina Medicorp*, 344 N.C. 133, 136, 472 S.E.2d 778, 780 (1996).

In a legal malpractice action based upon claims of attorney negligence, a plaintiff is required through the pleadings to place the defendant on notice that plaintiff intends to prove and must then be able to offer proof that plaintiff would not have suffered the harm alleged absent the negligence of his attorney. *Rorrer v. Cooke*, 313 N.C. 338, 361, 329 S.E.2d 355, 369 (1985). In order for a plaintiff to properly allege and prove causation, plaintiff must establish three things: (1) *the underlying claim upon which the legal malpractice action is based was valid*; (2) the claim would have resulted in a judgment in the plaintiff's favor; and (3) the judgment would have been collectible or enforceable. *Id.* (Emphasis added). In a claim for legal malpractice, plaintiff is required to prove the viability and likelihood of success of the underlying case, which has been referred to as having to prove "a case within a case." *Kearns v. Horsley*, 144 N.C. App. 200, 211, 552 S.E.2d 1, 8 (2001). This requisite applies even if the negligent actions of the attorney resulted in

a total foreclosure of the underlying case being heard on its merits. *See id.* at 211-12, 552 S.E.2d at 8-9.

In the instant case, Judge Ellis ruled plaintiffs' complaint alleging attorney negligence in a medical malpractice case was subject to Rule 9(j), and concluded it was subject to dismissal due to plaintiffs' failure to "include the certification required by G.S. § 1A-1, Rule 9(j)." Because plaintiffs' legal malpractice action was based on defendants' handling of a medical malpractice case, plaintiffs were required to allege and prove a "case within a case." In other words, plaintiffs must properly allege and in order to prevail, ultimately prove the underlying medical malpractice claim. I see no reason to distinguish the pleading requirements as to the underlying medical malpractice claim from the pleading requirements of the legal malpractice claim. *See Hummer v. Pulley, Watson, King & Lischer, P.A.*, 157 N.C. App. 60, 66, 577 S.E.2d 918, 923 (2003) (a legal malpractice plaintiff must prove success of the underlying action even if the attorney's "negligent actions . . . resulted in a total foreclosure of the underlying case being heard on its merits"), *disc. review denied*, 357 N.C. 459, 585 S.E.2d 758. As for a medical malpractice claim, compliance with Rule 9(j) must be made at the time the complaint is filed. *Keith v. Northern Hosp. Dist.*, 129 N.C. App. 402, 499 S.E.2d 200, *disc. review denied*, 348 N.C. 693, 511 S.E.2d 646 (1998). I disagree with plaintiff's argument and the majority's holding that Rule 9(j) certification is not required in this legal malpractice action. Clearly where our jurisprudence requires proof of a case within a case in a legal malpractice action, and where that legal malpractice action is based on medical malpractice, plaintiffs must plead and prove the underlying case. Moreover, *Thigpen* made it clear that the legislature intended Rule 9(j) to control the pleadings in a medical malpractice action. *Thigpen v. Ngo*, 355 N.C. 198, 202, 558 S.E.2d 162, 165 (2002) ("[M]edical malpractice complaints have a distinct requirement of expert certification with which plaintiffs must comply. Such complaints will receive strict consideration by the trial judge. Failure to include the certification necessarily leads to dismissal.").

The underlying medical malpractice action was filed by Mr. Britt on 19 August 1997. Although that original complaint is not in the record before us, plaintiffs accede in their brief the 19 August 1997 action "failed to contain a Rule 9(j) certification." The failure by Mr. Britt to properly certify the medical malpractice action under Rule 9(j) was a specific procedural error that mandated dismissal by the trial court. *See* N.C.G.S. § 1A-1, Rule 9(j) (2005). Likewise plaintiff's complaint in the instant legal malpractice action also failed to include a 9(j) certification

and subjects this case to dismissal. Notwithstanding plaintiff's 5 September 2003 proposed amendment to their legal malpractice complaint to allege, *inter alia*, a Rule 9(j) certification, the proposed amendment "[did] not allege that the review of the medical care at issue in this action took place before the filing of the original [c]omplaint." Thus, plaintiffs have not established the "viability and likelihood of success" of their underlying medical malpractice claim.

In short, plaintiffs have failed to properly plead a "case within a case." Therefore, the trial court did not err in dismissing the legal malpractice complaint and accordingly, I must dissent from the majority.

IN RE: GARY JAMES LUSTGARTEN, M.D., RESPONDENT

No. COA05-891

(Filed 6 June 2006)

Physicians and Surgeons— discipline—testimony during medical malpractice trial—good faith

The superior court erred by upholding a disciplinary order from the North Carolina Medical Board based on an accusation that respondent had testified in a medical malpractice action in bad faith. There was a good faith basis in the evidence for respondent's testimony that another doctor's medical note was not credible, and it is clear from the record that respondent was content to state no more than his opinion that the note was faulty until he was pressed on cross-examination. Defense attorneys introduced the words "falsified," "liar," and "lying."

Appeal by respondent Gary J. Lustgarten from judgment entered 18 April 2005 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 9 March 2006.

D. Todd Brosius and Thomas W. Mansfield for the North Carolina Medical Board, petitioner appellee.

Smith, James, Rowlett & Cohen, L.L.P., by Seth R. Cohen, for respondent appellant.

McCULLOUGH, Judge.

Dr. Gary J. Lustgarten appeals from a superior court order affirming a disciplinary decision of the North Carolina Medical Board, which suspended Dr. Lustgarten's license for one year based upon the Board's finding that he had engaged in unprofessional conduct. For the reasons set forth herein, the superior court's order is reversed, and this case is remanded for dismissal of the disciplinary charges against Dr. Lustgarten.

Facts

Dr. Gary J. Lustgarten is a board certified neurosurgeon licensed to practice medicine in Florida. He also has a license to practice medicine in North Carolina, though his North Carolina license has been inactive since 1998. On 25 April 2002, the North Carolina Medical Board filed a document charging Dr. Lustgarten with engaging in unprofessional conduct and alleging that he was subject to discipline pursuant to section 90-14(a)(6) of the General Statutes.

The charges against Dr. Lustgarten arose from his testimony for the plaintiffs in a medical malpractice case, *Hardin v. Carolina Neurological Services, et al.* The *Hardin* plaintiffs alleged that two neurosurgeons, Drs. Victor J. Keranen and Bruce P. Jaufmann, provided negligent treatment resulting in the death of a shunt-dependent patient with hydrocephalus, or "water on the brain," the condition that occurs when there is an enlargement of the ventricles of the brain.

Dr. Keranen had performed a surgical shunt revision on the patient, after which the patient was transferred to a recovery room. Shortly thereafter, the patient began to experience headaches and restlessness, and he eventually suffered cardiopulmonary arrest. As the patient's heath declined, Dr. Jaufmann was called in to treat him. Dr. Jaufmann checked the shunt and was unable to obtain a flow of cerebral spinal fluid. He therefore performed a surgical removal of the catheter inserted earlier by Dr. Keranen, and inserted a new catheter. According to a notation made by Dr. Jaufmann, the patient's cerebral fluid was not under increased pressure at the time this procedure was performed. Regrettably, despite Dr. Jaufmann's efforts, the patient died.

In pretrial deposition testimony given in the *Hardin* case, Dr. Lustgarten stated his opinion that the applicable standard of care required that (1) the shunt-dependent patient be transferred to intensive care or a "step-down" unit after surgery; (2) Drs. Keranen and Jaufmann

have an oral exchange of information concerning the patient before his care was turned over to Dr. Jaufmann; (3) the treating physician place a note in the patient's file indicating that the physician should be called if some untoward event occurred, and (4) the responsible physician place a telephone call to ask about the status of the patient before the physician went to bed. Dr. Lustgarten offered an opinion that these standards of care were not observed.

While being cross-examined by counsel for Drs. Keranen and Jaufmann, Dr. Lustgarten also stated that he had "difficulty believing" Dr. Jaufmann's notation that the patient's intracranial pressure was not elevated at the time that the second catheter was inserted. In support of his skepticism concerning the notation, Dr. Lustgarten provided the following reasons for his conclusion that the pressure had to be elevated: (1) after the initial surgery, the patient experienced headaches that did not respond to pain medication, and the patient had not experienced such headaches in the past; (2) the patient moved from an alert, oriented, and cooperative state to a more restless and agitated state; (3) a CAT scan, taken a few hours after Dr. Keranen operated, revealed that the ventricles in the patient's brain were practically the same size as they were in a CAT scan taken prior to that surgery; (4) when Dr. Jaufmann disconnected the catheter inserted by Dr. Keranen, he found that there was no ventricular drainage.

After articulating these observations, Dr. Lustgarten stated,

> I have difficulty believing . . . the comment that Dr. Jaufmann made at the time . . . he passed the ventricular catheter . . . that the [spinal fluid] did not appear to be under abnormal or unusual pressure . . . . I believe that the [spinal fluid] was under pressure. And that nobody else who witnessed this recalls whether spinal fluid spurted out or not. Basically the only one who commented on that was Dr. Jaufmann.
>
> Well, it is difficult for me to believe that the spinal fluid was not under pressure. I believe it was under pressure and that all the evidence before and after, including the CAT-scan that was done within 30 to 40 minutes after, was consistent with increased intracranial pressure.
>
> So I believe that it was under pressure.

The following colloquy then ensued:

[DEFENSE ATTORNEY]: Okay. Are you saying that Dr. Jaufmann was lying at the time that he tapped the shunt and found no pressure?

. . . .

[DR. LUSTGARTEN]: I'll say that. You don't have to say that. I've met him. I'm looking at him and I'm not going to call him a liar. But on the other hand, he is covering for a partner and he runs into a situation where he knows somebody screwed up here and that he should have been called earlier by the nurses. And as indicated before, he is running into a meat cleaver. He is the recipient of a disaster that he didn't ask for, and which was not his fault. And with all due respect to older partners and the hospital, I think he tried to temporize his findings and write a note that was benevolent.

[DEFENSE ATTORNEY]: So in other words, you are saying you believe Dr. Jaufmann's notes in the records which indicate there was no increased intracranial pressure is [sic] a lie?

[DR. LUSTGARTEN]: Well, he didn't take the pressure, first of all. That's number one.

[DEFENSE ATTORNEY]: Correct.

[DR. LUSTGARTEN]: So he can't say what the pressure was.

[DEFENSE ATTORNEY]: He can say whether it was increased.

[DR. LUSTGARTEN]: I don't know if while he was putting in the patient's head was elevated or whether it was flat. But generally when a neurosurgeon puts a catheter into a ventricle he can recognize whether the fluid is increased. And a neurosurgeon who does that should accurately report what he finds. Dr. Jaufmann wrote a note that the pressure wasn't elevated. I have a great deal of difficulty believing that based upon the symptomatology of the patient that was manifested, knowing that it was an obstructed system, knowing that the CAT-scan done afterwards shows the ventricles to be just as large as they were before with other evidence of increased intracranial pressure, and the scan done the next day after that the ventricles were almost down to normal size. So yes, I have difficulty believing the pressure was normal.

After pursuing another line of the questioning, the defense attorney revisited the issue of whether Dr. Lustgarten believed that Dr. Jaufmann had been untruthful:

[DEFENSE ATTORNEY]: You are accusing, are you not, Dr. Jaufmann of falsifying medical records?

[DR. LUSTGARTEN]: I think a jury is going to have to interpret what the testimony is.

[DEFENSE ATTORNEY]: I'm asking.

[DR. LUSTGARTEN]: Dr. Jaufmann has his story. I can understand his story and why he may have said that. And as opposed to becoming a screaming maniac and kicking his feet and slamming things against the wall and yelling and screaming at nurses, he was trying to do the best for all people concerned, including the hospital, the nurses, his partner in treating this man, and I don't believe for an instant that this ventricular pressure was normal, no.

[DEFENSE ATTORNEY]: Then the answer—

[DR. LUSTGARTEN]: I think Dr. Jaufmann has his own agenda for saying that. He will have to answer to that and then the jury is going to have to believe who they believe.

[DEFENSE ATTORNEY]: Okay. The answer to my question is: Yes, you believe Dr. Jaufmann's notes was [sic] a falsification of the medical records, the note which indicates that there was no increased pressure?

[DR. LUSTGARTEN]: I'm saying I believe there was increased intracranial pressure, and the facts fit that.

This deposition testimony was discussed at the trial of the *Hardin* case during Dr. Lustgarten's cross-examination by defense attorneys.

Several years after Dr. Lustgarten testified in the *Hardin* case, the North Carolina Medical Board charged him with committing several specific instances of unprofessional conduct during his testimony in the *Hardin* case. Five of the charges of misconduct were premised upon allegations that Dr. Lustgarten had misrepresented the applicable standard of care for Drs. Keranen and Jaufmann and had improperly testified that these treating physicians failed to have a meaningful exchange of information about the patient. Another charge of misconduct was levied based upon an allegation that "Dr. Lustgarten testified in the absence of any corroborating evidence and in spite of evidence to the contrary, that a physician [Dr. Jaufmann] falsified medical records to protect his associate."

Following a hearing, the Board entered a 22 August 2002 order in which it found that Dr. Lustgarten had misrepresented the standards of care applicable in the *Hardin* case, had wrongfully stated that Drs. Keranen and Jaufmann had failed to have a meaningful exchange of information, and had testified that Dr. Jaufmann falsified a medical record with "absolutely no direct evidence to support this extremely serious allegation." The Board concluded that, with respect to each finding, Dr. Lustgarten had engaged in unprofessional conduct pursuant to section 90-14(a)(6) of the General Statutes, and the Board revoked his license to practice medicine in North Carolina.

Dr. Lustgarten appealed the Board's disciplinary order to the Wake County Superior Court. Following a hearing, the superior court entered an order which affirmed in part and reversed in part the Board's disciplinary order. Specifically, the court ruled that Dr. Lustgarten could not be disciplined for his testimony concerning the applicable standards of care or for offering his opinion that Drs. Keranen and Jaufmann did not have a meaningful exchange of information. However, the court upheld the Board's conclusion that Dr. Lustgarten had committed unprofessional conduct "when he repeatedly testified without an evidentiary or good faith basis that Dr. Jaufmann had falsified medical records." The court remanded the case to the Board for a determination as to the appropriate discipline for "testifying that Dr. Jaufmann falsified medical records."

On remand, the Board held a hearing and entered a 30 March 2004 order suspending Dr. Lustgarten's North Carolina medical license for a period of one year. Dr. Lustgarten again appealed to the Wake County Superior Court, which conducted a hearing and affirmed the Board's 30 March 2004 disciplinary order.

Dr. Lustgarten now appeals to this Court. In his primary argument on appeal, Dr. Lustgarten contends that the superior court should not have affirmed the Board's second order of discipline because there was no substantial record evidence that Dr. Lustgarten's testimony accused Dr. Jaufmann of falsifying a medical record without a good faith evidentiary basis.

Legal Discussion

The North Carolina Medical Board is statutorily imbued with the authority "to regulate the practice of medicine and surgery for the benefit and protection of the people of North Carolina." N.C. Gen. Stat. § 90-2 (2005). The Board has the power "to deny, annul, suspend, or

revoke [the] license" of a license-holder found by the Board to have committed

> [u]nprofessional conduct, including, but not limited to, departure from, or the failure to conform to, the standards of acceptable and prevailing medical practice, or the ethics of the medical profession, irrespective of whether or not a patient is injured thereby, or the committing of any act contrary to honesty, justice, or good morals, whether the same is committed in the course of the physician's practice or otherwise, and whether committed within or without North Carolina.

N.C. Gen. Stat. § 90-14(a)(6) (2005). As such, the Board is an occupational licensing agency, which is governed by Article 3A of the North Carolina Administrative Procedure Act. *See* N.C. Gen. Stat. § 150B-2(4b) (2005) (" 'Occupational licensing agency' means any board . . . which is established for the primary purpose of regulating the entry of persons into, and/or the conduct of persons within a particular profession, . . . and which is authorized to issue and revoke licenses."); N.C. Gen. Stat. § 150B-38(a)(1) (2005) (providing that Article 3A applies to occupational licensing agencies). Therefore, a person seeking judicial review of a decision of the Board "must file a petition in the Superior Court of Wake County. . . ." N.C. Gen. Stat. § 150B-45 (2005).

"The review by a superior court of [the Board's] decisions . . . [is] conducted by the court without a jury." N.C. Gen. Stat. § 150B-50 (2005).

> [T]he court may affirm the decision . . . or remand the case . . . for further proceedings. It may also reverse or modify the agency's decision . . . if the substantial rights of the petitioner[] may have been prejudiced because the agency's findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence . . . in view of the entire record as submitted; or
>
> (6) Arbitrary, capricious, or an abuse of discretion.

N.C. Gen. Stat. § 150B-51(b) (2005).

As to matters of fact, the superior court must apply the "whole record test" and is " 'bound by the findings of the [agency] if they are supported by competent, material, and substantial evidence in view of the entire record as submitted.' " *Bashford v. N.C. Licensing Bd. for General Contractors*, 107 N.C. App. 462, 465, 420 S.E.2d 466, 468 (1992) (citations omitted).

> When the [superior] court applies the whole record test . . . it "may not substitute its judgment for the agency's as between two conflicting views, even though it could reasonably have reached a different result had it reviewed the matter *de novo*." "Rather, a court must examine all the record evidence—that which detracts from the agency's findings and conclusions as well as that which tends to support them—to determine whether there is substantial evidence to justify the agency's decision." "Substantial evidence" is "relevant evidence a reasonable mind might accept as adequate to support a conclusion."

N.C. Dep't of Env't & Natural Res. v. Carroll, 358 N.C. 649, 660, 599 S.E.2d 888, 895 (2004) (quoting *Watkins v. N.C. State Bd. of Dental Exam'rs*, 358 N.C. 190, 199, 593 S.E.2d 764, 769 (2004) and N.C. Gen. Stat. § 150B-2(8b) (2003)). However, "[i]f it is alleged that an agency's decision was based on an error of law[,] then a *de novo* review is required." *Walker v. N.C. Dept. of Human Resources*, 100 N.C. App. 498, 502, 397 S.E.2d 350, 354 (1990), *disc. review denied*, 328 N.C. 98, 402 S.E.2d 430 (1991).

"A party to a review proceeding in a superior court may appeal to the appellate division from the final judgment of the superior court. . . . The scope of review to be applied by the appellate court . . . is the same as it is for other civil cases." N.C. Gen. Stat. § 150B-52 (2005). Thus, this Court examines the trial court's order for errors of law; this " 'twofold task' " involves: " '(1) determining whether the [superior] court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly.' " *Eury v. N.C. Employment Security Comm.*, 115 N.C. App. 590, 597, 446 S.E.2d 383, 387-88 (citation omitted), *appeal dismissed and disc. review denied*, 338 N.C. 309, 451 S.E.2d 635 (1994).

In the instant case, Dr. Lustgarten challenges the following determination made by the Board:

> Dr. Lustgarten testified under oath that Dr. Jaufmann, in order to somehow protect Dr. Keran[e]n, falsified the procedure note, which indicated that [the shunt-dependent patient's] CSF did not appear to

> be under increased pressure. Dr. Lustgarten had absolutely no direct evidence to support this extremely serious accusation.

The superior court ruled that this finding was supported by substantial evidence in the record. After careful review of the record, we conclude that the superior court erroneously affirmed the Board's determination, as the substantial record evidence does not permit an inference that Dr. Lustgarten made an entirely unfounded statement concerning Dr. Jaufmann's notes.

The evidence before the Board tended to show that, at the time of his deposition in the *Hardin* case, Dr. Lustgarten was of the opinion that the shunt-dependent patient's intracranial pressure had to be elevated. Accordingly, he stated under oath that he had "difficulty believing" Dr. Jaufmann's contrary notation. Dr. Lustgarten's skepticism was based upon CAT-scan results, mood changes in the patient, pain-medication-resistant headaches being experienced by the patient, and the lack of ventricular flow, each of which indicated to Dr. Lustgarten that the patient's intracranial pressure was necessarily elevated. These observations provided a good faith evidentiary basis for Dr. Lustgarten's opinion that Dr. Jaufmann's notation was not credible.

Further, the record is clear that Dr. Lustgarten was content to state no more than his opinion that Dr. Jaufmann's note was faulty. However, a defense attorney representing Dr. Jaufmann in the *Hardin* case repeatedly asked Dr. Lustgarten whether Dr. Jaufmann was lying. Dr. Lustgarten did not wish to answer this question, but he eventually stated that he was "not going to call [Dr. Jaufmann] a liar" but that, in his opinion, Dr. Jaufmann had "tried to temporize his findings and write a note that was benevolent." Further, when the defense attorney persisted by asking whether Dr. Lustgarten was "accusing . . . Dr. Jaufmann of falsifying medical records," Dr. Lustgarten responded that the issue would have to be decided by a jury and again indicated that he had difficulty believing Dr. Jaufmann's note.

In explaining these statements, Dr. Lustgarten continually noted that, in his opinion, the patient's pressure had to be elevated and the circumstances in which Dr. Jaufmann found himself were quite difficult:

> [Dr. Jaufmann was] covering for a partner and he [ran] into a situation where he kn[ew] somebody screwed up . . . and that he should have been called earlier by the nurses. And as indicated before, he [was] running into a meat cleaver. He [was] the recipient of a disaster that he didn't ask for, and which was not his fault.

Dr. Lustgarten also noted that "nobody else who witnessed [Dr. Jaufmann examining the shunt] recalls whether spinal fluid spurted out or not. Basically the only one who commented on that was Dr. Jaufmann." Thus, Dr. Lustgarten explained the basis for his conclusion that Dr. Jaufmann had "temporize[d]" his findings by writing a "note that was benevolent." Moreover, at no point did Dr. Lustgarten actually state that Dr. Jaufmann had "falsified" a medical record or use the terms "liar" or "lying" to describe Dr. Jaufmann or his conduct. Rather, these terms were introduced by defense attorneys representing Dr. Jaufmann.

As the foregoing discussion demonstrates, Dr. Lustgarten did not testify that Dr. Jaufmann had "tried to temporize his findings and write a note that was benevolent" until pressed to do so on cross-examination, and the substantial evidence of record demonstrates that Dr. Lustgarten had a good faith basis for making the statement for which the Medical Board seeks to impose discipline. Further, no other evidence in the record supports the Board's decision. Therefore, the Board erred by finding that Dr. Lustgarten levied a groundless accusation, and the superior court erroneously applied the whole record test to affirm the Board's determination.

The superior court's order affirming the Board's discipline is reversed. Further, because proper application of the whole record test does not permit a Board finding that Dr. Lustgarten made a bad faith accusation concerning the falsification of a medical record, on remand the superior court shall order that the disciplinary proceedings against Dr. Lustgarten be dismissed.

Reversed and remanded.

Judges TYSON and ELMORE concur.

JOHN P. ARMSTRONG, PLAINTIFF-APPELLANT v. MARY E. DROESSLER, DEFENDANT-APPELLEE

No. COA05-617

(Filed 6 June 2006)

Child Support, Custody, and Visitation— support—reduction in income—findings not sufficient

The issue of involuntary reduction in the income of a parent moving to reduce child support could not be resolved because the court did not make specific findings about the amount of plaintiff's income at the time of the hearing.

Judge CALABRIA dissenting.

Appeal by plaintiff from order entered 16 September 2004 by Judge Anne B. Salisbury in District Court, Wake County. Heard in the Court of Appeals 22 March 2006.

Rosen Law Firm, by Scott E. Allen, for plaintiff-appellant.

No brief filed by defendant-appellee.

McGEE, Judge.

John P. Armstrong (plaintiff) and Mary E. Droessler (defendant) (collectively the parties) were married 29 November 1990. During their marriage, the parties had two children, born 30 December 1994 and 4 January 1999. The parties signed a consent order for custody and child support dated 8 May 2002, the terms of which required plaintiff to pay defendant $1,800.00 ($900.00 per child) per month as child support. Plaintiff subsequently filed a motion in the cause to modify child support. He alleged a substantial change of circumstances since the entry of the consent order that affected plaintiff's ability to provide child support.

After a hearing on 30 June 2004, the trial court denied plaintiff's motion. In its order denying plaintiff's motion, the trial court made the following pertinent findings of fact:

3. . . . At the time of the entry of the Consent Order, Plaintiff had a gross income of $170,000 per year.

4. At the time of the entry of the Consent Order, Plaintiff was one-third owner of a company called Monolith, a computer software

company. The company was for sale and the presumptive value of Plaintiff's share of the company was recited within the Consent Order at between $1 and $1.5 million. The parties knew at the time of the entry of the Consent Order that when the company sold, the Plaintiff would have to have new employment.

5. The company did, in fact, sell. To effectuate the sale, Plaintiff established a Domestic Non-Grantor Trust in the State of Nevada and transferred his shares of stock to the trust. His share of the company was purchased by the Buyer via payment of Plaintiff's $1.3 million share of the purchase price into the trust in exchange for Plaintiff's share of the company stock.

6. The Trust which was established is an irrevocable trust in which Plaintiff's proceeds are not payable until age 65 and at a rate of $500,000.00 per year. . . . Plaintiff does have the ability to borrow from the Trust and has done so. The children are beneficiaries of the Trust at Plaintiff's death. . . .

7. After the sale of Monolith, Plaintiff decided to pursue his dream of working in the aviation industry. He began working as a fund-raiser for the Wright Brothers Centennial of Flight celebration[.] . . . He worked in this capacity until January, 2004 when the Centennial Celebration came to an end. . . . In 2003, Plaintiff received $43,000.00 from the "First in Flight" celebration and also set up Buyitright.com a subsidiary to market VIP seating at the event. Plaintiff has since tried to secure employment with the North Carolina Department of Transportation in the aviation field.

8. Since the entry of the Consent Order, Plaintiff has remarried and his Wife makes a six figure income and contributes to his support.

. . .

12. At the time of the entry of the Consent Order, Plaintiff and Defendant both knew Plaintiff would be selling his interest in Monolith and could conceivably be without income or without the income he enjoyed[.] [Plaintiff] also knew that he would have between $1 million and $1.3 million at his disposal but instead established a trust placing the funds beyond his reach, except for loans, and beyond the reach of creditors, and ensuring one half million dollars per year to himself at age 65.

Based on its findings, the trial court concluded the following: (1) there had been no change of circumstances since the entry of the

consent order justifying a modification of child support, (2) the needs of the children had not decreased, and (3) plaintiff was not entitled to a modification of his child support obligation. Plaintiff appeals. On appeal, plaintiff brings forward six assignments of error. Assignments of error not argued in plaintiff's brief are deemed abandoned. N.C.R. App. P. 28(b)(6).

Child support orders may be modified pursuant to N.C. Gen. Stat. § 50-13.7(a) (2005) which states: "An order of a court of this State for support of a minor child may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances[.]" Our Court has deemed modification of child support a two-step process. *McGee v. McGee*, 118 N.C. App. 19, 26, 453 S.E.2d 531, 536, *disc. review denied*, 340 N.C. 359, 458 S.E.2d 189 (1995). A trial court "must first determine a substantial change of circumstances has taken place; only then does it proceed to apply the [North Carolina Child Support] Guidelines to calculate the applicable amount of support." *Id.* at 26-27, 453 S.E.2d at 536. The burden of demonstrating changed circumstances rests upon the party moving for modification of support. *Id.* at 26, 453 S.E.2d at 535.

The trial court in the present case dealt solely with the first step of modification: whether there was a substantial change of circumstances. The trial court concluded there had been no change of circumstances warranting modification of child support. Plaintiff assigns error to this conclusion, arguing that the conclusion was not supported by the trial court's findings. Plaintiff further argues he was entitled to modification because he suffered an involuntary reduction in income, which affected his ability to pay for the needs of the parties' children. The trial court found that the needs of the children had not changed. Plaintiff does not challenge this factual finding, and therefore it is binding on appeal. *See Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991).

In cases where the needs of the children have not changed, a substantial change of circumstances can be found to exist based on a parent's ability to pay. *Askew v. Askew*, 119 N.C. App. 242, 244, 458 S.E.2d 217, 219 (1995). Our Court has explained:

> A substantial and *involuntary* decrease in a parent's income constitutes a changed circumstance, and can justify a modification of a child support obligation, even though the needs of the child are unchanged. A *voluntary* decrease in a parent's income, even if sub-

> stantial, does not constitute a changed circumstance which alone can justify a modification of a child support award. A *voluntary* and substantial decrease in a parent's income can constitute a changed circumstance only if accompanied by a substantial decrease in the needs of the child.

Mittendorff v. Mittendorff, 133 N.C. App. 343, 344, 515 S.E.2d 464, 466 (1999) (internal citations omitted). In the present case, since it is undisputed that there was no change in the needs of the children, a determination of a "substantial and involuntary" decrease in plaintiff's income would be necessary to constitute a changed circumstance justifying modification of plaintiff's child support obligation. *See id.* Plaintiff argues the trial court erred in not finding that he suffered an involuntary decrease in income. A review of the record shows the trial court's order does not include any findings as to whether plaintiff's income had decreased, and if so, whether any such decrease was substantial and involuntary.

In *Pittman v. Pittman*, 114 N.C. App. 808, 443 S.E.2d 96 (1994), the trial court denied the defendant's motion for a reduction in child support because the defendant offered no evidence of a reduction in the needs of the defendant's children. *Id.* at 809, 443 S.E.2d at 97. The facts of *Pittman* are similar to the present case; the evidence in *Pittman* tended to show that the defendant's ability to pay child support had decreased, but that the needs of the children had not changed. *Id.* at 811, 443 S.E.2d at 97. Our Court reversed the trial court's denial of the defendant's motion, holding that modification was not barred as a matter of law by the absence of a change in the children's needs. *Id.* at 810-11, 443 S.E.2d at 97-98. Our Court remanded the matter to the trial court for a determination of whether the defendant suffered a substantial and involuntary decrease in income sufficient to warrant modification of child support. *Id.* at 811, 443 S.E.2d at 98.

In the present case, as in *Pittman*, there was no evidence that the needs of the children had changed since entry of the prior order; however, there was evidence that plaintiff's ability to pay his child support obligation had decreased. The trial court found that at the time of the entry of the consent order, plaintiff had a gross income of $170,000.00 per year. Although the trial court made no finding as to plaintiff's gross income at the time of the modification hearing, evidence in the record shows that plaintiff's gross income for the last taxable year prior to the hearing was $31,947.81. Therefore, there was competent evidence that plaintiff's income was substantially reduced. To constitute a changed

circumstance warranting modification, this substantial reduction in income must have been shown by plaintiff to be involuntary. *See Mittendorff*, 133 N.C. App. at 344, 515 S.E.2d at 466.

On the issue of the voluntariness of plaintiff's income reduction, the trial court made the following uncontested findings: (1) plaintiff knew at the time of the consent order that when the company sold, he would have to find new employment; (2) plaintiff's $1.3 million share of the purchase price of the company was deposited into an irrevocable trust, the proceeds of which could be accessed by plaintiff only through a loan and from which proceeds would not be payable to plaintiff until age sixty-five; (3) plaintiff decided to "pursue his dream" of working in the aviation industry and earned $43,000.00 for his work with the First in Flight celebration; (4) after the end of the celebration, plaintiff tried to find employment with the North Carolina Department of Transportation; (5) the brokerage house managing plaintiff's trust was involved in fraudulent activity; and (6) at the time of the hearing, the trust contained $100,000.00, which was available to plaintiff only through a loan.

In summary of those uncontested findings, the trial court made finding number twelve, which plaintiff contests:

> 12. At the time of the entry of the Consent Order, Plaintiff and Defendant both knew Plaintiff would be selling his interest in Monolith and could conceivably be without income or without the income he enjoyed[.] [Plaintiff] also knew that he would have between $1 million and $1.3 million at his disposal but instead established a trust placing the funds beyond his reach, except for loans, and beyond the reach of creditors, and ensuring one half million dollars per year to himself at age 65.

Plaintiff argues there was insufficient evidence to support finding number twelve. Because finding number twelve is merely a summation of other uncontested findings, we overrule this assignment of error.

Plaintiff also argues that the trial court erroneously "invoked the earning capacity rule" in finding number twelve. Earning capacity may be used to impute income to a party for the purpose of calculating child support. *See Ellis v. Ellis*, 126 N.C. App. 362, 364, 485 S.E.2d 82, 83 (1997). In the present case, however, the trial court never reached the step of calculating plaintiff's child support obligation, since the trial court found no change of circumstances warranting a modification of plaintiff's current obligation. Therefore, plaintiff's discussion of the

earning capacity rule is incorrect. The more accurate inquiry for our Court is whether the trial court's order contained sufficient findings to support its legal conclusion that no change of circumstances had occurred. A determination of whether there has been a substantial change of circumstances is a legal conclusion, which must be supported by adequate findings of fact. *See Garrett v. Garrett*, 121 N.C. App. 192, 197, 464 S.E.2d 716, 720 (1995), *disapproved of on other grounds by Pulliam v. Smith*, 348 N.C. 616, 620, 501 S.E.2d 898, 900 (1998). The findings of fact must be "material findings of fact which resolve[] the issues raised[] . . . [and] must be sufficient to allow an appellate court to determine upon what facts the trial court predicated its judgment." *Ebron v. Ebron*, 40 N.C. App. 270, 271, 252 S.E.2d 235, 236 (1979).

In the present case, the trial court found at the time of the hearing that (1) plaintiff's irrevocable trust contained approximately $100,000.00, (2) plaintiff could access the trust by loan only, and (3) plaintiff received $43,000.00 in income in 2003. However, the trial court made no specific finding as to the amount of plaintiff's income at the time of the hearing. Without a specific finding as to plaintiff's income at the time of the hearing, the issue of whether plaintiff's income had been involuntarily decreased cannot be resolved. *Cf. McGee*, 118 N.C. App. at 28, 453 S.E.2d at 536-37 (holding that, where the trial court's findings of fact included, *inter alia*, the amount by which the defendant's monthly income had decreased and that the defendant's estate had been "substantially depleted," the trial court's findings were sufficient under *Pittman* to uphold a determination of changed circumstances).

Accordingly, we apply our holding in *Pittman* to the facts of the present case. We vacate the trial court's dismissal of plaintiff's motion for modification of child support. We remand to the trial court to determine whether plaintiff's income was substantially and involuntarily decreased by an amount sufficient to warrant a reduction in child support. If the trial court finds a voluntary decrease in plaintiff's income, plaintiff's threshold burden of showing substantial change in circumstances has not been met, and the trial court is without authority to modify the existing child support order. *See Davis v. Risley*, 104 N.C. App. 798, 800-01, 411 S.E.2d 171, 173 (1991). If, however, the trial court determines that plaintiff suffered a substantial and involuntary decrease in income sufficient to warrant modification, the trial court shall proceed to the next step of calculating plaintiff's reduced child support obligation. *See McGee*, 118 N.C. App. at 26-27, 453 S.E.2d at 536. In calculating plaintiff's obligation, "without a showing of deliberate depression of income or other bad faith, the trial court is without power to

impute income, and must determine [plaintiff's] child support obligation based on [plaintiff's] actual income." *Ellis*, 126 N.C. App. at 365, 485 S.E.2d at 83. If, however, the trial court finds that plaintiff was acting " 'in bad faith by deliberately depressing [his] income or otherwise disregarding the obligation to pay child support,' [plaintiff's] earning capacity can be used to determine his child support obligation." *Chused v. Chused*, 131 N.C. App. 668, 671, 508 S.E.2d 559, 562 (1998) (quoting *Schroader v. Schroader*, 120 N.C. App. 790, 794, 463 S.E.2d 790, 792 (1995)).

Vacated and remanded.

Judge GEER concurs.

Judge CALABRIA dissents with a separate opinion.

CALABRIA, Judge, dissenting.

Because I disagree with the majority's holding that the trial court's findings were insufficient to support its conclusion that there was no change of circumstances justifying a modification of child support, I respectfully dissent.

North Carolina General Statutes § 50-13.7(a) (2005) states, "An order of a court of this State for support of a minor child may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances." *Royall v. Sawyer*, 120 N.C. App. 880, 882, 463 S.E.2d 578, 579 (1995). The party requesting modification has the burden of demonstrating changed circumstances. *McGee v. McGee*, 118 N.C. App. 19, 26, 453 S.E.2d 531, 535 (1995) (citations omitted). In this case, the trial court specifically found, and plaintiff does not contest, that "the needs of the minor children have not decreased since the entry of the Consent Order." Nonetheless, even when the children's needs have not changed, a modification of child support may still be warranted if there is a substantial and *involuntary* decrease in a parent's income that constitutes a changed circumstance. *Mittendorff v. Mittendorff*, 133 N.C. App. 343, 344, 515 S.E.2d 464, 466 (1999) (citations omitted). However, if there is a *voluntary* decrease in a parent's income, even if substantial, it cannot constitute a changed circumstance if there is no decrease in the needs of the minor children. *Schroader v. Schroader*, 120 N.C. App. 790, 794, 463 S.E.2d 790, 793 (1995). Thus, in the case *sub judice*, because the minor children's needs did not decrease, the only way plaintiff could establish a substantial change in

circumstances would be by showing an *involuntary* decrease in his income. *See Mittendorff*, *supra*; *Schroader*, *supra*.

Yet, the pertinent findings of fact establish that any change of circumstance was *voluntary*:

> 4. At the time of entry of the Consent Order, Plaintiff was one-third owner of a company called Monolith, a computer software company. The company was for sale and the presumptive value of Plaintiff's share of the company was recited with the Consent Order at between $1 and $1.5 million. The parties knew at the time of the entry of the Consent Order that when the company sold, the Plaintiff would have to have new employment.
>
> 5. The company did, in fact, sell. To effectuate the sale, Plaintiff established a Domestic Non-Grantor Trust in the State of Nevada and transferred his shares of stock to the trust. His share of the company was purchased by the Buyer via payment of Plaintiff's $1.3 million share of the purchase price into the trust in exchange for Plaintiff's share of the company stock. . . .
>
> 7. After the sale of Monolith, Plaintiff decided to pursue his dream of working in the aviation industry. He began working as a fundraiser for the Wright Brothers Centennial of Flight celebration[.] . . . Plaintiff has an airplane which he used in fundraising and established a website for the marketing of "First in Flight" products and memorabilia. He conducted business under the name of "Five Star Marketing, Inc." He worked in this capacity until January 2004 when the Centennial Celebration came to an end. Five Star Marketing, Inc. is an aviation marketing firm, marketing charter flights. In 2003, Plaintiff received $43,000.00 from the "First in Flight" celebration and also set up Buyitright.com a subsidiary to market VIP seating at the event. Plaintiff has since tried to secure employment with the North Carolina Department of Transportation in the aviation field.
>
> 8. Since the entry of the Consent Order, Plaintiff has remarried and his Wife makes a six figure income and contributes to his support.
>
> . . .
>
> 12. At the time of the entry of the Consent Order, Plaintiff . . . knew [he] would be selling his interest in Monolith and could conceivably be without income or without the income he enjoyed[.] He also

knew that he would have between $1 million and $1.3 million at his disposal but instead established a trust placing the funds beyond his reach, except for loans, and beyond the reach of creditors, and ensuring one half million dollars per year to himself at age 65.

These findings sufficiently establish that any decrease in plaintiff's income was *voluntary* in that plaintiff put between $1 million and $1.3 million dollars in a trust where he could not reach it until age 65 and switched his career path by pursuing his dream job of working in the aviation industry. *See Mittendorf*, 133 N.C. App. at 344, 515 S.E.2d at 466 (holding a defendant's voluntary redirection of his career could not support a modification of support when the minor children's needs had not changed); *Schroader*, 120 N.C. App. at 795, 463 S.E.2d at 793 (holding that a custodial parent's voluntary reduction in income by quitting her employment to attend school could not lead to modification of child support in the absence of her showing a change in circumstances relating to the needs of the minor children). Although the trial court does not use the word "voluntary" in its findings of fact, its language sufficiently establishes that plaintiff voluntarily made the choices that led to his current predicament. *See Mittendorf*, 133 N.C. App. at 344, 515 S.E.2d at 466. Since the findings establish that any decrease in income was voluntary, a modification of child support was impermissible given that the minor children's needs did not decrease. *See Schroader*, 120 N.C. App. at 795, 463 S.E.2d at 793. Accordingly, I would hold that the trial court's findings support its conclusion that there has been no change of circumstances warranting modification of child support, and I would affirm the order of the trial court.

STATE OF NORTH CAROLINA v. BOBBY RAY McCOLLUM

No. COA05-845

(Filed 6 June 2006)

1. Criminal Law— prosecutor's argument—reference to World Trade Center attack

The trial court did not abuse its discretion in a first-degree murder case by failing to intervene ex mero motu during the State's closing argument that defendant contends included prejudicial matters outside the record, because: (1) the context for the prosecutor's comments was to explain that defendant's lack of a specific

motive could not absolve him of responsibility for the criminal act; (2) the prosecutor's reference to the World Trade Center attack was a reminder to the jury there is not always an explanation for why criminal actions occur, and was not an attempt to somehow equate defendant's actions with those of terrorists on 11 September 2001; and (3) argument of counsel must be left largely to the control and discretion of the presiding judge, and counsel is accorded wide latitude in the argument of hotly contested cases.

2. Criminal Law— prosecutor's argument—doctor's testimony could not impact or influence assessment of defendant's premeditation and deliberation

The trial court did not abuse its discretion in a first-degree murder case by failing to sustain defendant's objection to the prosecutor's closing argument that the jury was in a better position to assess defendant's state of mind than the doctor and that the doctor kept talking about terms of psychiatry which did not apply as opposed to legal terms, because: (1) the prosecutor's comments were neither extreme nor calculated to prejudice defendant; (2) the prosecutor apprised the jury that the doctor's testimony could not impact or influence their evaluation of whether defendant had the premeditation and deliberation to murder the victim; (3) the prosecutor's argument was not prejudicial toward defendant but rather an accurate statement regarding the law; and (4) defendant failed to show how the results of the trial would have been different absent such remarks.

3. Criminal Law— instructions—medical expert cannot testify to legal terms

The trial court did not err in a first-degree murder case by refusing to instruct the jury that a medical expert could not testify to legal terms.

4. Homicide— first-degree murder—requested instruction— premeditation and deliberation

The trial court did not err in a first-degree murder case by failing to read the entire jury instruction listing all seven circumstances whereby proof of defendant's premeditation or deliberation could be inferred regarding the unlawful killing of the victim, because: (1) not only did the trial court's actual instruction provide the substance of what defendant requested, but defense counsel declared the desired instruction on infliction of lethal wounds after the victim is felled was inapplicable to the facts of this case; (2) six of

the seven circumstances listed as being indicative of premeditation and deliberation were given to the jury; (3) so long as the substance of the requested instruction is provided, such instruction is sufficient; and (4) defense counsel admitted both the facts and the evidence did not warrant inclusion of the requested circumstance.

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

The remainder of defendant's assignments of error that were not briefed on appeal are deemed abandoned under N.C. R. App. P. 28(b)(6).

Judge WYNN concurring in the result.

Appeal by defendant from judgment entered 19 July 2004 by Judge J.B. Allen, Jr. in Alamance County Superior Court. Heard in the Court of Appeals 8 February 2006.

Attorney General Roy Cooper, by Special Deputy Attorney General Alexander McC. Peters, for the State.

Glover & Petersen, P.A., by Ann B. Petersen for defendant-appellant.

CALABRIA, Judge.

Bobby Ray McCollum ("defendant") appeals from a judgment entered upon a jury verdict finding him guilty of first-degree murder. He was sentenced to life imprisonment without parole in the North Carolina Department of Correction. We find no error.

The State presented the following evidence at trial: on 30 August 2003, Willis McCollum ("Willis"), defendant's brother, and Leon Evans ("Leon"), defendant's first cousin, asked Priscilla McCollum Jennings ("Priscilla"), defendant's sister and wife of the victim, Weldon Lamont Jennings ("Weldon"), if they could have a family cookout at Priscilla's mother's home. After Priscilla's mother agreed and Leon and Willis bought the food, Priscilla, Weldon, Leon, and Willis all made their way to Priscilla's mother's home. After cooking for approximately thirty minutes, Willis stated he saw defendant coming and proceeded, along with Leon, to argue with defendant regarding mowing lawns that day. Defendant had a side business mowing lawns and had expected both Willis and Leon to assist him that day. Weldon apparently made a joke referencing the argument between defendant and Willis and Leon. Defendant threw up his hands and left the cookout. Twenty minutes later, defendant returned and according to Priscilla "he just came right

around and put his hand on [Weldon's] head and put the gun to [Weldon's] head and pulled the trigger." Priscilla grabbed her granddaughter, ran into the house, and called 911.

Deputy Sheriff Christopher Ross ("Deputy Ross") testified he responded to the 911 call. Upon arrival, Deputy Ross met with Willis and was told defendant shot Weldon. Sergeant Gary Summers ("Sergeant Summers"), who had known defendant for nearly thirty years, proceeded to defendant's residence. Once apprehended by police, defendant stated "[h]ell, man, I shot him. I just meant to knock the s**t out of him with the gun, and it went off." Police retrieved the gun used by defendant in the shooting from defendant's home.

Defendant presented the following evidence at trial: Felicia McCollum ("Felicia"), defendant's wife of 22 years, testified that in June of 1984, defendant's brother, George, was shot and killed. The bullet, which was meant for defendant, went in defendant's jaw and through his neck before it struck George. Defendant became very withdrawn, distant, and paranoid. Felicia also testified that one year later, defendant's father fired a gun at him wounding his hand. Defendant and his father never spoke of the incident again and as a result, defendant carried around a tremendous amount of guilt once his father died. Finally, Felicia testified that in 1987 defendant's eldest daughter was born with a variety of congenital birth defects. This added to defendant's financial stress and with it, marital stress, as a result of dividing his time between work and the hospital.

Dr. James Bellard ("Dr. Bellard"), an expert in forensic psychiatry, testified to the following: defendant had post-traumatic stress disorder ("stress disorder"); major depression; and cognitive disorder. Dr. Bellard traced the stress disorder to the events surrounding the shooting of defendant's brother and explained how the stress disorder caused symptoms such as anxiety and irritability. Further, Dr. Bellard testified defendant's depression had similar ingredients to that of defendant's stress disorder. Due to the above medical diagnoses, Dr. Bellard testified "I don't believe that [defendant] was able to form the specific intent to kill [Weldon]." Dr. Bellard also stated "I think he wasn't able to fully appreciate the ramifications, the results of his actions."

At the conclusion of the trial, the jury returned a verdict finding defendant guilty of first-degree murder. The trial court sentenced defendant to life imprisonment without the possibility of parole. Defendant appeals.

I. *Closing Argument*:

Defendant argues the trial court erred in failing to intervene *ex mero motu* in permitting the State to include prejudicial matters that existed outside the record in its closing argument. Defendant also argues the trial court erred in permitting the State to contend in its closing argument certain matters contrary to the law. We disagree.

a. *No Objection*:

[1] "The standard of review when a defendant fails to object at trial is whether the [closing] argument complained of was so grossly improper that the trial court erred in failing to intervene *ex mero motu*." *State v. Trull*, 349 N.C. 428, 451, 509 S.E.2d 178, 193 (1998). "In determining whether the prosecutor's argument was . . . grossly improper, this Court *must examine the argument in the context in which it was given and in light of the overall factual circumstances to which it refers*." *State v. Hipps*, 348 N.C. 377, 411, 501 S.E.2d 625, 645 (1998) (emphasis added). " '[T]he impropriety of the argument must be gross indeed in order for this Court to hold that a trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument which defense counsel apparently did not believe was prejudicial when he heard it.' " *Id.* (quoting *State v. Johnson*, 298 N.C. 355, 369, 259 S.E.2d 752, 761 (1979)).

In the instant case, the prosecutor said the following without objection from defendant.

> We live in violent times. There have been many cold-blooded murders that seem to make no sense at all. And if you stop and think about it, you realize that. We've had presidents who were shot, who were assassinated. We've had 3,000 people in New York who were assassinated by the airplane flying into a building. Does it make any sense? Of course not. Is it rational[sic]? Certainly not. Is it murder? Absolutely.
>
> And that's what the defendant did in this case. He executed Mr. Jennings. The word assassinate, in Webster's Dictionary, means a murderer who strikes suddenly and by surprise. The word assassinate means to murder by surprise, to attack, to murder by surprise attack.

In accordance with *Hipps*, *supra*, examining the closing argument in light of both the given context and factual circumstances, it is clear the trial court did not err in failing to intervene *ex mero motu*. First, the

context for the prosecutor's comments was to explain that defendant's lack of a specific motive could not absolve him of responsibility for the criminal act. Defendant argued at trial because he lacked motive to murder Mr. Jennings, he also lacked the necessary premeditation and deliberation to commit first-degree murder. Second, the prosecutor's reference to the World Trade Center attack was a reminder to the jury there is not always an explanation for why criminal actions occur, not an attempt to somehow equate defendant's actions with those of terrorists on 11 September 2001. Furthermore, our Supreme Court has "held in numerous cases that argument of counsel must be left largely to the control and discretion of the presiding judge and that counsel must be allowed wide latitude in the argument of hotly contested cases." *State v. Monk*, 286 N.C. 509, 515, 212 S.E.2d 125, 131 (1975) (citations omitted). Therefore, because the remarks by the prosecutor were not so grossly improper as to require intervention, we hold the trial court was correct in not intervening *ex mero motu*.

b. *Objection*:

[2] "The standard of review for improper closing arguments that provoke timely objection from opposing counsel is whether the trial court abused its discretion by failing to sustain the objection." *State v. Jones*, 355 N.C. 117, 131, 558 S.E.2d 97, 106 (2002). "In order to assess whether a trial court has abused its discretion when deciding a particular matter, this Court must determine if the ruling 'could not have been the result of a reasoned decision.' " *Id.* (quoting *State v. Burrus*, 344 N.C. 79, 90, 472 S.E.2d 867, 875 (1996). Nevertheless, because "[a]rguments of counsel are largely in the control and discretion of the trial court[,] [t]he appellate courts ordinarily will not review the exercise of that discretion unless the *impropriety of counsel's remarks is extreme and is clearly calculated to prejudice the jury*." *State v. Huffstetler*, 312 N.C. 92, 111, 322 S.E.2d 110, 122 (1984) (emphasis added).

In the instant case, the prosecutor said the following:

> Now, indeed, members of the jury, you folks heard a lot more, seen a lot more and know a lot more about this case than Dr. Bellard knows. You are in a much better position to assess the defendant's state of mind and his actions than the doctor. And not to mention the fact that Dr. Bellard kept talking about terms of psychiatry, which do not apply as opposed to legal terms which do. You must decide does the evidence prove. . . .

In accordance with *Huffstetler*, *supra*, the prosecutor's comments were neither extreme nor calculated to prejudice the defendant. In fact, the

prosecutor apprised the jury that Dr. Bellard's testimony could not impact or influence their evaluation of whether or not defendant had the premeditation and deliberation to murder Mr. Jennings. This was not done, as argued by defendant, to suggest "the jury should find that [defendant] had premeditation and deliberation because Dr. Bellard never testified that he did not." The prosecutor's argument was not prejudicial towards defendant but rather an accurate statement regarding the law. *See State v. Daniel*, 333 N.C. 756, 763, 429 S.E.2d 724, 729 (1993) (stating "we have held that testimony by medical experts relating to precise legal terms such as premeditation or deliberation . . . should be excluded.") Moreover, error "is prejudicial *only upon a showing by the defendant that* there is a reasonable possibility that, *had the error in question not been committed, a different result would have been reached* at the trial." *State v. McEachin*, 142 N.C. App. 60, 70, 541 S.E.2d 792, 799 (2001) (citation and internal quotation marks omitted) (emphasis added). Though defendant argues this portion of the prosecutor's closing argument was unfair and ultimately prejudicial, he fails to clearly illustrate why the result would have been any different absent such remarks. We discern no abuse of discretion by the trial court and consequently, defendant's assignments of error pertaining to the State's closing argument are overruled.

II. *Jury Instruction not Given*:

[3] Defendant next argues the trial court erred in refusing to instruct the jury that a medical expert could not testify to legal terms. We disagree. Here, defendant's entire argument is premised on the proposition that the prosecutor's closing argument, informing the jury that Dr. Bellard's testimony could not impact or influence their assessment of whether or not defendant had the premeditation and deliberation to murder Mr. Jennings, was error. That argument was refuted above and remains equally unavailing here. This assignment of error is overruled.

III. *Jury Instruction Given*:

[4] Defendant argues the trial court erred in not reading the entire jury instruction listing all seven circumstances whereby proof of defendant's premeditation or deliberation could be inferred regarding the unlawful killing of Mr. Jennings. Defendant contends though the trial court charged the jury in accordance with Pattern Jury Instruction 206.13, the court's rendition excluded one of the circumstances from the list of seven circumstances and this exclusion constituted reversible error. We disagree.

Though "[a] trial court must give a requested instruction that is a correct statement of the law and is supported by the evidence[,] [t]he trial court need not give the requested instruction verbatim [for] an instruction that gives the substance of the requested instructions is sufficient." *State v. Conner*, 345 N.C. 319, 328, 480 S.E.2d 626, 629 (1997) (citations omitted). In the instant case, not only did the actual instruction by the trial court provide the substance of what defendant requested, but defendant's counsel declared the desired instruction was inapplicable to the facts of this case.

Pattern Jury Instruction 206.13 reads as follows:

> Neither premeditation or deliberation are usually susceptible of direct proof. They may be proved by circumstances from which they may be inferred, such as the lack of provocation by the victim, conduct of the defendant before, during, and after the killing, threats and declarations of the defendant, use of grossly excessive force, infliction of lethal wounds after the victim is felled, brutal or vicious circumstances of the killing, [and] manner in which or the means by which the killing was done.

The actual instruction given by the trial court excepted the circumstance of "infliction of lethal wounds after the victim is felled." Thus, six of the seven circumstances listed as being indicative of premeditation and deliberation were given to the jury. This appears to follow the prescription of *Conner*, *supra*, that so long as the "substance" of the requested instruction is provided, such an instruction is sufficient. Moreover, in arguing for inclusion of the excepted circumstance, defendant's counsel asserted "I realize it did not happen in this case, the infliction of lethal wounds after the victim was felled, but all the others were read." The trial court acknowledged excluding this circumstance stating "I made the determination . . . there was evidence to support all those circumstances, except infliction of lethal wounds after the victim has felled[.]" Consequently, since defendant's counsel admitted both the facts and the evidence did not warrant inclusion of the requested circumstance, the "substance" of his request was in fact given. We overrule this assignment of error.

[5] The remainder of defendant's assignments of error were not briefed on appeal and thus, according to N.C. R. App. P. 28(b)(6) (2005), they are abandoned.

No error.

Judge BRYANT concurs.

Judge WYNN concurs in the result.

WYNN, Judge, concurring in the result.

I do not agree with the majority's conclusion that "because the remarks by the prosecutor were not so grossly improper as to require intervention, we hold the trial court was correct in not intervening *ex mero motu*." Instead, in my opinion, trial court erred in its failure to intervene *ex mero motu* to protect Defendant's rights and to preserve the sanctity of the proceedings. But I concur in the majority's result because this error does not amount to prejudicial error.

Where a defendant has not objected to a closing argument, the standard of review on appeal is whether the trial court erred in failing to intervene *ex mero motu* to protect the rights of the parties and the sanctity of the proceedings. *State v. Walters*, 357 N.C. 68, 101-02, 588 S.E.2d 344, 364, *cert. denied*, 540 U.S. 971, 157 L. Ed. 2d 320 (2003). The reviewing court must determine whether the trial court should have "intervened on its own accord and: (1) precluded other similar remarks from the offending attorney; and/or (2) instructed the jury to disregard the improper comments already made." *State v. Jones*, 355 N.C. 117, 133, 558 S.E.2d 97, 107 (2002).

In *State v. Jones*, our Supreme Court held that a prosecutor's comparative references between the defendant's shootings and the Columbine shootings and the bombing of the federal building in Oklahoma City were improper because they (1) "referred to events and circumstances outside the record;" (2) "urged jurors to compare defendant's acts with the infamous acts of others;" and (3) "attempted to lead jurors away from the evidence by appealing instead to their sense of passion and prejudice." *Jones*, 355 N.C. at 132, 558 S.E.2d at 107. The Court found the impact of the prosecutor's remarks was "too grave to be easily removed from the jury's consciousness[,]" even with instructions to the jury to disregard the statements. *Id.*

Subsequent to our Supreme Court's decision in *Jones*, this Court awarded a new trial to a defendant where the prosecutor made a comparison of the defendant's acts to those of the 11 September 2001 terrorists. *State v. Millsaps*, 169 N.C. App. 340, 610 S.E.2d 437 (2005). The prosecutor in *Millsaps* stated in relevant part:

> They want you to disregard all that evidence of strong motive and say, well, he just had this crazy delusion about following God's

> orders. Yeah, *that's like people that fly airplanes into buildings for their ends and claim to be doing God's work.*

Id. at 346-47, 610 S.E.2d at 442 (emphasis in original). The *Millsaps* Court held that the prosecutor's remarks "appealed to the jury's 'sense of passion and prejudice' by comparing defendant's acts to infamous events outside the record." *Id.* at 349, 610 S.E.2d at 443. The Court explained:

> defendant's commission of the shootings and his mental defect at the time of the shootings were both uncontested; the contested issue at trial was whether defendant knew right from wrong at the time he committed the acts. We cannot say beyond a reasonable doubt that the improper and prejudicial argument by the prosecutor, which was neither checked nor cured by the trial court, did not contribute to defendant's conviction. A different result might have been reached had the trial court properly exercised its discretion to control the prosecutor's misleading characterizations and improper inferences. Therefore, we have no choice but to award defendant a new trial.

Id.

Although the facts in *Millsaps* are strikingly similar to the facts in the instant case, it should be noted that the defendant in *Millsaps* objected to the prosecutor's remarks at trial and that Defendant in this case did not. However, as it relates to counsel's failure to object to closing arguments, our Supreme Court explained:

> . . . this Court is mindful of the reluctance of counsel to interrupt his adversary and object during the course of closing argument for fear of incurring jury disfavor. Thus, it is incumbent on the trial court to monitor vigilantly the course of such arguments, to intervene as warranted, to entertain objections, and to impose any remedies pertaining to those objections. Such remedies include, but are not necessarily limited to, requiring counsel to retract portions of an argument deemed improper or issuing instructions to the jury to disregard such arguments.

Jones, 355 N.C. at 129, 558 S.E.2d at 105.

As "it is incumbent on the trial court to monitor vigilantly the course of such arguments [and] to intervene as warranted," *see Jones*, 355 N.C. at 129, 558 S.E.2d at 105, I would hold the trial court erred in its failure to intervene *ex mero motu* to protect Defendant's rights.

Notwithstanding, for reasons given in the majority opinion, I would hold that this error was not prejudicial and thus Defendant is not entitled to a new trial as a result of this error. *Cf. Millsaps*, 169 N.C. App. at 349, 610 S.E.2d 443 (awarding a new trial where the court could not "say beyond a reasonable doubt that the improper and prejudicial argument by the prosecutor, which was neither checked nor cured by the trial court, did not contribute to defendant's conviction.").

STATE OF NORTH CAROLINA v. JASPER KALVEN SUMMERS

No. COA05-1248

(Filed 6 June 2006)

1. Appeal and Error— preservation of issues—failure to make timely objection

Although defendant contends the trial court erred in a first-degree rape, attempted first-degree rape, triple first-degree sexual offense, attempted robbery with a dangerous weapon and first-degree kidnapping case by denying defendant's motion for a mistrial even though he contends the evidence of identification was so thoroughly tainted and defendant was prejudiced by his inability to properly present a defense, defendant failed to properly preserve this issue for review, because: (1) defense counsel knew about the alleged improper photo line-up prior to the victim's related testimony, but raised no objection when the victim testified about the photo line-up and instead waited until the testimony of an additional witness before objecting and moving for a mistrial; and (2) based on these facts, defendant failed to make a timely objection.

2. Evidence— prior crimes or bad acts—common plan or scheme

The trial court did not abuse its discretion in a first-degree rape, attempted first-degree rape, triple first-degree sexual offense, attempted robbery with a dangerous weapon and first-degree kidnapping case by admitting the testimony of a State's witness that she had also been attacked by defendant even though defendant contends the evidence was not sufficiently similar and was introduced for allegedly improper reasons, because: (1) the two attacks were sufficiently similar and not too remote in time as to logically establish a common plan or scheme to commit the offense charged; and

(2) the testimony did not violate N.C.G.S. § 8C-1, Rule 403 since it did not have an undue tendency to suggest a decision on an improper basis when offered for the limited purpose of showing a common plan or scheme.

3. Appeal and Error— appellate rules violations—failure to include standard of review

Although defendant contends the trial court erred by entering a judgment as to three different sexual offenses even though the indictments for all three are identical and allegedly do not put defendant on notice of three different crimes, this assignment of error is dismissed because defendant violated N.C. R. App. P. 28(b)(6) by failing to include a standard of review.

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

The remaining assignments of error that defendant failed to argue are deemed abandoned under N.C. R. App. P. 28(b)(6).

Appeal by defendant from judgments entered 13 December 2004 by Judge J. Gentry Caudill in Guilford County Superior Court. Heard in the Court of Appeals 13 April 2006.

Attorney General Roy Cooper, by Assistant Attorney General Leonard Green, for the State.

Richard E. Jester for defendant-appellant.

CALABRIA, Judge.

Jasper Kalven Summers ("defendant") appeals from judgments entered upon jury verdicts finding him guilty of first degree rape, attempted first degree rape, three counts of first degree sexual offense, attempted robbery with a dangerous weapon, and first degree kidnapping. We find no error.

In the Fall of 1992, J.P.[1] (the "victim") was a student at the University of North Carolina at Greensboro. At about midnight on 05 November 1992, the victim drove her car to a laundry facility at her apartment complex to retrieve clothes she had left there to dry. While the victim was inside alone, defendant entered and asked her where he might find a telephone. The victim told him there might be one in the office around the corner, and defendant departed. Approximately one

1. We will use the victim's initials rather than her full name in order to protect her identity.

minute later, defendant returned, brandished a knife, and demanded that the victim give him money. The victim responded that she did not have any money on her person but that she had $12 in her car. At this point, defendant pressed the knife against the victim's throat and threatened her with death if she screamed. Defendant ordered the victim into her car, forcing her through the driver's side door into the passenger seat. Defendant then entered the driver's seat, and he ordered the victim to place her head below the dashboard, to start the car, and to put the car in gear. Defendant held the victim's head below the dashboard and drove a short distance.

After stopping the car, defendant reclined the driver's seat, unzipped his pants, and exposed his penis. Defendant held a knife to the victim's throat and ordered her to perform fellatio on him. The victim, frightened for her life, used her hands to arouse defendant. Defendant became agitated that the victim did not comply with his request, and he again ordered the victim to perform fellatio. The victim complied. While the victim performed fellatio, defendant rubbed his hand over her pubic area. Defendant subsequently stopped the victim, and she returned to a sitting position in the passenger seat. Defendant continued to threaten the victim with the knife, and he got on top of the victim, pulled her shorts and underwear aside, and unsuccessfully attempted to engage in intercourse with her. Still holding the knife, defendant again ordered the victim to perform fellatio, and the victim complied. At this point, defendant ordered the victim to remove her shorts and underwear. Defendant again got on top of the victim in the passenger seat, and he had sexual intercourse with her. Defendant then ordered the victim out of the car, and he drove away. The victim contacted the Greensboro Police Department ("Greensboro P.D."). Greensboro P.D. located the victim's car near the location of the assault; however, they could not locate defendant at that time.

About a month later, the victim saw defendant riding a bicycle on the street near where the assault had taken place; however, Greensboro P.D. was unable to locate him despite patrolling the area with the victim on several occasions. Subsequently, Greensboro P.D. showed the victim a photo line-up of males meeting defendant's description. Defendant's photo was not included in the photo line-up, and the victim reported that none of the pictures were the assailant. After failing to apprehend a suspect, Greensboro P.D. eventually closed its investigation.

In October 2003, Greensboro P.D. implemented a review of several old cases, incorporating the State Bureau of Investigation's ("S.B.I.") DNA database. Greensboro P.D. had maintained in evidence the shorts

the victim had been wearing the night of the attack, which were stained with semen. The shorts were sent to the SBI lab for analysis, and the SBI lab matched the DNA in the semen to defendant. Greensboro P.D. then obtained a search warrant, ordering defendant to provide a blood sample. The DNA in the blood and the semen matched, and an SBI expert testified that the DNA matched so closely that it was scientifically unreasonable to believe that the semen on the victim's shorts came from anyone other than defendant.

In May 2004, *The News & Record*, a newspaper published in Greensboro, intended to publish a story about the crime and defendant's arrest, and the newspaper planned on including defendant's picture in the report. Solely to reduce the victim's trauma in the event she saw the newspaper report, a Greensboro P.D. officer summoned the victim to the police department to show her the picture before she saw it in the report. Although the officer did not show the victim the picture for identification purposes, the victim stated that the man in the picture, defendant, was the man who attacked her.

The Grand Jury subsequently indicted defendant for first degree rape, attempted first degree rape, three counts of first degree sexual offense, armed robbery, and first degree kidnapping. On the date of trial, defendant's attorney, unaware that the victim had been shown defendant's picture in May, requested an identification line-up pursuant to N.C. Gen. Stat. § 15A-281 (2005). The District Attorney protested to a physical line-up due to the late date of the request but offered to conduct a photo line-up. The trial judge also expressed concern over the late request. Defense counsel agreed to the photo line-up, and the same picture that the victim had been shown in May 2004 was utilized in the line-up. The victim again identified defendant as her attacker. After the trial began but before the victim testified regarding the photo line-up, the State notified defense counsel that the victim had previously seen the same picture used in the line-up. Defense counsel made no objection to the use of the photo line-up in evidence at the time the State introduced it; however, defense counsel subsequently made a motion for a mistrial based upon the State's failure to disclose to defense counsel that the victim had previously seen the same picture used in the photo line-up. The trial judge denied the motion for a mistrial. Defense counsel then moved that all the evidence of the photo line-up be stricken from evidence as a sanction against the District Attorney for failing to comply with discovery rules. The trial court granted this motion.

The jury subsequently found defendant guilty of all charges. The trial court sentenced defendant in the aggravated range to consecutive

sentences in the North Carolina Department of Correction as follows: (1) life imprisonment for first degree rape and each of the three first degree sexual offenses, (2) 20 years imprisonment for attempted first degree rape, (3) 40 years imprisonment for attempted robbery with a dangerous weapon, and (4) 30 years for first degree kidnapping. Defendant appeals.

[1] Defendant initially argues that the trial court erred in denying his motion for mistrial because "the evidence of identification was so thoroughly tainted and the defendant was prejudiced by his inability to properly present his defense as to the identification[.]" We hold that this assignment of error has not been properly preserved for our review.

The North Carolina Rules of Appellate Procedure state, in pertinent part, "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." N.C. R. App. P. 10 (2006) (emphasis added). Additionally, N.C. Gen. Stat. § 15A-1446 (2005) states:

> (a) Except as provided in subsection (d), error may not be asserted upon appellate review unless the error has been brought to the attention of the trial court *by appropriate and timely objection or motion*. . . .
>
> (b) Failure to make an appropriate and timely motion or objection *constitutes a waiver of the right to assert the alleged error upon appeal*[.] . . .

We have held the "sound rationale which undergirds this requirement is the recognized need that alleged errors in the trial be made clear to the trial judge, at some time sufficiently close to the occurrence of the errors to permit their correction." *State v. Smith*, 96 N.C. App. 352, 355, 385 S.E.2d 808, 810 (1989) (citation and quotations omitted). The rule "is a crucial means of ensuring that trials are conducted free from the taint of prejudice. This is particularly true in the context of a motion for mistrial, the very purpose of which is to provide a remedy where 'substantial and irreparable prejudice' results from error in the proceedings." *Id.*

On the facts of this case, defense counsel knew about the improper photo line-up prior to the victim's related testimony; however, defense counsel raised no objection when the victim testified about the photo line-up. Rather, defense counsel waited until the testimony of an additional witness before objecting and moving for a mistrial. On these

facts, we hold defendant failed to make a timely objection, and his assignment of error relating to the trial court's failure to declare a mistrial has not been properly preserved for our review. *See State v. Hunt*, 324 N.C. 343, 355, 378 S.E.2d 754, 761 (1989) ("Failure to object when identification is made before the jury is a waiver of the right to have the propriety of that identification considered by the appellate court"); *Smith*, 96 N.C. App. at 355, 385 S.E.2d at 810 ("The plain language of G.S. § 15A-1446 does not permit defendant to raise on appeal the denial of his eleventh-hour motion for mistrial").

[2] Defendant next argues that the testimony of State witness J.G.[2] ("J.G.") was improperly admitted because the evidence "was not sufficiently similar and . . . introduced for improper reasons" in violation of N.C. R. Evid. 404(b) (2005). Defendant also argues "the prejudicial effect of that evidence outweighed its probative value" under N.C. R. Evid. 403 (2005).

North Carolina Rule of Evidence 404(b) states,

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as . . . plan [and] identity[.]

N.C. R. Evid. 404(b) (2006).

In analyzing this rule, we have said,

> [Rule 404(b)] is a clear general rule of inclusion of relevant evidence of other crimes . . . by a defendant, subject but to 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. Kennedy, 130 N.C. App. 399, 403, 503 S.E.2d 133, 135 (1998). Additionally, our courts have been "markedly liberal in admitting evidence of similar sex offenses by a defendant for the purposes now enumerated in Rule 404(b) such as establishing the defendant's identity as the perpetrator of the crime charged." *State v. Bidgood*, 144 N.C. App. 267, 271, 550 S.E.2d 198, 201 (2001) (citations omitted). Two constraints govern admission of evidence under Rule 404(b): similarity and temporal proximity. *Id.* For the purposes of showing identity, "[u]nder Rule 404(b) a prior crime is similar to the one charged if some unusual facts or particularly similar acts are present in both which would indicate that both crimes were committed by the same person." *State v. Moore*,

2. We will use the witness's initials in order to protect her identity.

335 N.C. 567, 596, 440 S.E.2d 797, 813 (1994). For prior similar acts to be admissible, "[s]imilarities need not be bizarre or uncanny; they simply must 'tend to support a *reasonable* inference that the same person committed both the earlier and later acts.' " *State v. Murillo*, 349 N.C. 573, 593, 509 S.E.2d 752, 764 (1998). Moreover, "evidence of another crime is admissible to prove a common plan or scheme to commit the offense charged. But, the two acts must be sufficiently similar as to logically establish a common plan or scheme to commit the offense charged, not merely to show the defendant's character or propensity to commit a like crime." *State v. Willis*, 136 N.C. App. 820, 822-23, 526 S.E.2d 191, 193 (2000). "Remoteness in time [between the other crimes and the current charges] generally goes to the weight of the evidence not its admissibility." *State v. Harrington*, 171 N.C. App. 17, 31, 614 S.E.2d 337, 348 (2005) (citations omitted).

"Once the trial court determines evidence is properly admissible under Rule 404(b), it must still determine if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice" under Rule 403. *Bidgood*, 144 N.C. App. at 272, 550 S.E.2d at 202. North Carolina Rule of Evidence 403 states, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of . . . unfair prejudice." In construing this rule, we have said, "[A]ll evidence favorable to the [State] will be, by definition, prejudicial to defendants. The test under Rule 403 is whether that prejudice to defendants is unfair." *Matthews v. James*, 88 N.C. App. 32, 39, 362 S.E.2d 594, 599 (1987). The term "unfair prejudice" means "an undue tendency to suggest decision on an improper basis[.]" *State v. DeLeonardo*, 315 N.C. 762, 772, 340 S.E.2d 350, 357 (1986).

We review a trial court's determination to admit evidence under N.C. R. Evid. 404(b) and 403, for an abuse of discretion. *State v. Aldridge*, 139 N.C. App. 706, 714, 534 S.E.2d 629, 635 (2000) (regarding the standard of review for Rule 404(b)); *State v. Mason*, 315 N.C. 724, 731, 340 S.E.2d 430, 435 (1986) (regarding the standard of review for Rule 403). An abuse of discretion occurs when a trial judge's ruling is "manifestly unsupported by reason." *State v. Riddick*, 315 N.C. 749, 756, 340 S.E.2d 55, 59 (1986) (citations omitted).

In the case *sub judice*, the trial judge conducted a *voir dire* hearing concerning J.G.'s testimony. J.G. testified that on one evening in January of 1993, sometime between 6:30 p.m. and 7:30 p.m., she was getting ready to leave her office, which was located in Greensboro. During this time period, J.G. was alone, and she was loading items into her car

when she saw a person, later identified as defendant, approaching her from the back corner of her building. Defendant, who had a pistol, grabbed J.G. around the upper portion of her body, and J.G. struggled to get away, beating on defendant's face and shoulders. During the attack, defendant struck J.G. with the pistol several times. J.G. testified that defendant then grabbed her around the waist, and as she struggled, she fell to the ground. While J.G. was on the ground, she began kicking defendant and was able to get up and run away. J.G. stopped another vehicle and told the driver she had been attacked. The vehicle took J.G. to a location where she called the police. Based on this and related testimony, the trial court made the following relevant findings of fact:

> That [J.G] has positively identified the defendant as the perpetrator of the crime against her and the defendant has in fact tendered a plea of guilty to that offense.
>
> That the offenses against [J.G.] and against [the victim] occurred in the limits of the City of Greensboro approximately three miles apart.
>
> That both attacks occurred in the evening hours and during the hours of darkness.
>
> That both victims were alone at the time that they were attacked.
>
> That the attacker was armed on each occurrence with a deadly weapon.
>
> That both victims were injured during the encounter with the attacker.
>
> That in both instances the victim's car was nearby the place of the attack and was involved in the attack.
>
> That both victims were similar in age and both were white females.
>
> In both instances, the attacker showed a high degree of determination to complete his plan with regard to the victims.
>
> That [the] attack on [J.G.] occurred approximately two months after the attack on [the victim].

The trial court then concluded that there was a reasonable inference the same person committed both crimes and the evidence was relevant to show plan, *modus operandi*, and identity.

Defendant argues that the facts of this case and the facts of J.G.'s case do not meet the similarity and temporal proximity requirements of

Rule 404(b) because: (1) the attack on J.P. was three miles away from where the attack on J.G. occurred; (2) the attack on J.P. occurred approximately four to five hours later in the evening than the attack on J.G.; (3) the weapon used in the attack on J.P. was a knife, but the weapon used in the attack on J.G. was a handgun; (4) J.P. was raped, but J.G. received only minor injuries; and (5) J.P. was inside a building when first accosted, but J.G. was near her car.

We need not address whether the evidence presented supports a reasonable inference that the same person committed both the earlier and later attacks in this case because we hold the trial court did not abuse its discretion in determining that the two attacks were sufficiently similar, and not too remote in time, as to logically establish a common plan or scheme to commit the offense charged. *See, e.g.*, *State v. Williams*, 308 N.C. 357, 360, 302 S.E.2d 438, 440 (1983); *State v. Whitaker*, 103 N.C. App. 386, 388, 405 S.E.2d 911, 911 (1991).[3] Furthermore, the trial court did not abuse its discretion in admitting J.G.'s testimony over defendant's N.C. R. Evid. 403 objection since it did not have an undue tendency to suggest a decision on an improper basis when offered for the limited purpose of showing a common plan or scheme. *See State v. Chavis*, 141 N.C. App. 553, 565, 540 S.E.2d 404, 413 (2000). Accordingly, defendant's related assignments of error are without merit.

[3] Defendant also argues that "the trial court erred in entering a judgment as to three different sexual offenses when the indictments for all three are identical and do not put the defendant on notice of three different crimes." We decline to address this argument because defendant has violated the North Carolina Rules of Appellate Procedure by failing to include a standard of review.

The North Carolina Rules of Appellate Procedure state, in pertinent part,

> The argument shall contain a concise statement of the applicable standard(s) of review for each question presented, which shall appear either at the beginning of the discussion of each question presented or under a separate heading placed before the beginning of the discussion of all the questions presented.

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3. We also note, even assuming *arguendo* that the trial court erred, any error would be harmless given the victim's testimony identifying defendant as the perpetrator and the DNA evidence linking him to the crime. N.C. Gen. Stat. § 15A-1443(a) (2005); *State v. Gardner*, 316 N.C. 605, 613, 342 S.E.2d 872, 877 (1986).

N.C. R. App. P. 28(b)(6) (2006). Our Supreme Court added this language to Rule 28(b)(6) in August 2005, and the amendment became effective on 1 September 2005. Defendant's brief was filed on 8 November 2005, after the effective date. Yet, although defendant includes a section entitled "Standard of Review" at the beginning of the question presented, defendant fails to state the applicable standard of review related to the question of the sufficiency of the indictments. Likewise, defendant does not include this standard of review in a separate heading before the beginning of the discussion of all questions presented. Indeed, defendant does not state the applicable standard of review in any portion of his brief. Since defendant failed to brief the applicable standard of review, we do not address this assignment of error. *See Munn v. N.C. State Univ.*, 360 N.C. 353, 626 S.E.2d 270 (2006), *rev'g per curiam* for the reasons in 173 N.C. App. 144, 617 S.E.2d 335 (2005) (Jackson, J. dissenting) (stating that dismissal for rule violations is warranted "even though such violations neither impede our comprehension of the issues nor frustrate the appellate process" (citations omitted)); *Viar v. N.C. Dep't. of Transp.*, 359 N.C. 400, 401, 610 S.E.2d 360, 361 (2005).

[4] Defendant has failed to argue his remaining assignments of error, and we deem them abandoned pursuant to N.C. R. App. P. 28 (b)(6) (2006) ("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").

No error.

Judges McCULLOUGH and STEELMAN concur.

IN THE MATTER OF: D.H., C.H., B.M., C.H. III

No. COA05-1501

(Filed 6 June 2006)

Termination of Parental Rights— failure to appoint guardian ad litem—mental health issues of parent

The trial court did not err by terminating respondent mother's parental rights without appointing a guardian ad litem (GAL) under N.C.G.S. § 7B-1101 or N.C.G.S. § 1A-1, Rule 17 even though respondent contends her mental health problems were substantially inter-

twined with DSS's allegations of grounds to terminate her parental rights, because: (1) respondent did not request a GAL be appointed, and a psychologist who testified did not recommend the trial court appoint a GAL for respondent; (2) the trial court did not make repeated findings that respondent was incapable of parenting her minor children based upon her mental illness; and (3) the termination of respondent's parental rights was not based on mental health issues, but instead on neglect, willfully leaving the children in foster care for more than twelve months without showing reasonable progress, willfully failing to provide financial support to the children, and abandonment of the children for at least six months immediately preceding the filing of the petition.

Appeal by respondent mother from order entered 1 June 2005 by Judge James T. Hill for Durham County District Court. Heard in the Court of Appeals 11 May 2006.

Cathy L. Moore, for petitioner-appellee Durham County Department of Social Services.

Wendy C. Sotolongo, for petitioner-appellee Guardian ad Litem.

Richard Croutharmel, for respondent-appellant.

TYSON, Judge.

K.K. ("respondent") appeals from order entered terminating her parental rights to her minor children, D.H. and C.H., born in July 2000, B.M., born in September 1998, and C.H. III, born in February 2002. We affirm.

I. Background

Respondent was allegedly gang raped by approximately ten boys from her school on 15 September 1993, when she was fifteen years of age and no charges were filed. Respondent refused to testify against the alleged assailants. During the proceedings leading up to this appeal, respondent was diagnosed with post-traumatic stress disorder as a result of these alleged offenses.

Respondent dropped out of high school during the tenth grade. She worked in fast food restaurants and as a nurse's aid until 1999 when she moved into her boyfriend's home. Her boyfriend supported her financially.

By the time respondent was twenty-three years old, she had given birth to five children. Durham County Department of Social Services

("DSS") filed a juvenile petition alleging neglect of C.H. and D.H. on 21 December 2001. On 28 March 2002, the trial court adjudicated these children neglected. The children were placed in DSS's custody.

In April 2002, respondent admitted to using illegal drugs. In May 2002, respondent was arrested on twenty-three charges, including possession of cocaine and marijuana with the intent to sell or deliver, possession of marijuana and Schedule IV narcotics, maintaining a dwelling for the sale of drugs, and six charges of obtaining property by false pretenses. After respondent was released from jail, she moved into the home of Mr. H., the father of C.H. III, C.H., and D.H.

On 17 October 2002, respondent, Mr. H., and Mr. H.'s mother were arrested during a drug raid at Mr. H.'s home. At that time, all of her children went to live with respondent's mother. After release from jail, respondent moved into her mother's residence.

DSS filed another juvenile petition alleging neglect of T.H., B.M., and C.H. III on 21 November 2002 due to concerns respondent might remove the children from her mother's home. The trial court adjudicated B.M. and C.H. III to be neglected on 9 April 2003. All three children were placed in DSS's custody.

Respondent continued to reside in her mother's home. She made progress during this time. Respondent contacted the Durham Center in April and May 2003 for mental health services. She completed a parenting program. Respondent assisted in the daily care of the children. The medical provider for the twins, D.H. and C.H., stated, "[t]he mother of the children . . . has shown steady progress personally while living with her mother and her children."

Mr. H. was released from prison on 18 June 2003. Following his release, respondent missed several mental health appointments and was fired from her job. On 12 August 2003, police responded to a domestic violence complaint at respondent's mother's home. The police requested respondent and Mr. H. to leave her mother's home. Following this event, respondent resided with Mr. H.'s family at multiple addresses until April 2005, when she moved into her sister's home.

The children remained in the maternal grandmother's home. The childrens' guardian *ad litem* ("GAL") advocated to remove all four children from their grandmother's home due to "the state of filth demonstrated by the children (and extreme odor), lack of medical care and demonstrated level of hunger." The GAL also reported respondent

stated her children were not hungry and described the children as, "my children are greedy children, greedy children."

The trial court changed the permanent plan to adoption and ordered DSS to initiate termination of all parental rights on 25 May 2004. On 4 August 2004, the trial court ordered the parties to participate in mediation on the issue of placement of the children. DSS filed a motion to terminate the parental rights of the parents on 24 August 2004.

On 6 December 2004, respondent's attorney filed a motion to withdraw due to lack of contact with respondent. The trial court granted that motion on 23 December 2004. On 11 February 2005, the Durham County Public Defender assigned a court appointed attorney to represent respondent.

The trial court conducted the termination hearing on 5 and 6 May 2005 and terminated respondent's parental rights to C.H., D.H., B.M., and C.H. III. At the time of the hearing, respondent admitted she had not seen C.H., D.H., or C.H. III since January 2004 and had seen B.M. four times during the preceding year. Respondent appeals.

II. Issues

Respondent argues the trial court erred by proceeding to terminate her parental rights without appointing a guardian *ad litem* because her mental health problems were substantially intertwined with DSS's allegations of grounds to terminate her parental rights.

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).

The trial court's "conclusions of law are reviewable *de novo* on appeal." *Starco, Inc. v. AMG Bonding and Ins. Servs.*, 124 N.C. App. 332, 336, 477 S.E.2d 211, 215 (1996).

IV. Appointment of a GAL

N.C. Gen. Stat. § 7B-1101 governs the appointment of a GAL during termination of parental rights proceedings. N.C. Gen. Stat. § 7B-1101 (2003) provides, the trial court shall appoint a GAL to a parent "where it is alleged that a parent's rights should be terminated pursuant to [N.C.

Gen. Stat. § 7B-1111(a)(6)], and the incapability to provide proper care and supervision pursuant to that provision is the result of . . . mental illness, organic brain syndrome, or another similar cause or condition."

In its motion to terminate respondent's parental rights, DSS alleged:

a. The mother has neglected the children, and the children are neglected children within the meaning of N.C. Gen. Stat. § 7B-101(15). There is a reasonable probability of the repetition of neglect.

b. The mother has wilfully left the children in foster care for more than twelve (12) months without showing to the satisfaction of the Court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the children.

c. The children have been placed in the custody of Durham DSS and the mother, for a continuous period of six (6) months next preceding the filing of the petition, has wilfully failed for such period to pay a reasonable portion of the cost of care for the children although physically and financially able to do so.

d. The mother has wilfully abandoned the children for at least six (6) consecutive months immediately preceding the filing of the petition.

In the adjudication and termination petitions, DSS did not allege respondent's minor children were dependent. In the adjudication order of B.M. and C.H. III, the trial court stated, "[t]he mother is unable to provide appropriate care and supervision for the children due to her mental health issues, criminal involvement, and general instability."

In the adjudication order of C.H. and D.H., the trial court made the following finding of fact, "[a] specific factor as to the mother is that she appears to be depressed and that it appears that she had some mental health issues which may have impaired her ability to consistently follow through on the children's needs." When the trial court reviewed the matter for all of the children on 8 July 2003, 1 October 2003, 3 December 2003, 2 March 2004, 25 May 2004, and August 2004, it ordered respondent to "continue to seek mental health treatment through The Durham Center." Respondent argues, "[a] trial court's failure to appoint a [GAL] for a respondent-parent with mental health issues early on in abuse and neglect proceedings . . . is reversible error where the termination of parental rights was based, in part, on the mental health issues."

This Court held in *In re O.C. and O.B.*, "the motion to terminate parental rights neither alleged respondent was incapable of caring for the minor children due to a debilitating condition, nor cited G.S. § 7B-1111(a)(6)." 171 N.C. App. 457, 462, 615 S.E.2d 391, 394, *disc. rev. denied*, 360 N.C. 64, 623 S.E.2d 587 (2005). The respondent in *In re O.C. and O.B.* argued the termination order should be reversed because the initial adjudication petition alleged the children to be both neglected and dependant, and a GAL had not been appointed to her. 171 N.C. App. at 462, 615 S.E.2d at 394. This Court has rejected this argument and has stated:

> Only the order on termination of parental rights is before this Court; the order on adjudication is not. Even assuming, arguendo, that the trial court failed to appoint a GAL for respondent during the adjudication proceedings and that she was even entitled to such a GAL, we reject her argument that this bears a legal relationship with the validity of the later order on termination. First, there is no statutory authority for the proposition that the instant order is reversible because of a GAL appointment deficiency that may have occurred years earlier. Our legislature has adopted two separate juvenile GAL appointment provisions concerning the appointment of a GAL for a parent, one found in Article 6 of the Juvenile Code concerning petitions alleging the status of the child, G.S. § 7B-602(b), and a second, equally specific provision in Article 11 concerning the appointment of a GAL for a parent within the context of a motion or petition for termination of parental rights, G.S. § 7B-1101. Neither of these two provisions, nor anything in our Juvenile Code, evinces an intent on the part of the legislature that a failure to appoint a GAL during the earlier adjudication proceedings impacts a later order on termination of parental rights. Secondly, there is no common law authority to support such a proposition.

Id. at 462-63, 615 S.E.2d at 394-96.

The North Carolina General Assembly recently amended the law governing appointment for a GAL for a parent. The amendments are applicable only to proceedings filed on or after 1 October 2005. The amendment reveals the legislature's intent to limit the appointment of a GAL for a parent. The amended statute provides:

> On motion of any party or on the court's own motion, the court may appoint a guardian ad litem for a parent if the court determines that there is a reasonable basis to believe that the parent is incompetent

> or has diminished capacity and cannot adequately act in his or her own interest. The parent's counsel shall not be appointed to serve as the guardian ad litem.

N.C. Gen. Stat. § 7B-1101.1(c) (2005).

Respondent cites this Court's decision in *In re T.W.*, and argues, "[w]hile [r]espondent-[m]other may have been competent for some purposes, including her ability to perform routine tasks and maintain employment, it does not necessarily follow that she is not debilitated by her mental health issues when it comes to parenting her children." 173 N.C. App. 153, 160, 617 S.E.2d 702, 705 (2005).

The trial court made the following findings of fact in *In re T.W.*:

> In its 25 July 2001 order, based upon the 27 April 2001 hearing which occurred prior to respondent's psychological evaluation, the court included in its Findings of Fact that it was "concerned about the mother's ability to raise these children in light of her mental health and her current medications." The court went on to state that it expected DSS to "take appropriate action, including removing the children from the home" if there were further "concerns over the mother's mental health stability . . . ." Again, in its 13 December 2001 Adjudication and Disposition Order regarding E.H., based upon the 24 August 2001 hearing, the court found that "the []mother exhibited mental health instability." Similarly, in its Review Order of 13 December 2001 regarding T.W. and L.W., also based upon the 24 August 2001 hearing, the court found as a fact that "the psychological evaluations indicates [sic] [respondent] cannot adequately parent on her own." The court reiterated this identical finding in its 13 December 2001 Permanency Planning Order for all three children based upon its 21 September 2001 hearing.
>
> Finally, in its order Terminating Parental Rights, the court made the following finding of fact:
>
> The mother has been diagnosed with bipolar affective disorder with possible psychotic disorder. She is on medication for these ailments, but testified that she could take the medication at her pleasure and when she feels an "episode" coming on. She testified she has been given approval by her physician for this behavior. This testimony is beyond belief and shows a lack of insight by her into her mental status and ability to raise children.

173 N.C. App. at 158, 617 S.E.2d at 705.

The respondent in *In re T.W.* specifically requested a GAL be appointed to her. 173 N.C. App. at 159, 617 S.E.2d at 706. Also, a psychologist recommended to the court that a GAL be appointed to the respondent based on the respondent's psychological evaluation. *Id.* Despite these requests, the trial court failed to hold a hearing on the issue and no GAL was appointed for the respondent. *Id.* This Court reversed the termination order and stated:

> Clearly, the foregoing findings demonstrate the court's awareness of respondent's severe limitations in the ability to parent her children based upon her mental illness. Therefore, notwithstanding the fact that the court did not refer to North Carolina General Statutes section 7B-1111(a)(6) specifically in its order terminating respondent's parental rights, it was the court's repeated findings that respondent was incapable of parenting her minor children based upon her mental illness in addition to respondent's own motion that triggered the requirement for appointment of a [GAL].

Id. at 159, 617 S.E.2d at 705.

Here, respondent did not request a GAL be appointed. The psychologist who testified did not recommend the trial court appoint a GAL for respondent. The psychologist concluded, "this evaluation shows no reason that she should not be capable of adequate parenting to her children." The trial court did not make "repeated findings that respondent was incapable of parenting her minor children based upon her mental illness." *Id.*

The termination of respondent's parental rights was not based on "mental health issues." In its conclusions, the trial court did not reference respondent's mental health issues. The trial court terminated respondent's parental rights based on: (1) neglect; (2) wilfully leaving the children in foster care for more than twelve months without showing reasonable progress; (3) wilfully failing to provide financial support to the children; and (4) abandonment of the children for at least six months immediately preceding the filing of the petition.

This Court considered similar facts in *In re J.A.A. & S.A.A.*, and held:

> In the instant case, the petitions for termination of respondent's parental rights contained no allegations that respondent was incapable of properly providing care for her children. Rather, the petition alleged the children were neglected within the meaning of N.C.

> Gen. Stat. § 7B-1111. Although the petition does contain reference to respondent's drug abuse and alleged mental illness, the trial court is not required to appoint a guardian ad litem in every case where substance abuse or some other cognitive limitation is alleged.
>
> . . . .
>
> This case is distinguishable from *In re T.W.*, 173 N.C. App. 153, 617 S.E.2d 702 (2005) and *In re B.M.*, 168 N.C. App. 350, 607 S.E.2d 698 (2005). In *In re T.W.*, although incapability was not alleged, the respondent specifically requested the court appoint her a guardian ad litem and she underwent psychological evaluation, in which the doctor recommended she be appointed a guardian ad litem. Despite this, the trial court failed to revisit the guardian ad litem issue during the entire ensuing proceedings. In *In re B.M.*, DSS's petition to terminate the respondents' parental rights alleged the parents' incapability as grounds for termination. In neither of these cases did the trial court conduct a hearing on whether a guardian ad litem should have been appointed.
>
> In this case, neither incapability within the meaning of N.C. Gen. Stat. § 7B-1111(a)(6) was alleged, nor did respondent request that a guardian ad litem be appointed.

175 N.C. App. 66, 70-71, 623 S.E.2d 45, 48 (2005) (internal quotations and citations omitted).

In *In re J.A.A. and S.A.A.*, this Court also considered whether the trial court erred when it failed to appoint a GAL to the respondent under N.C. Gen. Stat. § 1A-1, Rule 17 (2005), which provides:

> When a guardian ad litem is appointed to represent an infant or insane or incompetent person, he must be appointed as follows:
>
> . . . .
>
> (4) When an insane or incompetent person is defendant and service by publication is not required, the appointment may be made upon the written application of any relative or friend of said defendant, or upon the written application of any other party to the action, or by the court on its own motion, prior to or at the time of the commencement of the action, and service upon the insane or incompetent defendant may thereupon be dispensed with by order of the court making such appointment.

An "incompetent adult" and "mental illness" are defined as:

> (7) "Incompetent adult" means an adult or emancipated minor who lacks sufficient capacity to manage the adult's own affairs or to make or communicate important decisions concerning the adult's person, family, or property whether the lack of capacity is due to mental illness, mental retardation, epilepsy, cerebral palsy, autism, inebriety, senility, disease, injury, or similar cause or condition.
>
> . . . .
>
> (12) "Mental illness" means an illness that so lessens the capacity of a person to use self-control, judgment, and discretion in the conduct of the person's affairs and social relations as to make it necessary or advisable for the person to be under treatment, care, supervision, guidance, or control. The term "mental illness" encompasses "mental disease", "mental disorder", "lunacy", "unsoundness of mind", and "insanity."

N.C. Gen. Stat. § 35A-1101 (2005).

Here, respondent did not request a GAL be appointed. The petition for termination of her parental rights did not allege respondent's incapability to parent the children. No allegations were asserted, and no showing was made that respondent was incompetent. The trial court was not required to appoint a GAL to respondent under either N.C. Gen. Stat. § 7B-1101 or N.C. Gen. Stat. § 1A-1, Rule 17. This assignment of error is overruled.

V. Conclusion

The trial court did not err in failing to appoint a GAL for respondent. The trial court terminated respondent's parental rights on four separate grounds, either of which is sufficient to uphold the trial court's order. The trial court's conclusions of law are supported by findings of fact that are based upon clear, cogent, and convincing evidence. The trial court's order is affirmed.

Affirmed.

Judges McCULLOUGH and HUDSON concur.

STATE OF NORTH CAROLINA v. ROBERT AMOS FARMER

No. COA05-1406

(Filed 6 June 2006)

1. Appeal and Error— preservation of issues—motion to dismiss—not renewed at end of evidence—waiver

Failure to renew a motion to dismiss at the end of all the evidence resulted in waiver of the right to challenge the sufficiency of the evidence on appeal.

2. Evidence— attempted bribe by defendant—door opened by defendant

An assault victim's testimony that defendant tried to bribe him was properly admitted. Defendant opened the door on cross-examination by asking the victim about conversations with defendant; the State was entitled to chase the rabbit released by defendant.

3. Evidence— identification of defendant—in-court identification not tainted by single photo show-up

There was no plain error in an in-court identification of defendant where the witness had made a out-of-court identification based on a single photograph. Her identification of defendant before being shown the photograph was sufficiently reliable.

Appeal by defendant from judgment entered 3 June 2005 by Judge Nathaniel J. Poovey in Catawba County Superior Court. Heard in the Court of Appeals 18 May 2006.

Attorney General Roy Cooper, by Assistant Attorney General Harriet F. Worley, for the State.

William D. Auman, for defendant-appellant.

TYSON, Judge.

Robert Amos Farmer ("defendant") appeals from judgment entered after a jury found him to be guilty of felonious assault with a deadly weapon with intent to kill and discharging a weapon into occupied property. We find no error.

I. Background

A. State's Evidence

Shananda Crockett ("Crockett") testified she and Demarcus Powell ("Powell") went to a convenience store to buy gasoline just before midnight on 8 October 2004. After Powell entered the store, Crockett observed defendant standing outside the store talking with a woman and standing next to a small tan pickup truck. Powell exited the store and began talking with defendant. Powell asked defendant "about something that had happened about his girlfriend getting tied up and him getting robbed." Defendant denied he was involved.

Powell testified he had a conversation with defendant outside of the convenience store, and defendant identified himself by name. Following the conversation, Powell drove his vehicle out of the parking lot. Crockett sat in the front passenger seat of Powell's vehicle. Powell stopped his vehicle at a stoplight immediately after he turned left out of the convenience store's parking lot. Powell intended to make a right turn to go to his aunt's home.

Crockett and Powell testified defendant drove a tan pickup truck along beside the driver's side of Powell's vehicle and fired shots into Powell's vehicle. One of the bullets struck Powell in the back of his neck. The gunshots also shattered the rear driver's side window of Powell's vehicle and left a bullet hole in the driver's headrest. Crockett testified that after she heard the gunshot, she moved into the floorboard of the vehicle, but later sat back in the passenger's seat and saw defendant put the gun down and drive away from the scene.

Powell drove his vehicle into a nearby parking lot. Crockett drove Powell to a hospital to seek medical assistance. Later that evening, Crockett and Powell spoke with law enforcement officials about the shooting. Crockett described the assailant as a "short white male, heavyset, and they knew him as Rob." Powell told the officer the man who shot him was a man named, "Rob," who was a short, chubby, white male.

Crockett testified she knew defendant's name because one of her friends went to school with him and had told her his name. She also testified that approximately one week before the shooting she and one of her friends had observed defendant at the convenience store "standing outside in the parking lot with guns."

Crockett told a police officer, whom she knew, that defendant was the person who had shot into Powell's car. Crockett also told police offi-

cers she thought she knew where defendant lived. Crockett had driven by a house and saw defendant playing with some children. She provided police officers general directions to defendant's home where he lived with his girlfriend and his children.

Lieutenant Dale Lafone ("Lieutenant Lafone") testified Crockett described the assailant and the assault. Lieutenant Lafone stated, "with the address confirmed by Officer Cox at 330 South Cline Avenue, I felt I knew the Rob she was talking about, the Rob being Robert Farmer, that lived, that stayed at that address on Cline Avenue." Lieutenant Lafone showed Crockett a photograph of defendant. Crockett identified defendant as the assailant. Powell also reviewed the photograph and identified defendant as the assailant.

On cross-examination and re-direct, Powell testified defendant contacted him in December 2004 and asked him if there were "some things that could be done about him shooting." Defendant told Powell that he would talk to him later. Powell contacted defendant a few days later and was asked by defendant how much money it would take for Powell not to testify. Powell gave defendant the figure of $15,000.00. Defendant responded he was uncertain whether he could provide Powell with that amount of money. Powell never heard from defendant again.

B. Defendant's Evidence

Defendant's mother, Lisa Ellison ("Ellison"), testified that on 8 October 2004, the day of the shooting, she went to a house located at 330 Cline Street and met with her son. Ellison drove defendant to the Lake Norman Motel and the Landing Restaurant and rented him a room for the night so he could spend time with friends. Ellison left defendant at the hotel without a vehicle.

John Paul Genaro ("Genaro") testified his family owns and he was employed at the Lake Norman Motel and the Landing Restaurant. Genaro stated defendant spent the evening of 8 October 2004 playing pool in the back of the restaurant. Genaro observed defendant go to his room at approximately 1:00 a.m., and also observed Bucky Bolden ("Bolden"), one of the restaurant's cooks, enter defendant's room.

Bolden testified he is one of defendant's friends and works at the Lake Norman Motel and the Landing Restaurant as a cook. After Bolden finished cleaning the kitchen, he and defendant went to defendant's motel room. Bolden stayed with defendant for approximately two hours before going home.

Defendant was convicted of felonious assault with a deadly weapon with intent to kill and discharging a weapon into occupied property. Defendant received an active sentence within the presumptive range of not less than thirty-four and no more than fifty months imprisonment. Defendant appeals.

II. Issues

Defendant argues the trial court erred by: (1) failing to dismiss the charges against him due to insufficiency of the evidence; (2) allowing Powell to testify that defendant offered to bribe him; and (3) allowing Crockett to make an in-court identification of him as the assailant.

III. Sufficiency of the Evidence

[1] Defendant argues the trial court should have dismissed the charges due to insufficiency of the evidence. Defendant's assignment of error references only his motion to dismiss at the close of the State's evidence. Defendant presented evidence through testimony by his mother and two friends. Defendant failed to renew his motion to dismiss at the end of all the evidence and waived his right to challenge the sufficiency of the evidence on appeal.

N.C. R. App. P. 10(b)(3) (2006) provides,

> [i]f a defendant makes such a motion after the State has presented all its evidence and has rested its case and that motion is denied and the defendant then introduces evidence, his motion for dismissal or judgment in case of nonsuit made at the close of State's evidence is waived. Such a waiver precludes the defendant from urging the denial of such motion as a ground for appeal.

This assignment of error is dismissed.

IV. Powell's Testimony

[2] Defendant argues the trial court should not have allowed Powell to testify that defendant offered to bribe him.

N.C. Gen. Stat. § 15A-903, as amended in 2004, provides the State, upon motion by a defendant, must make the State's complete files, including all witness statements, available to the defendant. N.C. Gen. Stat. § 15A-903 (2005).

N.C. Gen. Stat. § 15A-910 (2005) provides:

> (a) If at any time during the course of the proceedings the court determines that a party has failed to comply with this Article or with

an order issued pursuant to this Article, the court in addition to exercising its contempt powers 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.

(b) Prior to finding any sanctions appropriate, the court shall consider both the materiality of the subject matter and the totality of the circumstances surrounding an alleged failure to comply with this Article or an order issued pursuant to this Article.

Defendant filed motions for discovery and for affirmation of discovery compliance. Defendant argues the State has both "a constitutional and statutory duty to disclose material evidence," and "[n]o one would dispute that [defendant's] alleged bribe was in fact material, particularly with this being an alibi defense case."

During cross-examination, defense counsel asked Powell if he had spoken with defendant after the alleged incident. Powell answered, "Yes." On re-direct, the State asked Powell about the substance of that conversation. Defendant objected, and the judge excused the jury.

A *voir dire* examination of Powell was conducted, including questions by the State, defense counsel, and the trial judge. Powell testified during *voir dire*, defendant had asked him not to testify against him and whether Powell could "forget everything that happened." Powell also testified he had not told the State about these conversations with defendant. The trial court overruled defendant's objection and allowed Powell to testify regarding the conversation. The trial court noted Crockett had made a similar allegation that defendant offered to pay her not to testify, and the State had promptly given defense counsel that information. The court concluded, "it would make no sense for [the District Attorney] to tell you about one and not tell you about the other if he's going to tell you about any."

In *State v. Godwin*, our Supreme Court held the trial court did not err when it admitted a witness's testimony that he had received a tele-

phone call from the defendant who confessed to the witness that he had murdered the victim. 336 N.C. 499, 507, 444 S.E.2d 206, 210 (1994). The defendant objected to the admission of the testimony under a previous version of N.C. Gen. Stat. § 15A-903. *Id.* at 506, 444 S.E.2d at 210. The State is required to make known to the defendant oral statements made by the defendant that the State intended to offer into evidence, which were known to the State prior to or during the course of trial. *Id.* The State argued, "the substance of this statement was consistent with other statements made by defendant provided in discovery," and the witness had not previously revealed this information to the State. *Id.*

The Court held:

> The State cannot reasonably be expected to relate a statement to defendant which it has no knowledge of such as in the case at hand. Under these circumstances, we find that the State did not violate the discovery rules of N.C.G.S. § 15A-903(a); thus, the trial court did not err in allowing this testimony.

Id. at 507, 444 S.E.2d at 210.

In *State v. Taylor*, our Supreme Court stated:

> A major purpose of the discovery procedures of Chapter 15A is to protect the defendant from unfair surprise. When the defendant does not inform the trial court of any potential unfair surprise, the defendant cannot properly contend that the trial court's failure to impose sanctions is an abuse of discretion.

332 N.C. 372, 384, 420 S.E.2d 414, 421 (1992) (internal quotations and citations omitted).

Although *Godwin* was decided prior to the 2004 amendment to N.C. Gen. Stat. § 15A-903, the amendment does not alter the applicability of the Court's reasoning to the issue before us. Powell testified he had never revealed the contents of his telephone conversation with defendant to the State. The State was unaware of this conversation but had provided defendant with a similar statement from Crockett alleging defendant's attempt to bribe her.

Defendant opened the door on cross-examination by asking Powell about later conversations between he and Powell. The State was entitled to chase the rabbit after defendant let it loose. Defendant knew the State had evidence that he had attempted to bribe Crockett and should not have been surprised when Powell testified defendant had attempted to bribe him. Defendant cannot now reasonably complain that Powell's

testimony amounted to "unfair surprise." *Id.* This assignment of error is overruled.

V. Identification of Defendant

[3] Defendant argues the trial court erred when it allowed Crockett to make an in-court identification of him. Defendant "asks this Court to review the trial court's failure to suppress Crockett's identification of defendant under a plain error standard because defendant withdrew his objection to the identification." Defense counsel filed a motion to suppress the challenged identification by Crockett, based on an unduly suggestive out-of-court identification procedure. When Crockett testified, defendant's objection to her identification was overruled, and defense counsel withdrew his motion.

Defendant concedes:

> Plain error is applied cautiously and only in exceptional cases when after reviewing the entire record, it can be said the claimed error is a *fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or where [the error] is grave error which amounts to a denial of a fundamental right of the accused, or the error has resulted in a miscarriage of justice or in the denial to appellant of a fair trial or where the error is such as to seriously affect the fairness, integrity or public reputation of judicial proceedings. Under this standard, a defendant is entitled to a new trial only if 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) (internal quotations and citations omitted).

Lieutenant Lafone showed defendant's photograph to Crockett while she was at the hospital with Powell. Lieutenant Lafone did not show Crockett any other photographs. Crockett identified defendant as the assailant and told Lieutenant Lafone his name was "Rob." Defendant argues, "given the circumstances, showing only one photo to a prospective witness would be overly suggestive." Defendant acknowledges, "the identification of [defendant] via the 'show up' must be excluded unless it is first determined by the trial court that the in-court identification has an independent origin of the invalid pretrial procedure."

Regarding pretrial identifications, our Supreme Court has stated:

> Pretrial showup identifications, though they are suggestive and unnecessary, are not, however, *per se* violative of a defendant's due process rights. The primary evil to be avoided is the substantial likelihood of misidentification. Whether there is a substantial likelihood of misidentification depends on the totality of the circumstances.
>
> The factors to be considered . . . include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. Against these factors is to be weighed the corrupting effect of the suggestive identification itself.
>
> If under the totality of the circumstances there is no substantial likelihood of misidentification, then evidence of pretrial identification derived from unnecessarily suggestive pretrial procedures may be admitted.

State v. Flowers, 318 N.C. 208, 220, 347 S.E.2d 773, 781 (1986) (internal quotations and citations omitted).

The State argues, "Crockett's identification of defendant prior to being shown the picture was sufficiently reliable that admission of her identification of defendant at trial was not a fundamental error so prejudicial that justice cannot have been done." We agree.

Prior to seeing defendant's photograph, Crockett: (1) gave an accurate physical description of defendant as a short, white, heavyset male; (2) correctly identified defendant's first name; (3) gave an accurate description of defendant's residence, which was corroborated by defendant's mother; and (4) told police she "knew of" defendant and had seen him at the same convenience store in possession of guns one week prior to the shooting. Crockett was able "to view the criminal [before and] at the time of the crime" and testified she saw defendant lower the gun after Powell was shot and drive away from the scene. *Id.* Lieutenant Lafone showed Crockett the picture of defendant on the night of the shooting, while she was at the hospital with Powell. "[T]he time between the crime and the confrontation" was short. *Id.* Under plain error review, this assignment of error is overruled.

VI. Conclusion

Defendant failed to preserve for appellate review his assignment of error regarding the sufficiency of the evidence by failing to renew his

motion to dismiss after offering evidence. N.C. R. App. P. Rule 10(b)(3). The trial court properly allowed Powell to testify that defendant allegedly bribed him and properly admitted Crockett's in-court identification of defendant.

Defendant received a fair trial, free from prejudicial errors he preserved, assigned, and argued. We find no error in the judgment and sentence imposed.

No error.

Judges McCULLOUGH and HUDSON concur.

STATE OF NORTH CAROLINA v. EDDIE GLENN BOWDEN, DEFENDANT

No. COA05-635

(Filed 6 June 2006)

1. Search and Seizure— motion to suppress—checkpoint—reasonable articulable suspicion—investigatory stop

The trial court did not err in a habitual driving while impaired and driving with a revoked license case by denying defendant's motion to suppress all evidence obtained as a result of an officer's encounter with defendant, because: (1) even though the trial court failed to make findings of fact in connection with the denial of the motion to suppress, defendant did not present any evidence of his own and no apparent conflict arose from the State's evidence which was comprised solely of the officer's testimony; (2) defendant did not argue the pertinent checkpoint was unconstitutional, and thus, the trial court had no reason to address the issue and it will not be addressed for the first time on appeal; (3) whether the checkpoint complied with N.C.G.S. § 20-16.3A is immaterial when the checkpoint was a driver's license and registration checkpoint and not an impaired driving checkpoint; and (4) assuming arguendo that an investigatory stop occurred, the totality of circumstances justified the officer's pursuing and stopping defendant's vehicle to inquire as to why he turned away prior to the checkpoint including the late hour, the sudden braking of the truck when defendant crested the hill and could see the checkpoint, the abruptness of defendant's turn into the nearest apartment complex parking lot, and defend-

ant's behavior in first backing the truck into one space, pulling out and proceeding toward the parking lot exit, and then reparking when he spotted the patrol car approaching him.

2. Jurisdiction— superior court—habitual DWI a substantive offense—misdemeanor DWI—driving with revoked license

The superior court had jurisdiction to conduct a trial on defendant's misdemeanor DWI and driving with a revoked license charges without a trial first in district court, because: (1) habitual impaired driving is a substantive offense, and not a status offense as defendant would prefer; (2) the mere fact that a statute is directed at recidivism does not prevent the statute from establishing a substantive offense; and (3) defendant concedes that if the habitual DWI statute creates a substantive offense, then the superior court possessed jurisdiction to try him on the misdemeanor offenses set out in the same indictment with the habitual DWI charge.

Appeal by defendant from judgment entered 8 December 2004 by Judge John O. Craig III in Guilford County Superior Court. Heard in the Court of Appeals 30 November 2005.

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

M. Alexander Charns for defendant-appellant.

GEER, Judge.

Defendant Eddie Glenn Bowden appeals his convictions for habitual driving while impaired and driving with a revoked license. On appeal, defendant principally contends that the trial court erred in denying his motion to suppress. Although defendant argues that the police lacked reasonable articulable suspicion to stop him, the Supreme Court's opinion in *State v. Foreman*, 351 N.C. 627, 527 S.E.2d 921 (2000), addressing almost identical circumstances, holds otherwise. The trial court, therefore, properly denied defendant's motion to suppress.

Facts

The State's evidence tended to show the following facts. On the evening of 5 February 2003, the police were conducting a driver's license checkpoint on Florida Street in Greensboro, North Carolina. Florida Street is a two-lane road that intersects with Holden Road at the bottom of a hill. The checkpoint was not visible to motorists approaching on Holden Road until after they crested the hill about

250 feet away. One police officer, Officer Goodykoontz, sitting in a patrol car, was assigned to identify drivers on Holden Road who might be trying to elude the checkpoint.

At about 11:30 p.m., Officer Goodykoontz heard the sound of an engine revving loudly and then saw a pickup truck crest the hill on Holden Road and descend rapidly towards the checkpoint. As he watched, the truck braked hard, causing the front headlights to dip low. The truck then made an abrupt right-hand turn into the parking lot of the nearest apartment complex. Officer Goodykoontz followed in his patrol car with the blue lights turned off, arriving at the entrance of the parking lot approximately 30 seconds later.

Once he was in the parking lot, Officer Goodykoontz spotted a pickup matching the one he had just seen. As he approached in his patrol car, he saw the truck pull out of a parking space into which it had apparently backed, travel towards the parking lot's exit, but then drive head first into a new parking space as the patrol car drew near. Officer Goodykoontz pulled his patrol car behind the truck and activated his blue lights. He walked up to the truck and asked the occupant for his driver's license and registration.

In response, defendant, who was the truck's sole occupant, stated that another person named "Marcus" had been driving the truck, but that he had just left. Asked to explain further, defendant claimed that he had just come out of one of the apartments in the complex and that Marcus had asked him to drive the pickup to Marcus' girlfriend's apartment elsewhere in the complex. He stated that the girlfriend's apartment was "around the corner, but he didn't know which apartment."

As this conversation took place, Officer Goodykoontz noticed that defendant's speech was slurred, his eyes were glassy and red, and he smelled of alcohol. The officer asked defendant to step out of the truck. When defendant complied, Officer Goodykoontz observed that defendant was unsteady on his feet and was wavering from side to side. In order to check defendant's story, Officer Goodykoontz asked him to identify the apartment he had left when he went to move the truck for Marcus. Defendant then denied being in any apartment, claiming that he had reached the apartment complex on foot from a restaurant about two miles away.

When Officer Goodykoontz asked defendant how much he had had to drink, he replied that he had had "a few." Officer Goodykoontz then asked defendant to step to the sidewalk so that he could perform field

sobriety tests. At that point, defendant stuck out his hands towards the officer and said, "You might as well arrest me. I'm not doing any tests."

Officer Goodykoontz arrested defendant for driving while impaired ("DWI"). He was transported to the police department, read his *Miranda* rights, and asked to take an Intoxilyzer test, which he refused. He was later indicted for DWI, habitual DWI under N.C. Gen. Stat. § 20-138.5 (2005), and driving with a revoked license under N.C. Gen. Stat. § 20-28(a) (2005). A jury convicted him of all three crimes, and the trial judge imposed a consolidated sentence of 24 to 29 months. Defendant filed a timely appeal.

Motion to Suppress

[1] Defendant first assigns error to the trial court's denial of his motion to suppress all evidence obtained as a result of Officer Goodykoontz' encounter with defendant. In reviewing a trial court's ruling on a motion to suppress, we first determine whether the trial court's findings of fact are supported by competent evidence. *State v. Smith*, 160 N.C. App. 107, 114, 584 S.E.2d 830, 835 (2003). In this case, however, the trial court failed to make findings of fact in its ruling upon the motion to suppress, an omission that defendant contends is reversible error.

When the trial court conducts an evidentiary hearing regarding the competency of the evidence, the trial court is required to make findings of fact if there is a conflict in the evidence. *State v. Steen*, 352 N.C. 227, 237, 536 S.E.2d 1, 7 (2000), *cert. denied*, 531 U.S. 1167, 148 L. Ed. 2d 997, 121 S. Ct. 1131 (2001). When, however, there is no conflict in the evidence, findings are not required, although it is preferable for the trial court to make them. *Id.* In the event there is no conflict in the evidence and the trial court makes no findings, " 'the necessary findings are implied from the admission of the challenged evidence.' " *Id.* (quoting *State v. Vick*, 341 N.C. 569, 580, 461 S.E.2d 655, 661 (1995)).

Here, defendant did not present any evidence of his own, and no apparent conflict arose from the State's evidence, which was comprised solely of Officer Goodykoontz' testimony. The trial court did not, therefore, commit reversible error by failing to make findings of fact in connection with the denial of the motion to suppress.

Defendant's assignment of error regarding the merits of the motion to suppress states: "The trial court committed error by not granting defendant's motion to suppress the stop of his vehicle on the grounds that the stop was without probable cause or reasonable articulable suspicion . . . ." In his brief, however, defendant argues first that the trial

court erred in failing to make the findings of fact required by *State v. Rose*, 170 N.C. App. 284, 291-93, 612 S.E.2d 336, 341, *appeal dismissed and disc. review denied*, 359 N.C. 641, 617 S.E.2d 656 (2005), in determining the constitutionality of a checkpoint. Defendant did not, however, argue before the trial court that the checkpoint was unconstitutional. The trial court, therefore, had no reason to address the issue. Further, because defendant did not argue the constitutionality of the checkpoint below, we do not address that question on appeal. *State v. Hunter*, 305 N.C. 106, 112, 286 S.E.2d 535, 539 (1982) ("[A] constitutional question which is not raised and passed upon in the trial court will not ordinarily be considered on appeal.").

Alternatively, defendant argues that the checkpoint violated N.C. Gen. Stat. § 20-16.3A (2005), which sets out the requirements for "impaired driving checks of drivers of vehicles on highways and public vehicular areas." The State argues that the legality of the checkpoint does not matter in light of the fact defendant did not stop at the checkpoint. Since, however, the evidence in the record is undisputed that the checkpoint at issue was a driver's license and registration checkpoint and not an impaired driving checkpoint, whether the checkpoint complied with N.C. Gen. Stat. § 20-16.3A is immaterial, and we need not address the State's argument.

The final issue with respect to the motion to suppress is whether, under *State v. Foreman*, 351 N.C. 627, 527 S.E.2d 921 (2000), Officer Goodykoontz had a reasonable, articulable suspicion to stop defendant. *Foreman* "reaffirmed the long-standing rule that [w]hen an officer observes conduct which leads him reasonably to believe that criminal conduct may be afoot, he may stop the suspicious person to make reasonable inquiries." *Id.* at 630, 527 S.E.2d at 923 (internal quotation marks omitted) (alteration original). To justify a stop, the officer " 'must be able to point to specific and articulable facts, which taken together with rational inferences from those facts, reasonably warrant [the] intrusion.' " *Id.* (quoting *State v. Thompson*, 296 N.C. 703, 706, 252 S.E.2d 776, 779, *cert. denied*, 444 U.S. 907, 62 L. Ed. 2d 143, 100 S. Ct. 220 (1979)) (alteration original).

Foreman involved facts remarkably similar to those of this case. The police in *Foreman* were operating a DWI checkpoint in the middle of the night. They had posted signs warning of the checkpoint one-tenth of a mile prior to the actual stop, and they had an officer assigned to watch for vehicles that appeared to be avoiding the checkpoint. A small red car approached and made a quick, but legal, left turn immediately after passing the sign that warned of the checkpoint. The police officer

began following the car, without attempting to stop it, and watched it make another quick left hand turn. He lost sight of it for a moment, and then found it parked in a residential driveway, with its lights and engine turned off and the doors closed. The officer turned on his bright lights and shined them on the car, which enabled him to see people crouching down in the car and not moving. When backup arrived, the officer approached the vehicle and observed open containers of alcohol. Upon investigating further, he found that the driver smelled of alcohol and was unsteady on her feet. She was subsequently convicted of DWI.

The *Foreman* Court first held that the officer did not stop defendant's vehicle at any point because the defendant voluntarily parked her car and remained in the car until the officer approached. *Id.* at 630, 527 S.E.2d at 923. "Therefore, defendant was not 'seized' by the police officer until at least that point [when the officer approached the vehicle]." *Id. See also State v. Johnston*, 115 N.C. App. 711, 714, 446 S.E.2d 135, 138 (1994) (where defendant got out of his car and appeared unsteady, and officer asked why he turned off of the road prior to the license check, this Court noted that a "seizure does not occur simply because a police officer approaches an individual and asks a few questions. Communications between police and citizens involving no coercion or detention are outside the scope of the fourth amendment" (internal quotation marks and citation omitted)).

In this case, defendant contended at trial that the officer's use of his blue lights and his parking of the patrol car so as to block defendant's car resulted in a stop. Even if, however, we assume *arguendo* that a stop occurred, the remaining holding of *Foreman* compels the conclusion that the trial court properly denied the motion to suppress in this case.

Although the Supreme Court in *Foreman* had concluded that no stop occurred, it proceeded to reverse the Court of Appeals' conclusion that the legal turn immediately preceding the checkpoint, without more, did not justify an investigatory stop. The Court stated: "[W]e hold that it is reasonable and permissible for an officer to monitor a checkpoint's entrance for vehicles whose drivers may be attempting to avoid the checkpoint, and it necessarily follows that an officer, *in light of and pursuant to the totality of the circumstances* or the checkpoint plan, may pursue and stop a vehicle which has turned away from a checkpoint within its perimeters for reasonable inquiry to determine why the vehicle turned away." *Foreman*, 351 N.C. at 632-33, 527 S.E.2d at 924 (emphasis added).

In this case, the totality of the circumstances justified the officer's pursuing and stopping defendant's vehicle to inquire as to why he turned away prior to the checkpoint. In addition to the fact of defendant's legal turn immediately prior to the checkpoint, the following facts combined to allow Officer Goodykoontz to make a reasonable inquiry to determine whether defendant was trying to evade the checkpoint: (1) the late hour; (2) the sudden braking of the truck when defendant crested the hill and could see the checkpoint, to the point that the headlights dipped as the front of the truck dove towards the street; (3) the abruptness of defendant's turn into the nearest apartment complex parking lot; and (4) defendant's behavior in first backing the truck into one space, pulling out and proceeding towards the parking lot exit, and then re-parking when he spotted the patrol car approaching him. Under the totality of these circumstances, any investigatory stop that Officer Goodykoontz may have performed was proper. Therefore, the trial court correctly ruled that the evidence gleaned from the encounter between defendant and the officer should not be suppressed.

Defendant also contends that if the evidence from his encounter with Officer Goodykoontz had been suppressed, it would have been proper for the trial court to grant his motion to dismiss the charges for insufficiency of the evidence. Since we find that the evidence was properly admitted, we need not reach this argument. Defendant, we note, does not contend that his motion to dismiss should have been granted even in the event that Officer Goodykoontz' testimony was properly admitted.

Jurisdiction

[2] Defendant's final argument is that the superior court lacked jurisdiction to conduct a trial on defendant's misdemeanor DWI and driving with a revoked license charges without a trial first in district court. Defendant contends that habitual DWI is a status and not a substantive felony offense and therefore, those misdemeanor charges were not properly joined for trial in superior court. *See* N.C. Gen. Stat. § 7A-271(a)(3) (2005) (providing that superior court has jurisdiction to try a misdemeanor charge if properly consolidated with a felony charge under N.C. Gen. Stat. § 15A-926 (2005)).

As defendant recognizes, this Court held otherwise in *State v. Priddy*, 115 N.C. App. 547, 550, 445 S.E.2d 610, 612 (holding that a superior court erred in dismissing defendant's habitual DWI charge for lack of jurisdiction), *disc. review denied*, 337 N.C. 805, 449 S.E.2d 751 (1994). Defendant contends, however, that the subsequent case of

State v. Vardiman, 146 N.C. App. 381, 552 S.E.2d 697 (2001), *cert. denied*, 537 U.S. 833, 154 L. Ed. 2d 51, 123 S. Ct. 142 (2002), implicitly overruled *Priddy* because it described habitual DWI as a recidivist offense. One panel of the Court of Appeals may not, however, overrule another panel. *In re Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989).

In any event, *Vardiman* in fact reaffirms *Priddy's* holding that "[h]abitual impaired driving is a substantive offense[,]" not a status offense as defendant would prefer. *Vardiman*, 146 N.C. App. at 384-85, 552 S.E.2d at 700. The mere fact that a statute is directed at recidivism does not prevent the statute from establishing a substantive offense. Defendant "concedes that if this Court determines that the habitual DWI statute creates a substantive offense, then the Superior Court possessed jurisdiction to try him on the misdemeanor offenses set out in the same indictment with the habitual DWI charge."

No error.

Judges HUNTER and McCULLOUGH concur.

STATE OF NORTH CAROLINA v. ANTHONY WILLIAMS

No. COA05-978

(Filed 6 June 2006)

1. Drugs— cocaine transportation—no evidence that cocaine was moved

The trial court erred by not dismissing a charge of trafficking in cocaine by transportation where the cocaine was found in an automobile that was in a parking space and stationary during the law enforcement operation. The State presented no evidence of how the vehicle arrived, or that defendant moved the cocaine from one place to another.

2. Evidence— other crimes or bad acts—pornography business—not plain error

There was no plain error in a cocaine prosecution in the admission of evidence that defendant was involved in the pornography

business where there was substantial evidence that defendant was involved in trafficking in cocaine by possession.

3. Criminal Law—motion for appropriate relief— appeal timely filed— jurisdiction of trial court

A trial court was without jurisdiction to rule on defendant's motion for appropriate relief where defendant had given timely notice of appeal and the appeal was pending.

Appeal by defendant from judgments entered 10 September 2003 by Judge Yvonne Mims Evans, and certiorari review of a 23 April 2004 order entered on defendant's motion for appropriate relief by Judge Robert P. Johnston, all orders entered in Mecklenburg County Superior Court. Heard in the Court of Appeals 28 March 2006.

Attorney General Roy Cooper, by Assistant Attorney General Wendy L. Greene, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Daniel Shatz for defendant.

LEVINSON, Judge.

Anthony Williams (defendant) appeals from judgments entered upon his convictions for trafficking in cocaine by possession and trafficking in cocaine by transportation. We reverse the judgment for trafficking in cocaine by transportation, find no error in the judgment for trafficking in cocaine by possession, and vacate an order entered on defendant's motion for appropriate relief.

The pertinent facts may be summarized as follows: Jeffery Falls assisted the police in an undercover narcotics operation on 9 September 2002. Specifically, Falls who had purchased cocaine from defendant in the past, sought to purchase two kilograms of cocaine from defendant at a specified location where the police would observe.

The operation was organized, in part, by Special Agent Rodney Blacknall of the Bureau of Alcohol Tobacco and Firearms and Sergeant Rev Busker of the Charlotte-Mecklenburg Police Department. After telephone calls between Falls and the defendant, the two agreed to meet at a local YMCA. Falls was not wired for the meeting with defendant. Instead, to facilitate officers' monitoring of the events, Falls was instructed to leave his cell phone connection open when Blacknall telephoned him.

Falls drove to the YMCA, followed by Blacknall. Falls identified the defendant and his vehicle, a Cadillac Escalade. Falls exited his vehicle as the cell phone connection between Blacknall and Falls remained open. Falls first greeted the defendant on the stairs of the YMCA. Then, as per defendant's request, both men were seated in defendant's Escalade. After Falls told defendant that he needed to see the cocaine, the two men walked to the back of the vehicle. Defendant opened the back hatch and displayed cocaine that was stored in a black leather bag. Defendant gave two pornographic video tapes to Falls. Falls then signaled Blacknall over the cell phone and law enforcement officers arrested the defendant, and the two kilograms of cocaine were seized from the Escalade.

Shortly after the arrest, Blacknall and others executed a search warrant at two addresses associated with the defendant. Police found the following: documents in defendant's alias, Johnny Manning; documents revealing that Charmaine Thorton leased the Escalade; tax returns in defendant's true name, Anthony Williams; a couple of safes; and video equipment and tapes which suggested that defendant was operating a pornography business out of his apartment across the street from the YMCA.

Blacknall and Busker testified that they were unable to directly observe the transaction between Falls and defendant; Blacknall relied, instead, on the cell phone connection. However, an SBI agent observed Falls and the defendant exit the Escalade, walk to the rear of the vehicle, and open and close the back hatch.

Defendant was convicted of trafficking in cocaine by possession and trafficking in cocaine by transportation, and was sentenced to two consecutive prison terms of 175-219 months in judgments entered 10 September 2003. On 25 March 2004, while defendant's appeal as of right was pending, defendant filed a Motion for Appropriate Relief (MAR) in the trial court division, alleging the ineffective assistance of counsel. The record reveals that defendant believed he did not have an appeal pending before this Court when he filed this MAR. On 23 April 2004, the trial court summarily denied the MAR on the grounds that it did not state a claim upon which relief could be granted. Although the record reveals that defendant gave timely notice of appeal from the 10 September 2003 judgments, he nevertheless filed a petition for writ of certiorari on 23 June 2004 in this Court, seeking review of the criminal judgments entered 10 September 2003 as well as the trial court's summary denial of his MAR. This Court allowed defendant's petition for

writ of certiorari for the purpose of reviewing the criminal judgments entered 10 September 2003, and did not expressly allow or deny the petition with respect to the trial court's denial of the MAR.

We first address defendant's appeal from the criminal judgments entered 10 September 2003. Defendant contends that the trial court erred by (1) denying his motion to dismiss the charge of trafficking in cocaine by transportation, and (2) allowing the State to introduce evidence that defendant was involved in the pornography business.

[1] In defendant's first argument on appeal, he contends that the trial court erred by denying his motion to dismiss the charge of trafficking in cocaine by transportation. We agree.

When ruling on a motion to dismiss, "the trial court must determine only whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense." *State v. Crawford*, 344 N.C. 65, 73, 472 S.E.2d 920, 925 (1996).

> Evidence is substantial if it is relevant and adequate to convince a reasonable mind to accept a conclusion. In considering a motion to dismiss, the trial court must analyze the evidence in the light most favorable to the State and give the State the benefit of every reasonable inference from the evidence. The trial court must also resolve any contradictions in the evidence in the State's favor. The trial court does not weigh the evidence, consider evidence unfavorable to the State, or determine any witness' credibility.

State v. Robinson, 355 N.C. 320, 336, 561 S.E.2d 245, 255-56 (2002) (internal citations and quotation marks omitted). "[T]he rule for determining the sufficiency of evidence is the same whether the evidence is completely circumstantial, completely direct, or both." *State v. Crouse*, 169 N.C. App. 382, 389, 610 S.E.2d 454, 459 (2005).

In the instant case, defendant was charged with trafficking in cocaine by transportation, in violation of N.C. Gen. Stat. § 90-95(h)(3)(c) (2005), which provides, in relevant part, that "[a]ny person who . . . transports 28 grams or more of cocaine . . . shall be guilty of a felony . . . known as trafficking in cocaine." In order to sustain a conviction under this statute, the State must prove that the defendant (1) knowingly (2) transported a given controlled substance, and that (3) the amount transported was greater than the statutory threshold amount. *State v. Shelman*, 159 N.C. App. 300, 307, 584 S.E.2d 88, 94 (2003).

"A conviction for trafficking in cocaine by transportation requires that the State show a substantial movement." *State v. Wilder*, 124 N.C. App. 136, 140, 476 S.E.2d 394, 397 (1996) (citing *State v. Greenidge*, 102 N.C. App. 447, 451, 402 S.E.2d 639, 641 (1991)) (internal quotation marks omitted). Transportation is shown by evidence of carrying or movement of narcotics " 'from one place to another.' " *State v. Outlaw*, 96 N.C. App. 192, 197, 385 S.E.2d 165, 168 (1989) (quoting *Cunard Steamship Company v. Mellon*, 262 U.S. 100, 122, 67 L. Ed. 894, 901 (1923) ("we believe that it is correct to view transportation as 'any real carrying about or movement from one place to another' ")). "Our courts have determined that even a very slight movement may be 'real' or 'substantial' enough to constitute 'transportation' depending upon the purpose of the movement and the characteristics of the areas from which and to which the contraband is moved." *State v. McRae*, 110 N.C. App. 643, 646, 430 S.E.2d 434, 436 (1993). "A determination of whether there has been 'substantial movement' involves consideration of 'all the circumstances surrounding the movement[.]' " *State v. Manning*, 139 N.C. App. 454, 468, 534 S.E.2d 219, 228 (2000) (quoting *Greenidge*, 102 N.C. App. at 451, 402 S.E.2d ay 641).

In the instant case, the State failed to present evidence that the defendant moved the cocaine from one place to another. When law enforcement arrived at the YMCA, the Escalade containing the two kilograms of cocaine was already backed into a parking space and remained stationary during the course of the law enforcement operation. The State presented no evidence showing how the vehicle arrived at the YMCA. Additionally, no evidence was presented in regards to whether the cocaine was moved by defendant before Falls arrived. The State contends that the circumstantial evidence in the record is sufficient to demonstrate defendant moved the cocaine. In particular, the State relies on Falls' testimony that he observed defendant drive the Escalade on prior occasions, and defendant's suggestion to Falls that they meet at the YMCA. We disagree. Even considering all the surrounding circumstances, there is not sufficient evidence in the record to demonstrate when or how the cocaine was placed in the Escalade. Consequently, because the State failed to present substantial evidence that the cocaine was moved from one place to another by defendant, the conviction of trafficking in cocaine by transportation must be reversed.

[2] In defendant's second argument on appeal, he contends that the admission of evidence showing he was involved in the pornography business constituted error. Specifically, defendant contends that Blacknall's testimony referring to a pornography business (*e.g.*, video

cameras and tapes in defendant's apartment), as well as Falls' testimony that defendant handed him pornographic tapes, constitutes impermissible evidence of his character in violation of N.C. Gen. Stat. § 8C-1, Rule 404(b) (2005).

Because defendant failed to object to the admission of this evidence, we review for plain error. Plain error review is available for errors in the admission of evidence and jury instructions. *State v. Wolfe*, 157 N.C. App. 22, 33, 577 S.E.2d 655, 663 (2003). To establish plain error, a defendant must demonstrate "(i) that a different result probably would have been reached but for the error or (ii) that the error was so fundamental as to result in a miscarriage of justice or denial of a fair trial." *State v. Bishop*, 346 N.C. 365, 385, 488 S.E.2d 769, 779 (1997). We "must examine the entire record and determine if the . . . error had a probable impact on the jury's finding of guilt." *State v. Pullen*, 163 N.C. App. 696, 701, 594 S.E.2d 248, 252 (2004) (internal quotation marks omitted).

Under N.C. Gen. Stat. §8C-1, Rule 404(b) (2005), evidence of a defendant's prior conduct is not admissible for the purpose of proving that the defendant acted in conformity therewith on a particular occasion. Such evidence is only admissible if it is relevant to show something other than a defendant's character or propensity to commit the crime charged. Rule 404(b). Such permissible purposes include "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." *Id.* Hence, "[o]nly those acts which follow the rationale of the rule, with a relevant purpose other than to show that defendant had the disposition to commit the alleged crime, are admissible under the rule." *State v. Bush*, 164 N.C. App. 254, 261, 595 S.E.2d 715, 720 (2004).

In the instant case, assuming *arguendo* that the evidence should not have been admitted, its admission cannot be said to have amounted to an error that was so fundamental as to result in a miscarriage of justice or one that had a likely impact on the outcome of the trial. Here, there is substantial record evidence establishing defendant's commission of trafficking in cocaine by possession. For example, it is uncontradicted that law enforcement found two kilograms of cocaine in defendant's possession, which was stored in a black leather bag located in the rear of the vehicle. In addition, the record reveals that law enforcement seized the cocaine shortly after defendant walked to the back of the vehicle and showed the cocaine to Falls. This assignment of error is overruled.

[3] We next address defendant's argument that the trial court erred by denying his MAR, which set forth numerous reasons why he received ineffective assistance of counsel at trial. Defendant claimed, *inter alia*, that his trial counsel did not properly give notice of appeal from the 10 September 2003 judgments; did not file pre-trial motions to suppress evidence; and did not subpoena the registered owner of the Escalade to testify about the cocaine found in the vehicle and her alleged association with the presiding judge. In his petition for writ of certiorari to this Court seeking review of the trial court's denial of his MAR, defendant contends that an evidentiary hearing was necessary to enable the trial court to properly rule on his claims of ineffective assistance of counsel. We observe that the State, in its response to defendant's petition for writ of certiorari, acknowledged that his claims of ineffective assistance of counsel—excluding the one related to counsel's failure to give proper notice of appeal—required an evidentiary hearing. We now grant defendant's petition for certiorari to review the 23 April 2004 order denying his MAR.

"A case remains open for the taking of an appeal to the appellate division for the period provided in the rules of appellate procedure for giving notice of appeal." N.C. Gen. Stat. § 15A-1448(a)(1) (2005). Rule 4 of the North Carolina Rules of Appellate Procedure sets forth the time period for giving such notice of appeal. N.C.R. App. P. 4(a)(2). Rule 4 states, in pertinent part, that "[a]ny party entitled by law to appeal from a judgment or order of a superior or district court rendered in a criminal action may take appeal by filing notice of appeal . . . within 14 days after entry of the judgment." *Id.* (emphasis added). In addition, "[t]he jurisdiction of the trial court with regard to the case is divested, except as to actions authorized by G.S. 15A-1453, when notice of appeal has been given[.]" N.C. Gen. Stat. § 15A-1448(a)(3) (2005).

In the instant case, the trial court entered judgments on the trafficking in cocaine by possession and trafficking in cocaine by transportation on 10 September 2003. A written notice of appeal was filed on 23 September 2003. Defendant, therefore, gave timely notice of appeal because the appeal was taken within 14 days after entry of the judgment. *See* Rule 4(a)(2). Pursuant to G.S. § 15A-1448(a)(3), the trial court was without jurisdiction to rule on defendant's MAR filed 25 March 2004 because his appeal was pending. The proper venue for filing the MAR would have been in this Court pursuant to N.C. Gen. Stat. § 15A-1418(a) (2005). " 'When the record shows a lack of jurisdiction in the lower court, the appropriate action on the part of the appellate court is to arrest judgment or vacate any order entered without authority.' " *State*

v. Crawford, 167 N.C. App. 777, 779, 606 S.E.2d 375, 377 (2005) (quoting *State v. Felmet*, 302 N.C. 173, 176, 273 S.E.2d 708, 711 (1981)). We conclude that the trial court lacked jurisdiction to enter the 23 April 2004 order summarily denying defendant's MAR, and we vacate the same. In addition, we instruct the trial court to dismiss the MAR filed 25 March 2004. Defendant is not barred from filing a new MAR setting forth the claims of ineffective assistance of counsel which were set forth in his MAR of 23 March 2004.

No error in part; reversed in part; and vacated in part.

Judges WYNN and ELMORE concur.

ENRIQUE BADILLO, PLAINTIFF v. ALPHONZA J. CUNNINGHAM, CHRISTIE CUNNINGHAM, AND FRANK OTIS BURROUGHS, JR., DEFENDANTS

No. COA05-1252

(Filed 6 June 2006)

Pleadings— sanctions—violation of discovery dates

The trial court did not abuse its discretion by dismissing plaintiff's personal injury action with prejudice allegedly without considering lesser sanctions based on plaintiff's failure to meet discovery due dates, because: (1) N.C.G.S. § 1A-1, Rule 37 allows the trial court to impose sanctions, including dismissal, upon a party for discovery violations; (2) the trial court is not required to list and specifically reject each possible lesser sanction prior to determining that dismissal is appropriate; and (3) the trial court expressly stated that lesser sanctions were urged by plaintiff, which leads to an inference that the trial court did in fact consider lesser sanctions.

Judge WYNN dissents.

Appeal by plaintiff from order entered 27 June 2005 by Judge W. Douglas Albright in Rockingham County Superior Court. Heard in the Court of Appeals 11 April 2006.

Wilson & Iseman, LLP, by G. Gray Wilson, and Peebles Law Firm, PC, by Todd M. Peebles, for plaintiff-appellant.

Teague, Rotenstreich & Stanaland, LLP, by Paul A. Daniels, for unnamed defendant-appellee Nationwide Mutual Insurance Company.

ELMORE, Judge.

Enrique Badillo (plaintiff) appeals an order of the trial court dismissing his action with prejudice. For the reasons stated herein, we affirm the order below.

Plaintiff filed a personal injury action in Rockingham County Superior Court in September 2001. After taking a voluntary dismissal without prejudice in July 2003, plaintiff re-filed this action on 13 November 2003. Plaintiff did not give any notice of the refiling to counsel for the unnamed defendant Nationwide Mutual Insurance Company (Nationwide). During an administrative telephone conference on 15 November 2004, Superior Court Judge Melzer Morgan instructed plaintiff's counsel to provide proof of service and to serve copies of all pleadings on counsel for Nationwide. Judge Morgan scheduled the case for trial the week of 13 June 2005, with a 31 May 2005 discovery deadline. Counsel for Nationwide gave notice of appearance in the case on 15 December 2004.

On 16 December 2004 Nationwide moved to dismiss plaintiff's action for failure to prosecute and failure to provide proof of service and pleadings to Nationwide as requested by the trial court. Plaintiff complied with the court's order on 14 January 2005, just prior to the hearing on Nationwide's motion to dismiss. Nationwide served an Answer and written discovery on plaintiff on 24 January 2005. Plaintiff failed to respond, and Nationwide moved to compel discovery on 23 March 2005. In this motion, Nationwide asked the court to enter an order pursuant to Rule 37(d) of the North Carolina Rules of Civil Procedure requiring plaintiff to pay Nationwide's reasonable expenses and attorneys' fees related to obtaining an order compelling discovery. Nationwide's counsel stated that he made a good faith attempt to confer with counsel for plaintiff, in a letter dated 1 March 2005, before serving the motion to compel.

Nationwide's motion to compel was heard on 11 April 2005, and the trial court entered an order the same day. The court found that plaintiff's counsel did not seek an extension to respond to discovery and that counsel for Nationwide wrote to plaintiff's counsel on 1 March 2005, reminding him of discovery past due. As of 11 April 2005, the parties were only six weeks from the close of the discovery period set by Judge Morgan. The court concluded that plaintiff's counsel conduct was an inexcusable failure to make discovery and to prosecute his client's case in violation of Rule 37(d) of the North Carolina Rules of Civil Procedure. Pursuant to its order entered 11 April 2005, the court dismissed plain-

tiff's action with prejudice. Plaintiff filed a Motion to Reconsider. The court held a hearing on this motion and entered an amended order of dismissal on 27 June 2005.

Plaintiff appeals from the 27 June 2005 order entered by Judge Albright. Plaintiff argues that the court erred in dismissing the action without actually considering lesser sanctions. Plaintiff also asserts that the court's findings of fact are insufficient to support its determination that lesser sanctions are inappropriate.

Rule 37 of the North Carolina Rules of Civil Procedure authorizes a trial judge to impose sanctions, including dismissal, upon a party for discovery violations. *See* N.C. Gen. Stat. § 1A-1, Rule 37(d) (2005); N.C. Gen. Stat. § 1A-1, Rule 37(b)(2) (2005). Generally, responses to discovery requests are due within thirty days of service. N.C. Gen. Stat. § 1A-1, Rule 33(a) (2005); N.C. Gen. Stat. § 1A-1, Rule 34(b) (2005). We review the trial court's decision of whether to dismiss an action based upon discovery violations for an abuse of discretion. *See Cheek v. Poole*, 121 N.C. App. 370, 374, 465 S.E.2d 561, 564, *cert. denied*, 343 N.C. 305, 471 S.E.2d 68 (1996). "The determination of whether to dismiss an action because of noncompliance with discovery rules, 'involves the exercise of judicial discretion' and should not be disturbed unless 'manifestly unsupported by reason.' " *Id.* (quoting *Miller v. Ferree*, 84 N.C. App. 135, 136-37, 351 S.E.2d 845, 847 (1987)).

Plaintiff is correct that a trial judge must consider less severe sanctions prior to dismissing an action with prejudice for failure to respond to discovery requests. *See Goss v. Battle*, 111 N.C. App. 173, 176-77, 432 S.E.2d 156, 158-59 (1993). However, where the record on appeal permits the inference that the trial court considered less severe sanctions, this Court may not overturn the decision of the trial court unless it appears so arbitrary that it could not be the result of a reasoned decision. *See Hursey v. Homes by Design, Inc.*, 121 N.C. App. 175, 179, 464 S.E.2d 504, 506 (1995).

We reject plaintiff's argument that the trial court's conclusory statements that it considered lesser sanctions, without listing which specific sanctions it considered, are insufficient to support the ruling that lesser sanctions are inappropriate. Here, the trial court stated that:

> the Court having reconsidered this matter and the arguments of counsel, as well as the applicable case law, and having considered certain lesser discovery sanctions as urged by plaintiff, the Court being of the opinion that dismissal of the case was and remains the

> only appropriate sanction in view of the totality of the circumstances of the case, which circumstances amply demonstrate the severity of the disobedience of counsel for plaintiff in failing to make discovery and thereby impeding the necessary and efficient administration of justice, the Court being of the opinion that lesser sanctions in this case would be inappropriate . . . .

We hold that the trial court is not required to list and specifically reject each possible lesser sanction prior to determining that dismissal is appropriate. In *In re Pedestrian Walkway Failure*, 173 N.C. App. 237, 618 S.E.2d 819 (2005), this Court addressed the plaintiff's assertion that the trial court erred in dismissing his claims without considering lesser sanctions. The order dismissing the claims stated that:

> the Court has carefully considered each of [plaintiff's] acts [of misconduct], as well as their cumulative effect, and has also considered the available sanctions for such misconduct. After thorough consideration, the Court has determined that sanctions less severe than dismissal would not be adequate given the seriousness of the misconduct . . . .

In re Pedestrian Walkway Failure, 173 N.C. App. at 246, 618 S.E.2d at 828-29. The Court held that this language sufficiently demonstrated that the trial judge in fact considered lesser sanctions. *Id.*

We see no material difference between that language and the order of the trial court in the instant case. Judge Albright states that, given the severity of disobedience by plaintiff's counsel, lesser sanctions would be inappropriate. The record supports the seriousness of plaintiff's misconduct: Plaintiff did not answer or object to any of Nationwide's interrogatories or requests for production of documents. Neither did plaintiff seek a protective order or proffer any justification for this inaction. This Court has previously upheld a trial court's dismissal of an action based upon similar circumstances of a disregard of discovery due dates. *See Cheek*, 121 N.C. App. at 374, 465 S.E.2d at 564 (plaintiff did not object to discovery requests and failed to respond within extended time to comply); *Fulton v. East Carolina Trucks, Inc.*, 88 N.C. App. 274, 276, 362 S.E.2d 868, 869-70 (1987) (plaintiffs did not answer, object, or respond in any way to defendants' requests for discovery). Moreover, Judge Albright expressly states that lesser sanctions were *urged by the plaintiff*. As such, we can infer from the record that the trial court did in fact consider lesser sanctions. On this record, plaintiff simply fails to establish an abuse of the trial court's discretion in dismissing the action. We affirm.

Affirmed.

Judge LEVINSON concurs.

Judge WYNN dissents by separate opinion.

WYNN, Judge, dissenting.

"[B]efore dismissing a party's claim with prejudice pursuant to Rule 37, the trial court must consider less severe sanctions."[1] While the majority concludes that the trial court considered less severe sanctions before dismissing the claim, as the record does not support this conclusion, I would reverse and remand for consideration of less severe sanctions. Accordingly, I must respectfully dissent.

The majority correctly notes that Rule 37(d) of the North Carolina Rules of Civil Procedure authorizes a trial court to sanction a party pursuant to Rule 37(b)(2) for failure to serve answers or objections to interrogatories. N.C. Gen. Stat. § 1A-1, Rule 37(d). The trial court is given broad discretion to "make such orders in regard to the failure as are just" and authorized to, *inter alia*, dismiss the action, or render judgment against the disobedient party. N.C. Gen. Stat. § 1A-1, Rule 37(b)(2) (2005).

While the trial court is afforded discretion in imposing discovery sanctions, because a dismissal with prejudice is the ultimate punishment in a civil case, "before dismissing a party's claim with prejudice pursuant to Rule 37, the trial court must consider less severe sanctions." *Hursey*, 121 N.C. App. at 179, 464 S.E.2d at 507 (citing *Goss*, 111 N.C. App. at 177, 432 S.E.2d at 159). The trial court is not required to impose lesser sanctions, but only to consider lesser sanctions. *Goss*, 111 N.C. App. at 177, 432 S.E.2d at 159.

The following procedural history occurred prior to Judge Albright's dismissal order:

13 November 2003: Plaintiff files Complaint

9 December 2004: Order calendering case for trial the week of 13 June 2005 and setting a 31 May 2005 discovery deadline

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1. *Hursey v. Homes by Design, Inc.*, 121 N.C. App. 175, 179, 464 S.E.2d 504, 507 (1995) (citing *Goss v. Battle*, 111 N.C. App. 173, 177, 432 S.E.2d 156, 159 (1993)); *see also* N.C. Gen. Stat. § 1A-1, Rule 37(d) (2005).

15 December 2004: Notice of Appearance by counsel for Unnamed Defendant Nationwide Insurance Companies

24 January 2005: Nationwide filed its Answer and sent Plaintiff Interrogatories

1 March 2005: Letter from Nationwide's counsel to Plaintiff's counsel regarding overdue interrogatories

23 March 2005: Nationwide filed a Motion to Compel Discovery asking for expenses and attorneys' fees

11 April 2005: Order dismissing case with prejudice

In this case, the trial court did not state in its original dismissal order that it had considered lesser sanctions. Only after Plaintiff filed a motion to reconsider did the trial court make the conclusory statement that the trial court had "considered certain lesser discovery sanctions[.]" But it is not evident from the record or from the trial court's orders what form of lesser sanctions the trial court had considered.

Significantly, Nationwide never asked for dismissal of the case. Indeed, the trial court dismissed this action with prejudice in an order responding to Nationwide's motion to compel discovery which requested expenses and attorneys fees. The trial court never entered an order compelling responses to interrogatories nor does it appear from the record that it considered awarding expenses and attorneys' fees to Nationwide, the requested sanction.

Furthermore, while Plaintiff was late in responding to interrogatories, as of the first dismissal order, there was still over a month left until the 31 May 2005 discovery deadline. Also, Plaintiff had never violated a court order to compel discovery, as the trial court never took that initial step before dismissing the case with prejudice.

The majority cites to *In re Pedestrian Walkway Failure*, —— N.C. App. ——, 618 S.E.2d 819 (2005), to support its conclusion that the trial court's conclusory statement was sufficient to determine it had considered lesser sanctions. But in *In re Pedestrian Walkway Failure*, the defendant filed a motion which requested that the plaintiff be sanctioned with the dismissal of his claims but also requested, in the alterative, lesser sanctions. *Id.* at ——, 618 S.E.2d at 828. Moreover, the trial court in *In re Pedestrian Walkway Failure* dismissed the case pursuant to Rule 37(d) and Rule 41(b) for the plaintiff's repeated attempts to frustrate the discovery process and a court

order by failing to turn over his 2001 tax records, giving evasive and contradictory answers to a court ordered deposition, and falsely representing to the court the status of his 2001 tax filings. *Id.* at ——, 618 S.E.2d at 826-27.

Also in both *Cheek v. Poole*, 121 N.C. App. 370, 372, 465 S.E.2d 561, 563 (1996) and *Fulton v. East Carolina Trucks, Inc.*, 88 N.C. App. 274, 275, 362 S.E.2d 868, 869 (1987), the other cases cited by the majority, the defendant's *requested* dismissal as a sanction for discovery violations, unlike here, where Nationwide only requested expenses and attorneys' fees as a sanction.

The sanction imposed in this case was harsh. This Court has previously stated:

> Dismissal is the most severe sanction available to the court in a civil case. An underlying purpose of the judicial system is to decide cases on their merits, not dismiss parties' causes of action for mere procedural violations. In accord with this purpose, claims should be involuntarily dismissed only when lesser sanctions are not appropriate to remedy the procedural violation.

Wilder v. Wilder, 146 N.C. App. 574, 576, 553 S.E.2d 425, 427 (2001) (internal citations omitted).

Dismissal with prejudice is the ultimate sanction, and it must be evident from the record that the trial court first considered lesser sanctions. *See Goss*, 111 N.C. App. at 177, 432 S.E.2d at 159. It is evident from the record that Plaintiff had never violated a court order, therefore, an order compelling discovery and awarding attorneys' fees would have been an appropriate remedy to the procedural violation. *See Wilder*, 146 N.C. App. at 576, 553 S.E.2d at 427. The trial court's conclusory statement is not sufficient for this Court to determine if lesser sanctions were considered and why they were inappropriate to remedy the procedural violation. Therefore, this case should be reversed and remanded.

G.W. HOUSTON, PETITIONER v. TOWN OF CHAPEL HILL, A MUNICIPALITY, RESPONDENT, AND THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, THIRD-PARTY RESPONDENT

No. COA05-1461

(Filed 6 June 2006)

1. **Administrative Law— closing of road—appeal from town council to superior court—new evidence**

   A superior court sitting in appellate review of a town council decision on a road closing may hear additional evidence only on whether the council complied with statutory procedural requirements concerning a road closing, and the superior court here did not err by not conducting an evidentiary hearing and making findings and conclusions.

2. **Appeal and Error— assignments of error—insufficient to raise constitutional issue**

   The lack of a constitutional reference in an assignment of error meant that any constitutional question was not preserved for appellate review.

3. **Highways and Streets— road closing—superior court hearing—no new evidence**

   Town council hearings were the proper place for petitioner to present and rebut evidence about the closing of a road, and the superior court did not err by refusing to allow petitioner to present evidence at the hearing on his petition to vacate an order closing the road.

Appeal by petitioner from an order entered 24 May 2005 by Judge J.B. Allen, Jr. in Orange County Superior Court. Heard in the Court of Appeals 17 May 2006.

Robert A. Hassell and G. Keith Whited for petitioner-appellant.

Attorney General Roy Cooper, by Special Deputy Attorney General Thomas J. Ziko, and Ralph D. Karpinos for respondent-appellees.

BRYANT, Judge.

G.W. Houston (petitioner) appeals from an order entered 24 May 2005 dismissing his petition and affirming the order of the Town Council (Council) of the Town of Chapel Hill (Town) closing a portion of Laurel

Hill Road in Chapel Hill, North Carolina. We affirm the order of the superior court.

Facts and Procedural History

Petitioner is the owner of a home on Kings Mill Road in the Morgan Creek subdivision of Chapel Hill, North Carolina. Petitioner's home is nine lots west of the intersection of Kings Mill Road and Laurel Hill Road, which provides access to Fordham Boulevard for the residents, property owners and guests of the Morgan Creek subdivision. The Morgan Creek subdivision has five additional access points onto Fordham Boulevard.

On 3 August 2004, the University of North Carolina at Chapel Hill (the University) filed a request with the Council seeking the closure of part of Laurel Hill Road, citing three reasons: to promote safety; to unify the grounds of the North Carolina Botanical Garden; and to provide better teaching and visitor experiences. Property on both sides of the proposed road closure belongs to the University and is used by the North Carolina Botanical Garden.

On 7 September 2004, the Council passed a resolution establishing a public hearing on 18 October 2004 for the purpose of receiving public comment on the proposed closing of 1,000 feet of Laurel Hill Road. On 13 September 2004, the Council adopted a second resolution calling for the closing of the entire section of Laurel Hill Road from Coker Road to Fordham Boulevard. The second resolution also required that notice be published, posted on the property and mailed to appropriate property owners and utility companies.

Hearings before the Council on the proposed closure of Laurel Hill Road were held on 18 October, 27 October, and 22 November 2004. At the 18 October 2004 public hearing, statements were presented to the Council showing both public support for and opposition to the road closure; citing roadway overcrowding, issues as to bad weather conditions, fire and emergency vehicle access, and other issues. The Council also received numerous letters and e-mails from various citizens, including petitioner, expressing their support or opposition to the proposed closure. These materials were part of the record before the Council when it considered this matter.

On 22 November 2004, the Council adopted an Order, pursuant to N.C. Gen. Stat. § 160A-299, permanently closing the section of Laurel Hill Road from Coker Drive to Fordham Boulevard. In its Order, the Council found that:

upon review of the facts and of information received at the Public Hearing, that the closing of the Laurel Hill Road right-of-way between Coker Drive and Fordham Boulevard would not be contrary to the public interest, and that no individual owning property in the vicinity of the Laurel Hill Road right-of-way proposed for closure would be deprived of reasonable means of ingress and egress to his or her property by the closing of said right-of-way.

On 22 December 2004, petitioner filed a "Petition to Vacate and Appeal from [the] Order of the Town Council Closing a Municipal Road" in Orange County Superior Court. The Town filed and served its response and the certified Record of Proceedings before the Council pertaining to the closing of Laurel Hill Road on 23 February 2005. On 5 April 2005, the University filed a motion to intervene as a third party respondent, along with a response to petitioner's appeal.

Petitioner's appeal was heard before the Honorable J.B. Allen, Jr. in Orange County Superior Court on 16 May 2005. The superior court allowed the University's motion to intervene in open court and entered an Order to that effect on 20 May 2005. On 24 May 2005, the superior court entered an Order finding petitioner was a person aggrieved by the closing of Laurel Hill Road and thus had standing to present his appeal to the superior court. However, the superior court dismissed petitioner's appeal and affirmed the Order of the Council closing the portion of Laurel Hill Road between Coker Drive and Fordham Boulevard. Petitioner appeals.

Petitioner raises the issues of whether the superior court erred in: (I) failing to conduct an evidentiary hearing pursuant to N.C. Gen. Stat. § 160A-299(b) and make findings of fact and conclusions of law from the evidence at the hearing; (II) denying petitioner's motion to continue the hearing on the petition; and (III) refusing to allow petitioner to present evidence at the hearing on his petition. For the reasons below, we affirm the Order of the superior court.

I

[1] As petitioner concedes in his brief, the power to close a public street is a legislative power granted to municipal corporations, and, if exercised within the meaning of the statute, and not arbitrarily or capriciously, should be upheld. *See Homebuilders Ass'n of Charlotte, Inc. v. City of Charlotte*, 336 N.C. 37, 442 S.E.2d 45 (1994); *see also* N.C. Gen. Stat. §§ 160A-4, 160A-299 (2005). However, petitioner argues that, pursuant to N.C. Gen. Stat. § 160A-299, he has the right to show by evidence

presented to the superior court that the factors determined by the Town were insufficient to meet the standards required by statute. Petitioner contends the superior court erred in deciding he "had no right to meaningful discovery, had no right to be heard about the addition of a new party, declined to allow the Plaintiff to call witnesses or to testify in his own behalf, and undertook a review of the written record from the Town Council." Petitioner argues the language of N.C. Gen. Stat. § 160A-299(b), stating that "all facts and issues shall be heard and decided by a judge, sitting without a jury[,]" gives him the right to present evidence on appeal to the superior court. N.C.G.S. § 160A-299(b) (2005). We disagree.

N.C. Gen. Stat. § 160A-299 sets forth the procedure a town must follow when it "proposes to permanently close any street or public alley[.]" N.C.G.S. § 160A-299(a) (2005). The statute further provides:

> If it appears to the satisfaction of the council after the hearing that closing the street or alley is not contrary to the public interest, and that no individual owning property in the vicinity of the street or alley or in the subdivision in which it is located would thereby be deprived of reasonable means of ingress and egress to his property, the council may adopt an order closing the street or alley.

Id. Additionally, "[a]ny person aggrieved by the closing of any street or alley" may appeal the council's order to the superior court. N.C.G.S. § 160A-299(b) (2005). In such appeals,

> all facts and issues shall be heard and decided by a judge sitting without a jury. In addition to determining whether procedural requirements were complied with, the court shall determine whether, on the record as presented to the city council, the council's decision to close the street was in accordance with the statutory standards of subsection (a) of this section and any other applicable requirements of local law or ordinance.

Id. Thus, on appeal from an order closing a street or alleyway, the superior court must complete three separate inquiries:

(1) whether the council had complied with the procedural requirements of N.C. Gen. Stat. § 160A-299(a);

(2) whether the council's decision was in accordance with the statutory standards of N.C. Gen. Stat. § 160A-299(a), including:

   (a) whether closing the street or alley is not contrary to the public interest, and

(b) whether any individual owning property in the vicinity of the street or alley or in the subdivision in which it is located would be deprived of reasonable means of ingress and egress to his property; and

(3) whether the council's decision was in accordance with any other applicable requirements of local law or ordinance.

See N.C.G.S. § 160A-299(b) (2005). However, the language of N.C. Gen. Stat. § 160A-299 specifically states that the latter two inquiries are to be made "on the record as presented to the city council[.]" *Id.*

"When the language of a statute is clear and without ambiguity, it is the duty of this Court to give effect to the plain meaning of the statute, and judicial construction of legislative intent is not required." *Diaz v. Div. of Soc. Servs.*, 360 N.C. 384, 387, 628 S.E.2d 1, 3 (2006) (citing *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990)). Further, when the superior court sits as an appellate court, it is the function of the superior court to determine whether the findings of fact made by a municipal body are supported by the evidence before the municipal body and those findings are sufficient to support the municipal body's decision. *See Showcase Realty & Constr. Co. v. City of Fayetteville Bd. of Adjustment*, 155 N.C. App. 548, 550, 573 S.E.2d 737, 739 (2002) (stating appellate role of the superior court in reviewing decisions made by a city Board of Adjustment).

From the clear and unambiguous language of N.C. Gen. Stat. § 160A-299(b), the superior court, sitting in appellate review of an order closing a street or alleyway, may only hear additional evidence regarding whether the city council complied with the procedural requirements of N.C. Gen. Stat. § 160A-299(a). Parties are thus not entitled to present new evidence concerning whether closing the street or alley is contrary to the public interest, whether an aggrieved individual would be deprived of reasonable means of ingress and egress to his property, or whether the council's decision was in accordance with any other applicable requirements of local law or ordinance. All such evidence must be presented to the city council for its consideration.

As petitioner did not contest at the hearing in the superior court that all procedural requirements were complied with, and does not argue that any other applicable requirements of local law or ordinance were violated, the superior court did not err in failing to conduct an evidentiary hearing. In providing appellate review of the Council's Order closing a portion of Laurel Hill Road, the superior court was not

required to make any findings of fact. The superior court affirmed the Council's Order after concluding that the Council complied with the mandates of N.C. Gen. Stat. § 160A-299. From the record before this Court, the evidence before the Council supports its finding that the closing of Laurel Hill Road between Coker Drive and Fordham Boulevard is not contrary to the public interest, and that the closure would not deprive any individual owning property in the vicinity of reasonable means of ingress and egress to his or her property. This assignment of error is overruled.

II

[2] Petitioner also argues the superior court erred in denying his motion to continue. At the 16 May hearing, the superior court denied petitioner's oral motion to continue based on the addition of the University as a new third-party respondent. Petitioner argues that, upon the University's intervention in the appeal before the superior court, he had a right to confront the legal and factual basis underlying the University's request for the road closure. Petitioner claims he had a right to conduct discovery and to contest and confront the factual and legal validity of the University's position in the appeal and that the superior court's denial of his motion to continue violated his constitutional rights under Article I, Sections 18 and 19 of the North Carolina Constitution. However, petitioner has not properly preserved this issue for appellate review.

Rule 10 of the North Carolina Rules of Appellate Procedure requires appellants to "state plainly, concisely and without argumentation the legal basis upon which error is assigned." N.C. R. App. P. 10(c)(1). Petitioner's assignment of error states:

> The Trial Court erred prejudicially in denying the Defendant's [sic] Motion to Continue hearing on a Petition to allow the Petitioner's [sic] to conduct discovery against a newly added party.

This assignment of error makes no reference to any constitutional provisions or any violation of petitioner's constitutional rights. Therefore, it is insufficient to preserve a constitutional question for appellate review. *Kimmel v. Brett*, 92 N.C. App. 331, 334-35, 374 S.E.2d 435, 436-37 (1988) (an assignment of error that states the trial court erred to appellant's prejudice insufficient to preserve issue for appellate review). Further, we have reviewed petitioner's claim on its merits and find no error. This assignment of error is overruled.

III

[3] Petitioner lastly argues the superior court erred in refusing to allow him to present evidence at the hearing on his petition. Petitioner contends that N.C. Gen. Stat. § 160A-299 is unconstitutional as violative of the Separation of Powers Clause of the Constitution of North Carolina. Petitioner argues N.C. Gen. Stat. § 160A-299 deprives him of his constitutionally guaranteed right to a fair hearing where he is not only "apprised of all the evidence received by the court" but also "given an opportunity to test, explain, or rebut it." *In re Gupton*, 238 N.C. 303, 304, 77 S.E.2d 716, 717-18 (1953).

In *Gupton*, the "factual adjudication [was] based in substantial part upon evidence of an unrevealed nature gathered by the presiding judge in secret from undisclosed sources without [respondent's] knowledge or that of his counsel." *Id.* at 305, 77 S.E.2d at 718. In the instant case, petitioner was given the opportunity to test, explain and rebut the evidence as presented to the Council. The Council held three public hearings on the proposed road closure over the course of two months. These hearings were the proper place for petitioner to present evidence and rebut any evidence contrary to his position. This assignment of error is overruled.

Affirmed.

Judges CALABRIA and ELMORE concur.

IN THE MATTER OF A.J.M.

No. COA05-504

(Filed 6 June 2006)

1. Child Abuse and Neglect— neglect—findings of fact—clear, cogent, and convincing evidence

The trial court did not err in a child neglect case by its findings of fact numbers three through six, because: (1) despite the fact respondent mother never expressly denied that striking the minor child with a belt was inappropriate, her overall testimony supported such a finding; (2) respondent's testimony that striking the minor child with a belt amounted to appropriate discipline combined with

her not assigning error to the finding that she repeatedly struck the minor child with a belt on the buttocks and thighs supported the trial court's finding she physically harmed the minor child; (3) although respondent correctly asserts no testimonial evidence supported the finding she had yet to complete a mental health evaluation by the end of September 2003, she failed to assign error to the finding relevant to her mental health that she only attended five of the ten therapy sessions scheduled between February 18 and June 11, 2004; and (4) there was also clear, cogent, and convincing evidence that respondent was routinely offered assistance to visit her daughter but there were times respondent was not at home at the appointed times.

2. Child Abuse and Neglect— neglect—conclusion of law

The trial court did not err by concluding the minor child was neglected based on its findings including that: (1) respondent mother struck her then one-year-old child with a belt, and respondent testified she previously used the belt as a means of discipline for all three of her children; (2) a mental health evaluation and completion of accompanying therapy was required, but respondent failed to fully comply; and (3) despite attempts of the minor child's paternal aunt and others, respondent was not at home at the appointed times and consequently missed visits with the minor child and several therapy sessions.

3. Jurisdiction; Process and Service— failure to comply with Rule 4—general appearance without objection—waiver

The trial court in a child neglect case did not fail to obtain personal jurisdiction over respondent mother who was not served the juvenile summons in compliance with N.C.G.S. § 1A-1, Rule 4, because: (1) a defendant who makes a general appearance without objection waives the issues of insufficiency of service of process and submits to personal jurisdiction of the court; (2) respondent was not only present in court, but also agreed to continue the matter; (3) there is no evidence respondent raised any objection at the hearing regarding insufficient service of process or personal jurisdiction; and (4) respondent acknowledged she had actual notice of the proceedings, and failed to argue in her brief that she had made any such objections.

Appeal by respondent mother from order entered 20 August 2004 by Judge Sarah P. Bailey in Halifax County District Court. Heard in the Court of Appeals 22 March 2006.

Mercedes O. Chut for respondent-appellant mother.

No brief filed for appellee Halifax County Department of Social Services.

CALABRIA, Judge.

Ms. M. ("respondent mother"), the mother of now four-year-old A.J.M. ("the minor child"), as well as two additional children, appeals an order adjudicating the minor child neglected. We affirm.

In June of 2003, the Halifax County Department of Social Services ("DSS") received a call indicating respondent mother inappropriately disciplined the minor child with a belt as punishment for hitting a playmate over the head with a water gun. Respondent mother admitted she disciplined her minor children by using a belt whenever they failed to respond to verbal admonishment. During the DSS investigation, respondent mother's three children were cared for by her mother. Although respondent mother's two sons were later returned to her care, the minor child remained with her paternal aunt since respondent mother allegedly struck the minor child with a belt. Subsequently, DSS developed a case plan for reunification between the minor child and respondent mother if respondent mother completed both parenting classes and a mental health evaluation. Respondent mother agreed to allow the three children to live with their relatives, assist the relatives with the minor child's financial needs, and cooperate with supervised visitation.

Approximately one year later on 11 June 2004, DSS filed a juvenile petition alleging the minor child was neglected and dependent. Alvin S. Mills, the minor child's father, consented to dependency since his incarceration prevented him from providing proper care and supervision. The only issue for hearing was the issue regarding neglect.

At the hearing on 22 July 2004 to determine whether the minor child was neglected, the court's pertinent findings of fact included respondent mother's discipline procedures and progress. In June of 2003, respondent mother disciplined the minor child, who was about to turn two years old, by "striking her repeatedly with a belt on the buttocks and thighs" and "denied that this was inappropriate discipline." In August of 2003, respondent mother completed parenting classes, but not her mental health evaluation. Further, the minor child was staying with her paternal aunt "because she had been physically harmed by [respondent] mother," and by late September 2003, respondent mother

had not consistently visited the minor child or helped with the minor child's financial support.

Between 18 February and 11 June 2004, respondent mother attended only five of ten therapy sessions. In February of 2004, the minor child's paternal aunt moved to Emporia, Virginia. Despite a support group including: the aunt, a relative, and a social worker assisting with transporting either the minor child or respondent mother to and from Virginia to facilitate visitation and therapy appointments, respondent mother was not always home at the appointed times and she continued missing both therapy sessions and visitation with the minor child. Based upon clear, cogent, and convincing evidence, the court concluded as a matter of law the minor child was neglected pursuant to N.C. Gen. Stat. § 7B-101(15). That same day, the court entered an order placing the minor child in the legal custody of her paternal aunt who the court named "Guardian of the person." Respondent mother appeals.

I. FINDINGS OF FACT:

[1] Respondent mother first argues the trial court erred in making its findings of fact. Respondent mother contends certain findings are not supported by clear, cogent, and convincing evidence. We disagree.

"In a . . . neglect adjudication, the trial court's findings of fact supported by clear and convincing competent evidence are deemed conclusive, even where some evidence supports contrary findings." *In re Helms*, 127 N.C. App. 505, 511, 491 S.E.2d 672, 676 (1997). Further, "[if] respondent [mother] did not except to [certain] . . . findings, they are presumed to be correct and supported by evidence." *In re Moore*, 306 N.C. 394, 404, 293 S.E.2d 127, 133 (1982).

A. *Finding of Fact Three*:

In the instant case, respondent mother assigns error to portions of the findings of fact supporting the conclusion she neglected the minor child. First, she assigns error to the portion of finding of fact number three stating, "[d]uring her testimony in this matter, [respondent mother] admitted striking the [minor] child but denies that this was inappropriate discipline for a 2-year-old child since she only struck her '4 or 5 licks.' " Respondent mother contends she never denied that striking the child with a belt was inappropriate discipline. Despite the fact respondent mother never expressly denied that striking the minor child with a belt was inappropriate, her overall testimony supports such a finding. At the 22 July 2004 hearing, respondent

mother indicated her use of the same disciplinary method for all three of the children. She testified

> the way I discipline all three, not only [the minor child], all three of my children is I talk to them. You know, if they've done something wrong I tell them that it's wrong for them to do. And I may tell them once or twice before then. But then on this occasion, I spoke to [the minor child] twice about running away from her cousin[.] I talked to her and explained to her that that was wrong. She was playing with the little girl and she hit a little girl over the head with a water gun. And so her mother then came to me and told me what my daughter had did. And I simply popped her with the belt.

Respondent mother further testified that, "other times, I have disciplined my children with belts." Based upon respondent mother's testimony, she considers spanking with a belt after verbal admonishment to be appropriate discipline for all three of her children. Thus, based on respondent mother's own testimony, clear and convincing competent evidence supported the trial court's finding that she denied striking the minor child with a belt was inappropriate discipline.

B. *Finding of Fact Four and Five*:

Respondent mother next assigns error to the portions of finding of fact number four stating the minor child "had been physically harmed by her mother," respondent mother "had not had a mental health evaluation," and she "had not been consistently helping with [the minor child's] financial support and had not been visiting her regularly." Respondent mother's testimony that striking the minor child with a belt amounted to appropriate discipline combined with her not assigning error, *see Moore*, *supra*, to the finding that she "repeatedly [struck the minor child] with a belt on the buttocks and thighs" supports the trial court's finding she physically harmed the minor child.

Though respondent mother is correct in asserting no testimonial evidence supports the finding she had yet to complete a mental health evaluation by the end of September 2003, ultimately in finding of fact number five she fails to assign error to the finding relevant to her mental health that "she only attended [five] of the [ten] therapy sessions . . . scheduled between February 18 and June 11, 2004." Moreover, she assigns as error in finding of fact number five only that there was no evidence she missed two mental health appointments dated 3 October 2003 and 18 December 2003. Thus, because she does not object to the substantive finding of the trial court that she failed to attend half of her assigned mental health therapy sessions, that finding is supported by

convincing and competent evidence and moreover, ameliorates any concern pertaining to the two dates she allegedly missed mental health appointments. Admittedly, there is not testimonial evidence respondent mother failed to provide consistent financial support to the minor child. However, when compared to the overwhelming, substantive evidence supporting findings of fact four and five, that respondent mother physically harmed the minor child and failed to consistently attend assigned mental health sessions, and finding of fact six, that respondent mother failed to regularly visit the minor child, we believe such substantive evidence supports the trial court's conclusion the minor child was neglected.

C. *Finding of Fact Six*:

Respondent mother next assigns error to finding of fact number six which states

> [i]n mid or late February of 2004, [the minor child's paternal aunt] moved to Emporia, Virginia to be closer to her job, and [respondent mother] agreed for the [minor child] to continue living with [the paternal aunt.] Various people, including [the paternal aunt], another relative, the social worker and the CVS worker providing services to [respondent mother's] two boys, all agreed to take turns transporting this juvenile or her mother to and from Virginia to make visitation and therapy available. However, in spite of this assistance, [respondent mother] was sometimes not at home at the appointed times, and continued to miss therapy sessions and visitation with [the minor child].

Sholanda James ("Ms. James"), the social worker assigned to the instant case, testified that respondent mother was routinely offered this type of assistance. "It was arranged that [respondent mother] would have her visits with [the minor child] on Wednesdays." Ms. James continued "[w]e had the rotation that Ms. Clements[, the social worker,] would transport on certain weeks and the cousin, the relatives would transport." Despite this effort, Ms. James noted "there was times [respondent mother] didn't answer the door," specifically referencing 26 May 2004 where "I actually transported [the minor child] from Emporia [] [a]nd [respondent mother] did not answer the door." Accordingly, convincing and competent evidence supports finding of fact number six. Thus, because clear and convincing, competent evidence supports the trial court's findings of fact, this assignment of error is overruled.

II. CONCLUSIONS OF LAW:

[2] Respondent next argues the trial court erred in concluding the minor child was neglected. Respondent mother contends that conclusion is not supported by findings of fact or the evidence. We disagree.

North Carolina General Statutes § 7B-101(15) (2005) defines a neglected juvenile as "[a] juvenile who does not receive proper care, supervision or discipline from the juvenile's parent[.]" " '[T]his Court has consistently required that there be some physical, mental, or emotional impairment of the juvenile or a substantial risk of such impairment as a consequence of the failure to provide proper care, supervision, or discipline.' " *In re E.C.*, 174 N.C. App. 517, 524, 621 S.E.2d 647, 653 (2005) (quoting *In re Safriet*, 112 N.C. App. 747, 752, 436 S.E.2d 898, 901-02 (1993)). "Our review of a trial court's conclusions of law is limited to whether they are supported by the findings of fact." *Helms*, 127 N.C. App. at 511, 491 S.E.2d at 676.

In the instant case, the trial court's findings support the conclusion respondent mother neglected the minor child. First, respondent mother struck her then one-year-old child with a belt, raising the distinct potential of physical, mental, or emotional harm. Further, respondent mother testified she previously used the belt as a means of discipline for all three of her children, including the minor child. Second, a mental health evaluation and completion of accompanying therapy was required. However, she failed to fully comply, missing five of ten therapy sessions scheduled between 18 February and 11 June 2004. Finally, despite attempts of the minor child's paternal aunt, who had moved to Virginia in February of 2004, and others, respondent mother was not at home at the appointed times and consequently missed visits with the minor child and several therapy sessions. Therefore, because the court's findings support its conclusion that respondent mother neglected the minor child, this assignment of error is overruled.

III. SERVICE OF PROCESS AND PERSONAL JURISDICTION:

[3] Respondent mother argues the trial court erred by failing to obtain personal jurisdiction over her since she was not served the juvenile summons in compliance with Rule 4 of the North Carolina Rules of Civil Procedure. We disagree.

North Carolina General Statutes § 7B-406(a) (2005) states "[i]mmediately after a petition has been filed alleging that a juvenile is abused, neglected, or dependent, the clerk shall issue a summons to

the parent . . . requiring them to appear for a hearing at the time and place stated in the summons." This Court previously held " 'process must be issued and served in the manner prescribed by statute, and failure to do so makes the service invalid even though a defendant had actual notice of the lawsuit.' " *In re Mitchell*, 126 N.C. App. 432, 434, 485 S.E.2d 623, 624 (1997) (quoting *Roshelli v. Sperry*, 57 N.C. App. 305, 307, 291 S.E.2d 355, 356 (1982)). Nevertheless, a defendant who makes a general appearance without objection waives the issue of insufficiency of service of process and submits to the personal jurisdiction of the court. *See* N.C. Gen. Stat. § 1-75.7 (2005) (stating "[a] court of this State having jurisdiction of the subject matter may, *without serving a summons upon him*, exercise jurisdiction in an action over a person: (1) Who makes a general appearance in an action[.]") (emphasis added).

In the instant case, the juvenile petition was filed 11 June 2004 and the summons was issued four days later. The summons was returned by the sheriff on 30 June 2004 unserved. On 8 July 2004, respondent mother attended the hearing regarding the allegations the minor child was neglected and dependent. Respondent mother was not only present in court, but also agreed to continue the matter until 22 July 2004. There is no evidence in the record respondent mother raised any objection at this hearing regarding insufficient service of process or personal jurisdiction. Moreover, respondent mother, who acknowledged she had "actual notice" of the proceedings, fails to argue in her brief that she made any such necessary objections. This Court has held that this amounts to waiver. " '[A]ny act which constitutes a general appearance obviates the necessity of service of summons and waives the right to challenge the court's exercise of personal jurisdiction over the party making the general appearance.' " *In re A.B.D.*, 173 N.C. App. 77, 83, 617 S.E.2d 707, 712 (2005) (quoting *Lynch v. Lynch*, 302 N.C. 189, 197, 274 S.E.2d 212, 219 (1981)). This assignment of error is overruled.

Affirmed.

Judges McGEE and GEER concur.

FRANCES L. AUSTIN FAMILY LIMITED PARTNERSHIP AND PIEDMONT LAND CONSERVANCY, PLAINTIFFS v. CITY OF HIGH POINT, DEFENDANT

No. COA05-1514

(Filed 6 June 2006)

Cities and Towns; Easements— taking—presence of unused sewer line on now abandoned sewer easement—just compensation

The presence of defendant city's former buried sewer line on its abandoned and reverted sewer easement did not constitute a further taking of plaintiff's property for which plaintiff is entitled to just compensation, because: (1) defendant paid plaintiff just compensation for the taking when in 1963 defendant paid plaintiff's predecessor-in-title for the right to place its sewer line on plaintiff's property forever; (2) plaintiff's predecessor-in-title accepted payment of $988.24 as compensation for any lost value to the property as a result of defendant's installation and maintenance of the sewer line within its easement, and plaintiff is entitled to nothing more than what its predecessors-in-title were paid when plaintiff purchased the property with the easement and sewer line in place and the parties reached an agreement on additional damages for the new sewer easement; and (3) defendant can abandon the easement without further obligation to plaintiff to pay compensation or remove the buried pipe when the owner of the dominant estate is not required to maintain or repair the easement for the benefit of the servient tenement.

Appeal by plaintiffs from order entered 6 October 2005 by Judge W. Douglas Albright in Guilford County Superior Court. Heard in the Court of Appeals 18 May 2006.

Wyatt Early Harris Wheeler LLP, by Scott F. Wyatt, for plaintiffs-appellants.

Womble Carlyle Sandridge & Rice, PLLC, by Gusti W. Frankel and Alison R. Bost, for defendant-appellee.

Andrew L. Romanet, Jr. and John M. Phelps, II, for amicus curiae North Carolina League of Municipalities.

TYSON, Judge.

Frances L. Austin Family Limited Partnership ("AFLP") and Piedmont Land Conservancy (collectively, "plaintiffs") appeal from order entered concluding the presence of the City of High Point's ("defendant") former sewer line on its abandoned and reverted sewer easement does not constitute a further taking of AFLP's property. We affirm.

I. Background

AFLP is the owner of approximately 101 acres located in High Point formerly used as a dairy farm. No sewer lines or pipes were located on the property prior to 1963. In 1963, defendant, in consideration for $988.24, obtained an easement from AFLP's predecessor-in-title for the installation, operation, and maintenance of a sewer line across AFLP's property.

On 17 March 2003, defendant initiated condemnation proceedings for a new sewer pipeline to be placed on AFLP's property as part of defendant's Upper Deep River Outfall Project. This condemnation action was resolved by consent judgment entered 18 March 2005. The consent judgment states that a portion of the existing easement on the property "reverts to the Grantor or its successor in interest upon completion of construction of the new sanitary sewer line."

Pursuant to the 1963 easement, defendant has a twenty-foot wide easement for the placement, operation, and maintenance of its sewer line across AFLP's property. The total area of the 1963 sewer line easement is 67,521.67 square feet. A total area of 55,887.24 square feet of additional permanent sewer line easement was taken in the 2003 Upper Deep River Outfall condemnation proceeding. Portions of the new easement run parallel and overlap with or include portions of the 1963 easement. The Upper Deep River Outfall easement is thirty feet wide. In the consent judgment, defendant also took for temporary construction an additional ten feet on both sides of the thirty foot easement.

Defendant completed the new sewer line on 1 May 2004. Upon completion of the new sewer line, defendant abandoned 26,503.83 square feet of portions of the 1963 sewer easement. Defendant left approximately 1,520 linear feet of sewer pipe buried in the ground within the abandoned easement. The diameter of the abandoned pipe varies between eighteen and twenty-four inches. This pipe was abandoned when the new sewer line was placed into service and is not being used by defendant for a sewer line or any other purpose.

Plaintiffs filed suit in Guilford County Superior Court alleging various claims relating to the underground sewer pipe including taking by inverse condemnation. On 12 August 2005, plaintiffs filed a "Motion for Judicial Determination of Issue Other than Compensation" pursuant to N.C. Gen. Stat. § 40A-47 seeking a ruling from the trial court on whether the continued presence of defendant's sewer pipe on its abandoned sewer easement constitutes a taking of AFLP's property requiring defendant to pay just compensation. The trial court reviewed depositions, pleadings, exhibits, and other materials and concluded "the presence of defendant City of High Point's unused sewer line on its now abandoned sewer easement . . . does not constitute a taking of [AFLP's] property under Chapter 40A of the North Carolina General Statutes." Plaintiffs appeal.

II. Issue

Plaintiffs argue the trial court erred by concluding defendant's act of leaving its buried sewer pipe on its abandoned sewer easement did not constitute a taking of AFLP's property for which plaintiffs are entitled to just compensation.

III. Standard of Review

"Conclusions of law drawn by the trial court from its findings of fact are reviewable *de novo* on appeal." *Humphries v. City of Jacksonville*, 300 N.C. 186, 187, 265 S.E.2d 189, 190 (1980). Further, "[i]t is well settled that *de novo* review is ordinarily appropriate in cases where constitutional rights are implicated." *Piedmont Triad Reg'l Water Auth. v. Sumner Hills, Inc.*, 353 N.C. 343, 348, 543 S.E.2d 844, 848 (2001).

IV. Takings and Inverse Condemnation

The Fifth Amendment to the United States Constitution provides in pertinent part, "nor shall private property be taken for public use without just compensation." U.S. Const. amend. V. Article I, Section 19 of the North Carolina Constitution states in part, "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." N.C. Const. art. I, § 19.

> While North Carolina does not have an express constitutional provision against the "taking" or "damaging" of private property for public use without payment of just compensation, this Court has allowed recovery for a taking on constitutional as well as common law principles. We recognize the fundamental right to just compen-

> sation as so grounded in natural law and justice that it is part of the fundamental law of this State, and imposes upon a governmental agency taking private property for public use a correlative duty to make just compensation to the owner of the property taken. This principle is considered in North Carolina as an integral part of "the law of the land" within the meaning of Article I, Section 19 of our State Constitution. The requirement that just compensation be paid for land taken for a public use is likewise guaranteed by the Fourteenth Amendment to the Federal Constitution.

Long v. Charlotte, 306 N.C. 187, 195-96, 293 S.E.2d 101, 107-08 (1982).

In *Charlotte v. Spratt*, our Supreme Court discussed the doctrine of inverse condemnation:

> Where private property is taken for a public purpose by a municipality or other agency having the power of eminent domain under circumstances such that no procedure provided by statute affords an applicable or adequate remedy, the owner, in the exercise of his constitutional rights, may maintain an action to obtain just compensation therefor.

263 N.C. 656, 663, 140 S.E.2d 341, 346 (1965). An inverse condemnation remedy is provided in this State by statute. N.C. Gen. Stat. 40A-51(a) (2005). Where property has been taken and no complaint containing a declaration of taking has been filed, the owner "may initiate an action to seek compensation for the taking." *Id.* "In order to recover for inverse condemnation, a plaintiff must show an actual interference with or disturbance of property rights resulting in injuries which are not merely consequential or incidental . . . ." *Long*, 306 N.C. at 199, 293 S.E.2d at 109.

In *Loretto v. Teleprompter Manhattan CATV Corp.*, the United States Supreme Court dealt with a cable television company's installation of a cable on the plaintiff's apartment building. 458 U.S. 419, 73 L. Ed. 2d 868 (1982). New York law required a landlord to permit a cable television company to install its cable facilities on his property to provide cable television service to the tenants. *Id.* at 421, 73 L. Ed. 2d at 873. The Supreme Court answered the question of "whether a minor but permanent physical occupation of an owner's property authorized by government constitutes a 'taking' of property for which just compensation is due under the Fifth and Fourteenth Amendments of the Constitution." *Id.*

The Supreme Court recognized the distinction between cases involving a "permanent physical occupation" and cases involving governmental action outside a person's property which results in consequential damages. *Id.* The Court noted, "A taking has *always* been found only in the former situation." *Id.* at 428, 73 L. Ed. 2d at 877. The Court affirmed "the traditional rule that a permanent physical occupation of property is a taking." *Id.* at 441, 73 L. Ed. 2d at 886.

V. Analysis

Plaintiffs argue AFLP is entitled to just compensation because defendant's act in leaving the buried sewer pipe on its abandoned sewer easement across AFLP's property constituted a taking. We disagree.

In 1963, AFLP's predecessor-in-interest granted an express sewer easement across the property to defendant for consideration of $988.24. The language of the express easement states the rights were granted to defendant "forever." However, our Supreme Court has held:

> When the purpose, reason, and necessity for an easement cease, within the intent for which it was granted, the easement is extinguished. Hence, if an easement is not granted for all purposes, but for a particular use only, the right continues while the dominant tenement is used for that purpose, and ceases when the specified use ceases.

R.R. v. Way, 172 N.C. 774, 778, 90 S.E. 937, 939 (1916) (quotation omitted); *see also Int. Paper Co. v. Hufham*, 81 N.C. App. 606, 609, 345 S.E.2d 231, 234 ("If the deed conveyed only an easement, the estate of the railroad company ceased and terminated when its tracks were removed and the railroad was abandoned[.]"), *disc. rev. denied*, 318 N.C. 506, 349 S.E.2d 860 (1986).

The 1963 easement was created for an express purpose, being "a sewer line across the property of the parties . . . and for the maintenance and upkeep of said sewer line." Under our Supreme Court's precedent, defendant abandoned the easement when it ceased to be used for a sewer line. *R.R.*, 172 N.C. at 778, 90 S.E. at 939. The 18 March 2005 consent order states the abandoned easement "reverts" to AFLP upon the completion of the new sewer line.

Whether or not defendant abandoned portions of the sewer easement is not determinative to the outcome here. Defendant paid AFLP just compensation for the taking. In 1963, defendant paid AFLP's predecessor-in-title for the right to place its sewer line on AFLP's property

"forever." AFLP's predecessor-in-title accepted payment of $988.24 as compensation for any lost value to the property as a result of defendant's installation and maintenance of the sewer line within its easement. Defendant has agreed, and the parties stipulate that defendant "shall be responsible for any assessment and/or remediation of contamination emanating from abandoned underground sewer lines on the Property" to the extent required by state or federal statutes or federal, state, or local regulations. Defendant has paid AFLP for the burden to its property of the buried sewer line. Plaintiffs are not entitled to be paid twice for that right.

In *Hildebrand v. Telegraph Co.*, the plaintiff was paid just compensation for a right-of-way taken by the State for highway purposes. The right-of-way was granted for "all purposes for which the State Highway & Public Works Commission is authorized by law to subject said right of way." 221 N.C. 10, 13, 18 S.E.2d 827, 829 (1942). The State granted the defendant the right to place telephone poles on the State's right-of-way. The plaintiff claimed she was entitled to compensation for the additional burden on her land. *Id.* at 14, 18 S.E.2d at 829-30. Our Supreme Court held, "The plaintiff has been compensated for this additional burden. She may not again recover." *Id.* Here, the same reasoning applies against AFLP. Plaintiffs were compensated by defendant for the right to place sewer lines within its sewer easement. "Where a landowner has granted a right of way over his land, he must look to his contract for compensation, as it cannot be awarded to him in condemnation proceedings, provided the contract is valid . . . ." *Feldman v. Gas Pipe Line Corp.*, 9 N.C. App. 162, 166, 175 S.E.2d 713, 715 (1970).

Defendant can abandon the easement without further obligation to AFLP to pay compensation or remove the buried pipe. Over eighty-five years ago, our Supreme Court stated, "the owner of the dominant estate is not required to maintain or repair the easement for the benefit of the servient tenement. He may, ordinarily, abandon it altogether, without infraction of any rights of the servient owner." *Craft v. Lumber Co.*, 181 N.C. 29, 31, 106 S.E. 138, 139 (1921). Our Supreme Court later reaffirmed this rule and held:

> [I]t is well settled at common law that the owner of the dominant estate may abandon an easement if he sees fit without any act of consent or concurrence on the part of the servient tenant. Although, as a matter of fact, the abandonment may injure the land upon or near which the easement was exercised, it could not constitute an actionable injury at common law, and certainly does not amount to a taking within the meaning of the constitution.

Snow v. Highway Commission, 262 N.C. 169, 173, 136 S.E.2d 678, 681-82 (1964). Defendant has fully compensated AFLP for its loss in property value due to placing the sewer pipe on AFLP's property. AFLP is entitled to nothing more than what its predecessors-in-title were paid. AFLP purchased this property with the easement and sewer line in place. The parties reached an agreement on additional damages for the new sewer easement. This assignment of error is overruled.

VI. Conclusion

Defendant fully compensated AFLP's predecessors-in-title for the sewer easement. The trial court did not err by concluding that defendant leaving its buried sewer pipe on its abandoned and reverted sewer easement did not constitute a taking of AFLP's property. The trial court's order is affirmed.

Affirmed.

Judges HUDSON and STEELMAN concur.

JAYE DAY, PLAINTIFF v. PAUL RASMUSSEN, DEFENDANT

No. COA05-1314

(Filed 6 June 2006)

Trusts— intent of settlors—extrinsic evidence—distribution of assets

Although the intent of the settlors of a trust as to the time of revocation could not be determined from the face of the document, an affidavit from the drafting attorney made it clear that their intent to was allow amendment or revocation by the surviving settlor, so that amendments changing the distribution of the trust assets after the death of one settlor were valid, and summary judgment was correctly granted for defendant in an action bringing conversion and other claims.

Appeal by plaintiff from an order entered 14 June 2005 by Judge James C. Spencer, Jr., in Wake County Superior Court. Heard in the Court of Appeals 20 April 2006.

Randolph M. James, P.C., by Randolph M. James, for plaintiff appellant.

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

McCULLOUGH, Judge.

Plaintiff appeals from the entry of an order granting defendants' motion for summary judgment where there was no genuine issue of material fact, and defendant was entitled to judgment as a matter of law. We affirm.

On 20 October 2004 plaintiff Jaye Day ("Day") filed actions in Wake County Superior Court against her brother defendant Paul Rasmussen ("Rasmussen") and Timothy A. Nordgren, as executor of her father's estate, alleging conversion, constructive trust, and tortious interference with a contract based on her father's trust agreement. Rasmussen filed an answer and motion on 28 December 2004 denying specific factual allegations and alleging that Day's complaint failed to state a claim upon which relief could be granted. Rasmussen subsequently filed a motion for summary judgment and an amended and renewed motion for summary judgment on 18 February 2005 and 11 April 2005, respectively. The undisputed facts are as follows:

On 19 August 1987 Ethel Rasmussen and Edmund Rasmussen entered into a trust agreement which provided that the purpose of the trust was to hold all assets owned by the trust for the lifetime of the settlors and after the death of both settlors was to be distributed to Day and Rasmussen as beneficiaries in equal shares, share and share alike, *per stirpes*. The agreement stated that the trust's assets may be used for the settlors' support, general welfare, education, and health for as long as they shall live and at their sole discretion. The 1987 trust agreement further reserved the right to revoke or change the trust agreement through the following provision: "Edmund A. Rasmussen and Ethel V. Rasmussen reserve the right to revoke, amend or make changes to this Trust Agreement at any point during their lifetimes." The trust agreement further stated that it was to be enforced under Florida laws, the state in which the trust agreement was entered into.

On 21 September 1988 Ethel Rasmussen passed away and Edmund Rasmussen subsequently moved from Florida to North Carolina. After Ethel Rasmussen's death, two amendments were made by the drafting attorney in Florida allowing discretionary distributions of income to

Edmund Rasmussen and appointing Paul Rasmussen and Day as co-trustees. On 30 March 2001 Edmund Rasmussen transferred the assets of the 1987 Trust and created a new trust agreement, the 2001 Trust. The revocable trust agreement entered into on 30 March 2001 altered the terms of distribution and in turn provided that Day would receive $50,000.00 after the settlor's death and after such distribution, the balance of the trust would go to Rasmussen. Subsequently, on 30 April 2001 Edmund Rasmussen made an amendment to the trust agreement which again altered the terms of distribution replacing Article V, paragraph (a) of the 2001 Trust agreement which provided Day $50,000.00 and in turn stated that Day shall receive $25,000.00. No other amendments were made to the 2001 Trust prior to the death of Edmund Rasmussen on 14 June 2002.

In support of Paul Rasmussen's motion for summary judgment, the affidavits of Thomas Gurran, drafter of the 1987 Trust, Timothy Nordgren, drafter of the 2001 Trust, and Paul Rasmussen were filed. Pursuant to the summary judgment hearing, the trial court determined that "although the language of the original 1987 trust document is ambiguous with respect to revocation and amendment, the undisputed extrinsic evidence, including the affidavit of the attorney who drafted the trust, demonstrates the intent of the settlors to allow the survivor to revoke or amend the trust after the death of the other, and therefore, the trust remained revocable and amendable after the death of one settlor." On 14 June 2005 the trial court entered an order granting summary judgment where it was determined that there were no genuine issues of material fact and Rasmussen was entitled to judgment as a matter of law.

Plaintiff now appeals.

Day contends on appeal that the trial court erred in granting Rasmussen's motion for summary judgment where there was a genuine issue of material fact which was an issue for determination by the jury.[1] We disagree.

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

1. Plaintiff Day filed a companion case against Timothy A. Nordgren, as the executor of her father's estate, in which the facts and issues of law are identical. Therefore, the analysis and determination by the appellate court in this case, is also applicable and controlling in the companion case of *Day v. Nordgren*.

Stat. § 1A-1, Rule 56(c) (2005). On a motion for summary judgment, "[t]he evidence is to be viewed in the light most favorable to the non-moving party." *Moore v. Coachmen Industries, Inc.*, 129 N.C. App. 389, 394, 499 S.E.2d 772, 775 (1998). When determining whether the trial court properly ruled on a motion for summary judgment, this Court conducts a *de novo* review. *Va. Electric and Power Co. v. Tillett*, 80 N.C. App. 383, 385, 343 S.E.2d 188, 191, *cert. denied*, 317 N.C. 715, 347 S.E.2d 457 (1986).

There is no genuine issue of material fact where a party demonstrates that the claimant cannot prove the existence of an essential element of his claim or cannot surmount an affirmative defense which would bar the claim. *Vares v. Vares*, 154 N.C. App. 83, 86, 571 S.E.2d 612, 615 (2002), *disc. review denied*, 357 N.C. 67, 579 S.E.2d 576 (2003). Day stated three claims of action in her complaint: conversion, constructive trust, and tortious interference with a contract.

"Conversion is defined as: (1) the unauthorized assumption and exercise of the right of ownership; (2) over the goods or personal property; (3) of another; (4) to the exclusion of the rights of the true owner." *Di Frega v. Pugliese*, 164 N.C. App. 499, 509, 596 S.E.2d 456, 463 (2004). A constructive trust "arises when one obtains the legal title to property in violation of a duty he owes to another." *Fulp v. Fulp*, 264 N.C. 20, 22, 140 S.E.2d 708, 711 (1965). In order to establish a *prima facie* case for tortious interference with a contract, one must prove " '(1) a valid contract between the plaintiff and a third person which confers upon the plaintiff a contractual right against a third person; (2) the defendant knows of the contract; (3) the defendant intentionally induces the third person not to perform the contract; (4) and in doing so acts without justification; (5) resulting in actual damage to plaintiff.' " *Beck v. City of Durham*, 154 N.C. App. 221, 232, 573 S.E.2d 183, 191 (2002). Each of these claims is based on the contention that the unilateral revocation, alteration or amendment of the 1987 Trust, after the death of Ethel Rasmussen, was invalid as contrary to Florida law.

At the summary judgment hearing, it was for the trial court to determine whether there was a genuine issue of material fact as to whether the 2001 trust and the subsequent amendments constituted a valid testamentary document. It is a well-founded principle of law that "[a] settlor has the power to reserve the right to revoke the trust in whole or in part," to amend a trust, or to modify a trust. 76 Am. Jur. 2d, Trusts §§ 25-26, p. 58 (2005). "The only limitations on such powers to amend and revoke or to appoint are that they be exercised at the time and in the manner provided for in the instrument creating the power in

the first place." *Rollins v. Alvarez*, 792 So. 2d 695, 698 (Fla. Dist. Ct. App. 5th Dist. 2001).

In determining whether the revocation, amendment, or alteration of a trust was done in strict compliance with the provision provided for in the instrument, the Florida courts have first looked to whether the provision reserving the power to revoke was ambiguous. *L'Argent v. Barnett Bank, N.A.*, 730 So. 2d 395, 396-97 (Fla. Dist. Ct. App. 2d Dist. 1999). If the revocation reservation clause is determined to be ambiguous, then the court may look to extrinsic evidence to determine the intent of the settlor. *Knauer v. Barnett*, 360 So. 2d 399, 405 (Fla. 1978).

Prior cases under Florida law have held revocation reservation clauses to be unambiguous and therefore determined that extrinsic evidence was inadmissible. *L'Argent*, 730 So. 2d 395; *Rollins*, 792 So. 2d 695. The revocation reservation clause in *L'Argent* stated:

> [D]uring "the life of the Settlors, this trust may be amended, altered, revoked, or terminated, in whole or in part, or any provision hereof, by an instrument in writing signed by the Settlors and delivered to the trustees."

L'Argent, 730 So. 2d at 396 (citation omitted). The court determined that the provision was unambiguous where it clearly stated that an amendment must be made "during 'the life of the Settlors' " and "signed 'by the Settlors.' " *Id.* at 397. In *Rollins*, the revocation provision read:

> "We shall have the absolute right to amend or revoke our trust, in whole or in part, at any time. *Any amendment or revocation must be in writing, signed by both of us, and delivered to our Trustee.* . . . After the death of *one of us, this agreement shall not be subject to amendment or revocation.*"

Rollins, 792 So. 2d at 697 (citation omitted). It was further plain from the language in the *Rollins* case as to the exact terms of revocation and amendment where it specifically stated that the agreement was not subject to amendment or revocation after the death of one of the settlors.

However, contrary to previous cases, the plain language in the instant case did not unambiguously state the time and manner for revocation or amendment:

> Edmund A. Rasmussen and Ethel V. Rasmussen reserve the right to revoke, amend or make changes to the Trust Agreement at any point during their lifetimes.

Where a revocation clause is ambiguous, the ambiguity will not cause the clause to fail, but rather will allow the courts to look to extrinsic evidence to determine the controlling intent of the settlor. *See L'Argent*, 730 So. 2d at 397 ("The polestar of trust interpretation is the settlors' intent.").

This Court is unable to ascertain, from the face of the document, the intent of the settlors as to the manner and time of revocation. It is not clear what meaning is to be given to the clause "during their lifetimes." Where the clause itself creates an ambiguity, it was proper for the trial court to consider affidavits to determine the intent.

In support of the motion for summary judgment, Paul Rasmussen presented the affidavits of the drafting attorney of the 1987 Trust and the North Carolina attorney who drafted the 2001 Trust and its subsequent amendments. The affidavit of Thomas R. Gurran, drafter of the 1987 Trust containing the revocation clause, stated that the intent of Edmund and Ethel Rasmussen was to allow a right to amend or revoke the trust agreement after the death of either settlor. He further stated that the language used in the trust instrument was the standard language used to reserve a right to revoke or amend in a surviving settlor.

It is clear from the extrinsic evidence that the intent of the settlors was to allow amendment or revocation by a surviving settlor. Therefore, the amendments and revocation subsequent to the death of Ethel Rasmussen were valid, causing Day to fail in establishing each and every essential element of her claim entitling Paul Rasmussen to judgment as a matter of law.

Therefore, this assignment of error is overruled.

Accordingly, the trial court did not err in granting summary judgment in favor of Paul Rasmussen where the amendments to and revocation of the 1987 Trust were valid thereby allowing the terms of the 2001 Trust to stand.

Affirmed.

Judges CALABRIA and STEELMAN concur.

KATHLEEN WHITE, PLAINTIFF v. CROSS SALES & ENGINEERING COMPANY, D/B/A CROSS AUTOMATION AND CONTROL CORPORATION OF AMERICA, DEFENDANTS

No. COA05-1075

(Filed 6 June 2006)

Employer and Employee; Wrongful Interference— interference with contract—covenant not to compete and termination by new employer

Summary judgment for defendant was affirmed in an action for tortious interference with contract where defendant's evidence was that plaintiff worked for defendant before going to work for a competitor (CCA); plaintiff had signed a non-compete agreement with defendant; defendant sought to enforce that agreement and to prevent the loss of trade secrets; a lawsuit was filed; and CCA dismissed plaintiff. Defendant did not demand that plaintiff be fired (only that violations of the agreement cease); defendant threatened to sue but provided CCA with no incentive to fire plaintiff; defendant's intent was only to protect its own interests; and similar cases had resulted in negotiation and settlement rather than termination. Plaintiff provided no evidence to the contrary.

Appeal by plaintiff from judgment entered 14 March 2005 by Judge David S. Cayer in Gaston County Superior Court. Heard in the Court of Appeals 10 April 2006.

David Q. Burgess, for plaintiff-appellant.

Constangy, Brooks & Smith, LLC, by Kenneth P. Carlson, Jr., for defendant-appellee.

MARTIN, Chief Judge.

Plaintiff appeals from an order granting summary judgment in favor of defendant and dismissing her claim for tortious interference with contract. Plaintiff contends the trial court erred in deciding defendant, Cross Sales & Engineering Company ("Cross"), did not intentionally induce another company, Control Corporation of America ("CCA"), to fire her. Plaintiff also argues defendant acted without justification in inducing her termination. For the reasons which follow, we affirm.

Materials presented to the trial court, as relevant to the dispositive issue on appeal, tend to show that plaintiff began work on 8 September 1997 as a customer service representative for Cross, a company which

markets electronic and automation components for industrial machinery. Shortly after beginning her employment, on 16 September 1997, she signed a covenant not to compete. According to the non-competition agreement, plaintiff could not work as a competitor to Cross for a period of one year, within a radius of 50 miles from the office where she most recently worked. Plaintiff was also prohibited from using or disclosing any of Cross's trade secrets or other confidential information. Cross later changed plaintiff's job title to inside sales representative, and for her last three years with Cross her sales region covered the geographical area of Raleigh-Durham, North Carolina.

Plaintiff resigned her employment with Cross on 3 May 2002, and about a week later had an exit interview. In the interview, plaintiff declined to tell Cross where she subsequently would be working. When Cross specifically asked plaintiff whether she would be working for CCA, plaintiff refused to answer. Cross reminded plaintiff about the non-competition agreement she had signed, and indicated it would enforce the covenant if plaintiff went to work for CCA.

Through other conversations with plaintiff, Cross understood that she had let her future employer know of her non-competition agreement. On 6 May 2002, Cross sent plaintiff a letter reminding her about the agreement:

> Enclosed is a copy of your non-compete agreement. . . . We understand that your new employer is informed of the existence of your non-compete agreement. I recommend that you provide them with a copy, an extra is enclosed for this purpose. We appreciate your willingness to comply with your non-compete and hopefully this will be the only communication necessary regarding this matter.

Plaintiff did not respond to the letter.

On 14 May 2002, plaintiff started work with CCA, an industry competitor to Cross, as a manager of inside salespeople. Cross learned that plaintiff was working at CCA, and called her at work to confirm that fact. The president of Cross sent a letter to the president of CCA on 21 May 2002, copied to plaintiff, indicating Cross believed plaintiff was violating her non-competition agreement:

> I write to inform you that we have verified that Kathleen White, a former Cross Automation employee, has joined Control Corporation of America in Charlotte. We believe her employment with you is in violation of her non-competition agreement with Cross Automation, a copy of which is attached for your con-

venience. We have been told that CCA's management was informed that she had a non-competition agreement with us and that they were also given a copy of the signed agreement.

I kindly request your assistance in resolving this matter expeditiously. Please respond within 10 days after receipt of this letter.

Neither plaintiff nor CCA responded to the letter.

Having received no response to its previous two letters, Cross's counsel sent a third letter to plaintiff and CCA on 26 June 2002. After describing the content of the non-competition agreement, the letter concluded:

. . . Cross has investigated and has gathered information indicating that, not only has Control Corporation hired Ms. White, but it has placed her in an inside sales position, soliciting the very customers with whom she was associated during her employment with Cross. This was done despite notice to Control Corporation that Ms. White was obligated under her Agreement. In fact, Cross has information that Ms. White solicited at least one such customer without revealing that she had changed employers, thus leading the customer to believe that it was dealing with Cross when it was, in fact, dealing with Control Corporation.

The employment of Ms. White by Control Corporation is a clear violation of the Agreement. Further, Ms. White possesses information which she is prohibited from disclosing both pursuant to her Agreement and pursuant to the North Carolina Trade Secrets Protection Act. Yet, in her current position as a sales representative for Control Corporation, she will be unable to perform her duties without misappropriating this trade secret information. Further, the continuation of wrongful solicitation of Cross' customers and of Ms. White's employment in such a sales position in violation of her agreement, *after* the obligations under the agreement were brought to the attention of Control Corporation, and Control Corporation's efforts to interfere by wrongful means with Cross's contractual relations both with its suppliers and customers, violates North Carolina's Unfair and Deceptive Trade Practices Act.

This letter is a demand that Control Corporation and Ms. White immediately cease any and all activities in violation of their respective contractual statutory and common law duties, and provide to Cross adequate assurances that these activities will not be resumed. It is our hope and expectation that you will understand the serious-

> ness of this matter and will respond promptly. This is a matter of urgent and immediate concern to Cross. If we do not receive a satisfactory response by July 8, 2002, we have been authorized to initiate litigation to resolve this matter. In such litigation, we will seek both treble damages and attorney's fees pursuant to North Carolina's Unfair and Deceptive Trade Practices statute, as well as other available remedies, including equitable remedies.

Again, neither CCA nor plaintiff responded.

When Cross had received no response by 8 July 2002, it filed suit the next day, alleging breach of the non-competition agreement and other claims. CCA terminated plaintiff's employment on 14 July 2002, and gave her a one-sentence letter memorializing her termination on 15 July 2002: "Because of the lawsuit and your non-compete agreement with []Cross Automation, we are forced to terminate your employment effective today, July 15, 2002." Cross's suit against CCA and plaintiff is not at issue here.

Plaintiff filed suit against both Cross and CCA on 2 January 2004, with an amended complaint filed 9 February 2004. Plaintiff reached a settlement with CCA and voluntarily dismissed her claims against it.

We review a summary judgment order *de novo*. *Howerton v. Arai Helmut, Ltd.*, 358 N.C. 440, 470, 597 S.E.2d 674, 693 (2004). "[S]ummary judgment will 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.' " *Roumillat v. Simplistic Enters., Inc.*, 331 N.C. 57, 62, 414 S.E.2d 339, 341 (1992) (citing N.C.R. Civ. P. 56(c)). A defendant can attain summary judgment "by proving that an essential element of the opposing party's claim is nonexistent, or by showing . . . the opposing party cannot produce evidence to support an essential element of his claim." *Collingwood v. Gen. Elec. Real Estate Equities, Inc.*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989). A plaintiff cannot rest upon the mere allegations of her pleading. N.C.R. Civ. P. 56(c).

To establish a claim for tortious interference with contract, a plaintiff must show:

> (1) a valid contract between the plaintiff and a third person which confers upon the plaintiff a contractual right against a third person; (2) the defendant knows of the contract; (3) the defendant inten-

> tionally induces the third person not to perform the contract; (4) and in doing so acts without justification; (5) resulting in actual damage to plaintiff.

United Labs., Inc. v. Kuykendall, 322 N.C. 643, 661, 370 S.E.2d 375, 387 (1988) (citing *Childress v. Abeles*, 240 N.C. 667, 674, 84 S.E.2d 176, 181-82 (1954)). For purposes of the summary judgment motion, as well as this appeal, both plaintiff and Cross agree the first, second, and fifth elements were met.

The dispositive issue on this appeal is whether Cross intentionally induced CCA to terminate plaintiff's employment, i.e., whether Cross purposefully caused CCA to fire plaintiff in lieu of addressing Cross's concerns about the covenant not to compete. Plaintiff did not produce evidence, and can achieve no reasonable inference, that Cross intentionally induced her termination.

First, Cross did not demand that plaintiff be fired. Instead, Cross's letters were a "demand that Control Corporation and Ms. White immediately cease any and all activities in violation of their respective contractual statutory and common law duties, and provide to Cross adequate assurances that these activities will not be resumed." Cross's attempt to protect its interests is not equivalent to a demand for the firing of CCA's employees. CCA made the decision to fire plaintiff without ever conferring with Cross about the dispute.

Second, Cross provided no incentive to CCA for firing plaintiff. In other words, Cross did not "dangle a carrot" for CCA as an inducement to fire plaintiff, but rather threatened to use a stick in the form of a lawsuit. Since CCA refused to answer any of Cross's communications about the matter, we cannot import to Cross the responsibility for how CCA responded first to a request for assurances from Cross, and then to a threat of a lawsuit.

Third, and most important, are the motives of Cross in its communications with CCA. As described in the affidavit of Stephen Earley, one of Cross's division presidents, Cross believed it had a valid covenant not to compete which needed enforcement. Its motives included protecting its trade secrets and other confidential information, as well as protecting itself against unfair competition. Cross also was concerned that if plaintiff "joined CCA and we did not take action to ensure our Non-Compete Agreement was enforced, CCA might attempt to recruit other Cross Automation inside sales people." All of these motives show the intent of Cross simply to protect its own interests, and not to cause

harm to plaintiff, when it sent letters to CCA seeking assurances its business interests were being protected.

Furthermore, evidence showed that Cross and CCA had prior dealings on personnel matters very similar to the situation here. At least two employees previously had departed Cross for employment with CCA. One employee, Barry Jordan, had negotiated a modification in his severance agreement changing his non-competition requirements. A second employee, Barron Walker, left Cross and started work with CCA. Cross believed its covenant not to compete was violated, and sent Walker and CCA a letter reminding them of the non-competition agreement. When Cross received no response, Cross's counsel sent another letter indicating legal action might occur. In that instance, CCA acknowledged Cross's letter threatening legal action, and the parties negotiated a settlement. By following the same conduct with plaintiff as it had with Walker, Cross could reasonably have expected a similar result: negotiation and settlement, not the firing of an employee.

All of the foregoing evidence produced by Cross is uncontradicted, and plaintiff provided no contrary evidence to the trial court. Thus, plaintiff relies only on an allegation, with no proof, that Cross intentionally induced her firing. The uncontradicted weight of the evidence, i.e., the lack of demand for firing and lack of inducement provided, the business motives of Cross, and the prior dealings between Cross and CCA, shows Cross did not intentionally induce CCA to fire plaintiff. Accordingly, since plaintiff did not "produce evidence to support an essential element of [her] claim," *Collingwood*, 324 N.C. at 66, 376 S.E.2d at 427, the trial court properly granted summary judgment on this element.

A plaintiff must prove all of the elements of a tort, and because plaintiff here cannot show that Cross intentionally induced CCA to fire her, we need not address the fourth element, justification. We therefore do not consider the issue of whether Cross acted without justification due to plaintiff's contention that the covenant not to compete was invalid for lack of consideration because she signed it more than a week after starting her employment and had not previously known its terms. *See, e.g., Young v. Mastrom, Inc.*, 99 N.C. App. 120, 123, 392 S.E.2d 446, 448 (1990) ("It is immaterial that the written contract is executed after the employee starts to work. However, the terms of a verbal covenant which is later reduced to writing must have been agreed upon at the time of employment in order for the later written covenant to be valid and enforceable.") (citing *Stevenson v. Parsons*, 96 N.C. App. 93, 97, 384 S.E.2d 291, 293 (1989)).

Since White cannot prove her claim of tortious interference with contract, she is "not allowed an award of punitive damages because [she] must establish [her] cause of action as a prerequisite for a punitive damage award." *Watson v. Dixon*, 352 N.C. 343, 348, 532 S.E.2d 175, 178 (2000) (quoting *Oestreicher v. Am. Nat'l Stores, Inc.*, 290 N.C. 118, 134, 225 S.E.2d 797, 807-08 (1976)).

Affirmed.

Judges HUDSON and BRYANT concur.

IN THE MATTER OF: M.G.T.-B.

No. COA05-1396

(Filed 6 June 2006)

1. Appeal and Error— preservation of issues—quashal of subpoena—assignment of error—no offer of proof

An assignment of error was not properly preserved for appeal and was not addressed where the mother contended that the court used an improper standard in determining that a juvenile was not competent and quashing a subpoena, but made no offer of proof about the testimony that she sought to elicit and no competent reason for subpoenaing the child could be gleaned.

2. Evidence— hearsay—harmless error—other evidence

Any error in the admission of hearsay statements from a child abuse victim was harmless where there was sufficient other evidence on which the court could base its finding of neglect.

Appeal by respondent-mother from order entered 1 March 2005 by Judge Monica Bousman in Wake County District Court. Heard in the Court of Appeals 13 April 2006.

Susan J. Hall for respondent-mother appellant.

Richard Croutharmel for Guardian Ad Litem, petitioner appellee.

Corinne G. Russell for Wake County Human Services, petitioner appellee.

McCULLOUGH, Judge.

Respondent-mother appeals from an adjudication of abuse, neglect, and dependency entered 1 March 2005 in district court. We affirm.

FACTS

On 28 July 2004 Patrice Garlington ("Ms. Garlington"), an investigator with Wake County Human Services, received an allegation that the juvenile, M.G.T.-B., was being sexually abused by her stepfather and brother. The report alleged that when M.G.T.-B.'s mother and stepfather would fight he would come into her room and touch her inappropriately, that she had a toothache, had been sick in school on various occasions, and that respondent-mother was difficult to reach when attempts were made to contact her to pick up M.G.T.-B. from school.

In the initial home visit by Ms. Garlington, she spoke with respondent-mother regarding the report and her concerns. Ms. Garlington stated that as far as the allegations were concerned, respondent-mother didn't feel like there was anything to be worried about and appeared to be cooperative. Ms. Garlington implemented a safety plan which required that there be no unsupervised contact between the juvenile children in the home with either the stepfather or adult brother.

During a further investigation, Ms. Garlington learned that M.G.T.-B. made similar disclosures to adults at her school. At this point she contacted respondent-mother and asked her to have the stepfather and adult brother leave the home for the course of the investigation. Respondent-mother stated that she did not believe any of the allegations, did not trust M.G.T.-B., and that it was not possible for the men to leave the home. Respondent-mother further stated that the only option was for the child to be taken away by the agency. The child was not removed from the home at this time as respondent-mother agreed to continue to follow the safety plan that had originally been implemented.

On 13 August 2004, Ms. Garlington again visited the home of respondent-mother and M.G.T.-B. Upon arriving at the home, Ms. Garlington inquired of the adult brother as to where M.G.T.-B. was, and he reported that he was the only one at home and that M.G.T.-B. was at school. At that time, Ms. Garlington asked if she could look through the house to verify that M.G.T.-B. was not there and she noticed that the door to the juvenile's bedroom was locked by deadbolt. Ms. Garlington waited until respondent-mother came home at which time she learned that M.G.T.-B. was locked in her bedroom. Ms. Garlington then took the juvenile to her car to talk, where she learned that M.G.T.-B. was afraid

of her mother and unable to talk with her mother around. Ms. Garlington then informed respondent-mother that she was taking the child into non-secure custody out of concern for her safety. According to Ms. Garlington, respondent-mother began screaming at M.G.T.-B. that "you're not my daughter; you're on your own"; and saying "go away"; and calling her names such as "whore" and "bitch." Respondent-mother further stated that she did not want to see the child anymore and that the child no longer had a mother.

On 13 August 2004, the court entered a juvenile petition of abuse, neglect, and dependency and the child was ordered into the non-secure custody of the Department of Social Services. At trial Wake County Human Services and the juvenile's guardian *ad litem* made a motion to quash a subpoena issued by respondent-mother to M.G.T.-B. The trial judge contacted the juvenile's therapist, Ms. Drake, by telephone while in the courtroom and inquired as to whether M.G.T.-B. was able to testify. The trial judge asked counsel for respondent-mother to make an offer as to what she expected M.G.T.-B. would say if required by the court to testify. Counsel for respondent-mother replied, "Well, honestly, I have no way of knowing that, Judge." Based on the information the trial judge received about M.G.T.-B., she granted the motion to quash and found that the statements of the juvenile, offered through Ms. Garlington were offered as evidence of a material fact, the statements were more probative on the point for which they were offered than any other evidence which could be procured through reasonable means, and that the general purposes of the rules and interests of justice would best be served by introduction of the juvenile's statements into evidence. Respondent-mother did not make an offer of proof.

The trial court entered an order on 1 March 2005 concluding that M.G.T.-B. was abused, neglected, and dependent.

Respondent-mother now appeals.

ANALYSIS

I

[1] On appeal, respondent-mother contends that the trial court erred in applying an improper standard to determine whether or the not the minor victim was competent to testify. We disagree.

North Carolina General Statutes Section 8C-1, Rule 601, states

> [a] person is disqualified to testify as a witness when the court determines that he is (1) incapable of expressing himself concern-

> ing the matter as to be understood, either directly or through interpretation by one who can understand him, or (2) incapable of understanding the duty of a witness to tell the truth.

N.C. Gen. Stat. § 8C-1, Rule 601(b) (2005). Determining the competency of a witness to testify lies within the trial court's ambit of sound discretion. *State v. Phillips*, 328 N.C. 1, 17, 399 S.E.2d 293, 301, *cert. denied*, 501 U.S. 1208, 115 L. Ed. 2d 977 (1991).

In the instant case, the question of the competency of M.G.T.-B. was raised by Wake County Human Services and the juvenile's guardian *ad litem* in support of a motion to quash a subpoena issued by respondent-mother requiring M.G.T.-B. to testify. The trial court determined that M.G.T.-B. was not competent to testify and granted the motion to quash the subpoena. There was no evidence presented to the trial court regarding the testimony that respondent-mother sought to elicit from the juvenile, and this Court is unable to glean any competent reason for the subpoena of the child.

" ' "It is well established that an exception to the exclusion of evidence cannot be sustained where the record fails to show what the witness' testimony would have been had [s]he been permitted to testify." ' " *State v. Golphin*, 352 N.C. 364, 462, 533 S.E.2d 168, 231 (2000) (citations omitted), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001), *cert. denied*, 358 N.C. 157, 593 S.E.2d 84 (2004). " ' "[I]n order for a party to preserve for appellate review the exclusion of evidence, the significance of the excluded evidence must be made to appear in the record and a specific offer of proof is required unless the significance of the evidence is obvious from the record." ' " *Id.*

Respondent-mother made no offer of proof upon the trial court's exclusion of the child's testimony. Further, there is no indication that the juvenile would have testified in any manner inconsistent with the testimony of Ms. Garlington. Where this assignment of error was not properly preserved for appellate review, we decline to address the issue presented to this Court and therefore it is overruled.

II

[2] Respondent further contends on appeal that the trial court erred in admitting hearsay statements of the victim through the testimony of Ms. Garlington and failing to make specific findings of fact required for admission of hearsay statements pursuant to N.C. Gen. Stat. § 8C-1, Rule 803(24). We disagree.

Hearsay is by definition "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c) (2005). When one attempts to introduce such a statement at trial to prove the truth of the matter asserted, the statement is inadmissible unless it falls within one of the exceptions enumerated by the statutes and case law of this state. One such enumerated exception is stated in N.C. Gen. Stat. § 8C-1, Rule 803(24):

> A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

N.C. Gen. Stat. § 8C-1, Rule 803(24) (2005). However, even when the trial court commits error in allowing the admission of hearsay statements, one must show that such error was prejudicial in order to warrant reversal. *State v. Ramey*, 318 N.C. 457, 470, 349 S.E.2d 566, 574 (1986) ("It is well established that the erroneous admission of hearsay, like the erroneous admission of other evidence, is not always so prejudicial as to require a new trial.").

In the instant case, notwithstanding the hearsay statements made by M.G.T.-B., there was sufficient evidence on which the trial court could base a finding of neglect. The evidence at trial clearly showed (1) respondent-mother agreed to a protective safety plan and then violated that plan by leaving M.G.T.-B. alone with the alleged assaulters; (2) an examining doctor found extensive eroding dental caries going into the gums and a one-inch linear scar on the juvenile's lower leg which was opined to be inflicted by respondent-mother's use of either a shoe, a stick with thorns, or the metal part of a belt; (3) respondent-mother called the juvenile a "whore" and a "bitch" and further stated that the juvenile was no longer her daughter, that she was on her own and no longer had a mother; and (4) expert testimony that M.G.T.-B. displayed symptoms of anxiety, anger, disassociation, and post-traumatic stress disorder. This Court concludes that these facts standing alone were sufficient to warrant a determination of dependency and neglect and therefore any error in admission of hearsay statements was harmless.

Therefore, this assignment of error is overruled.

Accordingly, this Court declines to consider whether the determination of incompetency was proper where the issue was not properly preserved for appeal, and we further find no prejudicial error in the admission of the hearsay statements of M.G.T.-B. through the testimony of Ms. Garlington. Moreover, all other assignments of error not briefed on appeal are deemed abandoned.

Affirmed.

Judges CALABRIA and STEELMAN concur.

IN THE MATTER OF: J.H., JUVENILE

No. COA05-981

(Filed 6 June 2006)

Possession of Stolen Property— automobile—no evidence of condition or value—misdemeanor

An adjudication of delinquency for felonious possession of stolen property was remanded for an adjudication based on misdemeanor possession where there was no evidence of the car's value or condition.

Judge WYNN dissenting.

Appeal by juvenile from a disposition and commitment order entered 22 February 2005 by Judge Charles W. Wilkinson, Jr., in Granville County District Court. Heard in the Court of Appeals 18 April 2006.

Attorney General Roy Cooper, by Assistant Attorney General Donna D. Smith, for the State.

Kevin P. Bradley for juvenile-respondent.

LEVINSON, Judge.

J.H. (respondent) appeals from the trial court's adjudication and disposition order adjudging him delinquent for felonious possession of stolen property. We remand for imposition of an adjudication and disposition of misdemeanor possession of stolen property.

On 19 January 2005, the State filed a petition alleging that respondent committed the offenses of felonious larceny of an automobile and felonious possession of the same. The State presented evidence that tended to show the following: Respondent was living with his maternal grandfather (grandfather). Respondent's mother (mother) drove to grandfather's home on 6 January 2005 and then returned to her home with respondent. Later the same day, mother took respondent back to grandfather's home. Upon receiving a telephone call from grandfather, mother discovered that her 2000 Ford Focus was no longer in her driveway. She testified that only she and her husband had keys to the car and that her husband had not taken it. Mother contacted the Granville County Sheriff's Department and reported that respondent and her car were missing. Acting on a tip, mother found her car in a woman's driveway in Durham, North Carolina nine days later. She used a spare key to retrieve her car and then called police. Mother was outside the Durham house when police brought respondent out of the house.

Mother testified that when she asked respondent why he left, respondent stated that, "he knew he was going to fail [an upcoming] drug test." Then, when asked on direct examination if respondent said whether he had taken her car, mother stated, "he confessed." Later in her testimony, mother stated that respondent did not say anything to her either about the car or about driving her car. Mother observed one adult and four or five teenagers in the Durham house where she located respondent and her car.

Respondent did not present evidence. The trial court denied respondent's motions to dismiss based upon insufficiency of the evidence. The trial court found respondent delinquent only of felony possession of stolen goods and committed him to the Office of Juvenile Justice.

From the trial court's disposition and commitment order, respondent appeals, contending, *inter alia*, that the trial court erred in denying his motion to dismiss the charge of felonious possession of stolen goods because the State's evidence was not sufficient to prove either that respondent possessed the vehicle or the value of the vehicle. While there was insufficient evidence of the vehicle's value, we conclude there was substantial evidence that respondent possessed the vehicle.

In ruling on a motion to dismiss, the trial court must determine whether there is substantial evidence of each element of the offense. *State v. Vines*, 317 N.C. 242, 253, 345 S.E.2d 169, 175 (1986). In doing so, the trial court is to consider the evidence in the light most favorable to

the State and give the State the benefit of every reasonable inference to be drawn therefrom. *State v. Robbins*, 309 N.C. 771, 775, 309 S.E.2d 188, 190 (1983). "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). "[I]f the State has offered substantial evidence against defendant of every essential element of the crime charged[,]" a defendant's motion to dismiss must be denied. *State v. Porter*, 303 N.C. 680, 685, 281 S.E.2d 377, 381 (1981).

The elements of felonious possession of stolen property are: "(1) defendant was in possession of personal property, (2) valued at greater than [$1,000.00], (3) which has been stolen, (4) with the possessor knowing or having reasonable grounds to believe the property was stolen, and (5) with the possessor acting with dishonesty." *State v. Brantley*, 129 N.C. App. 725, 729, 501 S.E.2d 676, 679 (1998); *see also* N.C. Gen. Stat. §§ 14-71.1 and 14-72(a) (2005).

"One 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). "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).

In the instant case, there was substantial evidence that respondent possessed mother's vehicle. Respondent had access to the vehicle on the day it was taken. After respondent was returned to grandfather's house, a phone call by grandfather alerted mother that her vehicle was missing. Respondent was found nine days later inside a home in Durham, North Carolina with the vehicle parked in the home's driveway. Mother stated, "he confessed" when asked on direct examination, "Did [respondent] say if he took your car?" Taking the evidence in the light most favorable to the State, as we must, we conclude there was sufficient evidence for a rational factfinder to conclude that respondent had possession of the subject vehicle. Accordingly, this assignment of error is overruled.

Respondent next contends that the State failed to present substantial evidence of the value of the vehicle to sustain a conclusion that respondent was in felonious possession of stolen goods. We agree.

Mother testified that her car was a 2000 Ford Focus. There was, however, no evidence as to its value or condition. The fact finder must not be left to speculate about the value of the item. *See State v. Parker*,

146 N.C. App. 715, 717, 555 S.E.2d 609, 611 (2001). Therefore, due to insufficient evidence of the value of the vehicle, the adjudication and disposition for felonious possession of stolen goods must be reversed and the trial court directed to enter an order adjudging the juvenile delinquent for misdemeanor possession of stolen goods. *See, e.g.*, *State v. King*, 42 N.C. App. 210, 214, 256 S.E.2d 247, 249 (1979) (vacating the judgment on felony and remanding for the entry of judgment on misdemeanor unlawful possession).

We have evaluated defendant's remaining assignment of error and conclude it is without merit.

Reversed in part and remanded.

Judge ELMORE concurs.

Judge WYNN dissents.

WYNN, Judge, dissenting.

While I agree with the majority that the State failed to present sufficient evidence of the value of the vehicle, after throughly reviewing the record I find no substantial evidence that Juvenile possessed the vehicle; therefore, the adjudication and disposition must be reversed. Accordingly, I respectfully dissent.

To convict a defendant of felonious possession of stolen property, the State must present substantial evidence of the following elements: "(i) possession of personal property; (ii) valued at greater than $1,000; (iii) which has been stolen; (iv) the possessor knowing or having reasonable grounds to believe that the property is stolen; and (v) the possessor acts with a dishonest purpose." *State v. King*, 158 N.C. App. 60, 66, 580 S.E.2d 89, 94, *disc. review denied*, 357 N.C. 509, 588 S.E.2d 376 (2003); *see also* N.C. Gen. Stat. § 14-71.1 (2005). "If substantial evidence exists to support each essential element of the crime charged and that defendant was the perpetrator, it is proper for the trial court to deny the motion." *State v. Morgan*, 359 N.C. 131, 161, 604 S.E.2d 886, 904 (2004) (citing *State v. Malloy*, 309 N.C. 176, 178, 305 S.E.2d 718, 720 (1983)). However, if the evidence " 'is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator, the motion to dismiss must be allowed.' " *State v. Golphin*, 352 N.C. 364, 458, 533 S.E.2d 168, 229-30 (2000) (quoting *Malloy*, 309 N.C. at 179, 305 S.E.2d at 720).

In this case, Juvenile argues, and I agree, that the State failed to show substantial evidence that he possessed the vehicle. "One 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).

In *State v. Lofton*, 66 N.C. App. 79, 83, 310 S.E.2d 633, 636 (1984), the defendant was found to be in "possession" of a stolen vehicle when he had a key which he used to unlock the vehicle's trunk, clothes, checkbook, and loan agreement in the vehicle, although he was never seen driving the vehicle. This Court held that was substantial evidence that the defendant was in control and possession of the vehicle. *Id.* at 84, 310 S.E.2d at 636.

Unlike in *Lofton*, here, the only circumstantial evidence presented by the State was that: Juvenile was a passenger in the vehicle, driven by his mother, the day it was stolen. Juvenile was found inside a house, along with four or five other people, and the vehicle was in the driveway. The State presented no evidence that Juvenile was seen driving the vehicle, had keys to the vehicle, or had personal property in the vehicle. Nor was he alone in the house where the vehicle was found.

Accordingly, as the State failed to present substantial evidence that Juvenile was in possession of the vehicle, the trial court erred in denying his motion to dismiss.

THE PRESBYTERIAN HOSPITAL, PETITIONER v. N.C. DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF FACILITY SERVICES, CERTIFICATE OF NEED SECTION, RESPONDENT AND MOORESVILLE HOSPITAL MANAGEMENT ASSOCIATES, INC. D/B/A LAKE NORMAN REGIONAL MEDICAL CENTER, RESPONDENT-INTERVENOR

No. COA05-905

(Filed 6 June 2006)

Administrative Law— final agency decision—certificate of need—summary judgment—judicial estoppel

A de novo review revealed that the Department of Health and Human Services did not err by granting summary judgment in favor of respondent medical center for its application of a certificate of need (CON) to expand emergency room facilities, because: (1) although summary judgment is never appropriate for an application

for a CON where two or more applicants conform to the majority of the statutory criteria, respondent was the sole applicant for a non-competitive CON; (2) although petitioner hospital primarily asserts that substantial prejudice to its legal rights may result from continued challenges by respondent to its Huntersville project, our Supreme Court has recently dismissed this challenge as moot on the ground that the facility was completed and fully operational; and (3) judicial estoppel does not bar respondent's legal position in the instant case where petitioner has made no showing of substantial prejudice from the grant of the CON to respondent.

Appeal by petitioner from a final agency decision entered 20 April 2004 by the North Carolina Department of Health and Human Services. Heard in the Court of Appeals 15 March 2006.

Nelson Mullins Riley & Scarborough, LLP, by Noah H. Huffstetler, III, Denise M. Gunter, Catharine W. Cummer, and Lisa R. Gordon, for petitioner-appellant.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Melissa L. Trippe, for respondent-appellee.

Smith Moore LLP, by Maureen Demarest Murray and William W. Stewart, Jr., for respondent-intervenor-appellee.

HUNTER, Judge.

The Presbyterian Hospital ("Presbyterian") appeals from a final agency decision of the North Carolina Department of Health and Human Services ("DHHS") entered 20 April 2004. For the reasons stated herein, we affirm the final agency decision.

Lake Norman Regional Medical Center ("Lake Norman") filed a Certificate of Need ("CON") application to expand emergency room facilities with DHHS on 1 February 2003. The application was conditionally approved on 11 March 2003. On 9 April 2003, Presbyterian filed a contested case petition in the Office of Administrative Hearings ("OAH"), appealing the conditional approval of Lake Norman's CON application. Lake Norman filed a motion to intervene which was granted 13 May 2003.

Presbyterian filed a motion for summary judgment on 22 October 2003 on the grounds that Lake Norman's application failed to conform with one of the statutory criteria for a CON. On 23 October 2003, Lake Norman filed a motion for summary judgment on the grounds that

Presbyterian could not establish substantial prejudice from the DHHS decision to grant Lake Norman a CON. On 7 November 2003, Presbyterian filed a second motion for summary judgment on the grounds that *res judicata* barred Lake Norman's application.

A recommended decision was filed on 19 December 2003. The administrative law judge found that summary judgment should be entered in favor of DHHS and Lake Norman, and that Lake Norman should be awarded a CON. The administrative law judge concluded that Presbyterian had failed to prove an essential element of its claim, that it would be harmed by the grant of Lake Norman's application.

On 29 March 2004, Presbyterian submitted written exceptions to DHHS. On 20 April 2004, DHHS issued its final agency decision accepting the administrative law judge's recommended decision and affirming the original award of a CON to Lake Norman. Presbyterian appeals.

I.

We first address the appropriate standard of review for an appeal from a final agency decision. "The substantive nature of each assignment of error controls our review of an appeal from an administrative agency's final decision." *Craven Reg'l Med. Auth. v. Dep't of Health & Human Servs.*, 176 N.C. App. 46, 51, 625 S.E.2d 837, 840(2006). "Where a party asserts an error of law occurred, we apply a *de novo* standard of review." *Id.* If the issue on appeal concerns an allegation that the agency's decision is arbitrary or capricious or " 'fact-intensive issues "such as sufficiency of the evidence to support [an agency's] decision" ' we apply the whole-record test." *Id.* (quoting *North Carolina Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 659, 599 S.E.2d 888, 894 (2004)). As summary judgment is a matter of law, *Hilliard v. N.C. Dep't of Corr.*, 173 N.C. App. 594, 597-98, 620 S.E.2d 14, 17 (2005), review by the Court in this matter is *de novo*.

II.

Presbyterian first contends the final agency decision granting summary judgment to Lake Norman was in error. We disagree.

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Hilliard*, 173 N.C. App. at 597-98, 620 S.E.2d at 17. " 'The burden is upon the moving party to show that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law.' " *Rainey v. St.Lawrence Homes, Inc.*, 174 N.C. App. 611, 612, 621

S.E.2d 217, 219 (2005) (citation omitted).

> To meet its burden, the movant is required to present a forecast of the evidence available at trial that shows there is no material issue of fact concerning an essential element of the non-movant's claim and that the element could not be proved by the non-movant through the presentation of further evidence.

Lohrmann v. Iredell Mem'l Hosp. Inc., 174 N.C. App. 63, 70, 620 S.E.2d 258, 261, (2005), *disc. review denied*, 360 N.C. 364, 629 S.E.2d 853 (2006). "Once the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a *prima facie* case at trial." *Gaunt v. Pittaway*, 139 N.C. App. 778, 784-85, 534 S.E.2d 660, 664 (2000).

This Court has previously held that, as genuine material issues of fact will always exist, summary judgment is never appropriate in an application for a CON where two or more applicants conform to the majority of the statutory criteria. *See Living Centers-Southeast, Inc. v. N.C. Dep't of Health & Human Servs.*, 138 N.C. App. 572, 580-81, 532 S.E.2d 192, 197 (2000). We find the facts of this case distinguishable. Here, unlike in *Living Centers-Southeast*, Lake Norman was the sole applicant for a non-competitive CON. Therefore, an award of summary judgment is permissible in this matter.

We first examine the statutory requirements for contesting the issuance of a CON by DHHS. Review of a decision by DHHS to issue a CON is governed by N.C. Gen. Stat. § 131E-188(a) (2005), which states in part:

> After a decision of the Department to issue, deny or withdraw a certificate of need or exemption or to issue a certificate of need pursuant to a settlement agreement with an applicant to the extent permitted by law, any affected person, as defined in subsection (c) of this section, shall be entitled to a contested case hearing under Article 3 of Chapter 150B of the General Statutes.

Id. A contested case is commenced by the filing of a petition which

> 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.

N.C. Gen. Stat. § 150B-23(a) (2005) (emphasis added). In *Britthaven, Inc. v. N.C. Dept. of Human Resources*, 118 N.C. App. 379, 455 S.E.2d 455 (1995), this Court stated:

> The subject matter of a contested case hearing by the ALJ is an agency decision. Under N.C. Gen. Stat. § 150B-23(a), *the ALJ is to determine whether the petitioner has met its burden in showing that the agency substantially prejudiced petitioner's rights*, and that the agency also acted outside its authority, acted erroneously, acted arbitrarily and capriciously, used improper procedure, or failed to act as required by law or rule.

Id. at 382, 455 S.E.2d at 459 (emphasis added).

Presbyterian, in its Petition for a Contested Case Hearing, alleged that they were an aggrieved party because as "a provider of identical services in HSA III, [Presbyterian] is a person directly and indirectly affected substantially in its person and property by the Agency's foregoing decision, which interferes with Presbyterian's ability to carry out its lawful business in HSA III." Presbyterian primarily asserts that substantial prejudice to its legal rights may result from continued challenges by Lake Norman to its Huntersville project, a hospital to be constructed by Presbyterian in a neighboring community. We note that our Supreme Court recently dismissed this challenge as moot in *Mooresville Hosp. Mgmt. Assocs. v. N.C. Dep't of Health & Human Servs.*, 360 N.C. 156, 157-58, 622 S.E.2d 621, 622 (2005), on the grounds that the Huntersville facility was completed and fully operational.

Presbyterian also contends that judicial estoppel prevents Lake Norman from asserting that Presbyterian has not suffered substantial prejudice, due to Lake Norman's position in *Mooresville*. " ' "[J]udicial estoppel forbids a party from asserting a legal position inconsistent with one taken earlier in the same or related litigation." ' " *Price v. Price*, 169 N.C. App. 187, 191, 609 S.E.2d 450, 452 (2005) (citations omitted). We note that although both the instant case and *Mooresville* are appeals from CON determinations by DHHS, the cases are not related litigation and do not stem from a common set of circumstances. Therefore, judicial estoppel does not bar Lake Norman's legal position in the instant

case where Presbyterian has made no showing of substantial prejudice from the grant of the CON to Lake Norman.

A review of the record shows that no material issue of fact exists as to an essential element of the non-movant's claim, as Presbyterian has failed to forecast evidence of substantial prejudice to its rights from the grant of a CON to Lake Norman for expansion of its emergency room facilities. Presbyterian's assignment of error is overruled.

As the final agency decision properly granted summary judgment to Lake Norman, we do not reach Presbyterian's remaining assignments of error regarding Presbyterian's own motions for summary judgment not reached by the final agency decision. For the foregoing reasons, the final agency decision is affirmed.

Affirmed.

Judges HUDSON and BRYANT concur.

STATE OF NORTH CAROLINA v. SAMUEL WILLIAMS FEREBEE, III

No. COA05-1007

(Filed 6 June 2006)

1. **Obstruction of Justice— refusal to halt—campus security officer**

   There was sufficient evidence that defendant resisted, obstructed, or delayed a public officer where defendant argued that the person he ran from at Duke University was merely a private security officer, but there was evidence that defendant also tried to elude campus police officers.

2. **Evidence— hearsay—testimony that officer yelled to stop—not testimonial**

   The admission of hearsay testimony that a campus police officer yelled for defendant to stop was not a violation of the Confrontation Clause because the statement was not testimonial, and was not prejudicial because there was substantial other evidence to the same effect.

3. Appeal and Error— preservation of issues—instructions—no objection at trial—plain error not alleged

Defendant waived his right to appeal alleged error in jury instructions where he did not object at trial and did not allege plain error.

Appeal by defendant from judgment entered 2 March 2005 by Judge W. Osmond Smith, III in Durham County Superior Court. Heard in the Court of Appeals 8 March 2006.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Spurgeon Fields, III, for the State.

Brannon Strickland, PLLC, by Marlet M. Edwards, for defendant-appellant.

HUNTER, Judge.

Samuel Williams Ferebee, III ("defendant") appeals from his conviction entered upon a jury verdict finding him guilty of resisting, obstructing, or delaying a public officer. Defendant contends the trial court erred in (1) denying his motion to dismiss for lack of sufficient evidence; (2) admitting improper hearsay into evidence; and (3) failing to properly instruct the jury on whether a security guard is a police officer. For the reasons set forth herein, we find no error by the trial court.

On 19 April 2002, the Duke University Police Department issued a "BOLO" (be on the lookout) for defendant. Authorities from the University of North Carolina at Chapel Hill had previously alerted Duke Police regarding several "questionable" encounters between defendant and female students. These students reported that defendant asked for inappropriate information, such as their addresses and telephone numbers, and the authorities were concerned about the possibility of some uninvited touching.

Defendant was observed on campus by Duke University students and authorities. This information was transmitted to campus police and security guards via radio. A security guard, Joshua Strausser ("Mr. Strausser") observed defendant enter a building on campus and followed him. After entering the building, Mr. Strausser searched for defendant on the first floor. Shortly thereafter, a Duke police officer, Officer George, arrived. They decided to each take one of the two flights of stairs located in the building. Mr. Strausser encountered defendant as he entered the second stairwell. Defendant ran past him

and towards a back door as Mr. Strausser yelled "campus security, stop[.]" Officer George ran up behind Mr. Strausser yelling "campus police officer, stop."

Mr. Strausser and Officer George pursued defendant as he fled the building. They were then joined in the chase by another campus police officer. Officer George and the other campus police officer pursued defendant off-campus without Mr. Strausser. Mr. Strausser explained his decision to end his pursuit of defendant as follows: "I, at this point, decided to let one of the officers—they're there. They're armed. I don't carry any type of weapons. I'm not a commissioned officer yet." Defendant ran into an old tobacco warehouse that was under renovation. He was apprehended within approximately fifteen to twenty minutes. Duke Police Officer First Sergeant Greg Stotsenberg ("Sergeant Stotsenberg") testified that defendant cooperated after being placed under arrest.

Upon consideration of the evidence, the jury found defendant guilty of resisting, obstructing, or delaying a public officer. The trial court imposed an active sentence of sixty days imprisonment. Defendant appeals.

[1] Defendant first assigns as error the trial court's denial of his motion to dismiss for insufficiency of the evidence based on his contention that the State failed to prove that he resisted, obstructed, or delayed a public officer.

A determination of whether the evidence is sufficient to overcome a motion to dismiss and be submitted to the jury is based on whether there is substantial evidence of each and every essential element of the crime, or any lesser included offenses, and that the defendant was the party who committed the crime. *State v. Squires*, 357 N.C. 529, 535, 591 S.E.2d 837, 841 (2003), *cert. denied*, 541 U.S. 1088, 159 L. Ed. 2d 252 (2004). Substantial evidence is defined as any relevant evidence that a reasonable person would find sufficient to support a conclusion. *State v. Blake*, 319 N.C. 599, 604, 356 S.E.2d 352, 355 (1987). The evidence must be viewed in the light most favorable to the State, drawing all reasonable inferences therefrom. *State v. Fritsch*, 351 N.C. 373, 378-79, 526 S.E.2d 451, 455 (2000).

In this case, the charge against defendant required the State to prove that he did "willfully and unlawfully resist, delay or obstruct a public officer in discharging or attempting to discharge a duty of his office." N.C. Gen. Stat. § 14-223 (2005). Defendant bases his argument

on two facts: (1) that he cooperated with the arresting officer, Sergeant Stotsenberg, and (2) that Mr. Strausser, from whom he initially ran, was a private security guard and not a public officer. The State produced evidence, however, that defendant also tried to elude Officer George, a campus police officer, and that he hid in an old tobacco warehouse in an attempt to avoid capture by several campus police officers. Under N.C. Gen. Stat. § 74G *et seq.*, the Campus Police Act, campus police officers have the same statutory authority granted to municipal and county police officers to make arrests for both felonies and misdemeanors and to charge for infractions within their jurisdictions. N.C. Gen. Stat. § 74G-6(b) (2005). As such, they qualify as "public officers" pursuant to N.C. Gen. Stat. § 14-223. *See State v. Taft*, 256 N.C. 441, 444, 124 S.E.2d 169, 171 (1962) (holding that an alcoholic beverage control officer was a "public officer" within the meaning of the statute). The trial court did not err in denying defendant's motion to dismiss, and we overrule this assignment of error.

[2] Defendant next assigns as error the trial court's admission of a hearsay statement over his objection and argues that this violated his Sixth Amendment right to confront the witnesses against him. At trial, Mr. Strausser testified that after he yelled for defendant to stop, Officer George also yelled "campus police officer, stop." Defendant argues that admission of this testimony violated the Confrontation Clause of the Sixth Amendment under the analysis presented in *Crawford v. Washington*, 541 U.S. 36, 158 L. Ed. 2d 177 (2004), and that he is therefore entitled to a new trial. We disagree.

Crawford held that where testimonial evidence is at issue, it is only admissible based on a finding that the witness is unavailable for trial and that the defendant has had a prior opportunity for cross-examination. *Id.* at 68, 158 L. Ed. 2d at 203. Where non-testimonial evidence is involved, however, the ordinary rules of evidence apply in regards to admissibility. *Id.* While the Supreme Court did not give a complete definition of the word "testimonial" in *Crawford*, it did provide some guidance. The Court stated that testimonial evidence refers to statements that " 'were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial[.]' " *Id.* at 52, 158 L. Ed. 2d at 193. Testimonial evidence includes affidavits, depositions, or statements given to police officers during an interrogation. *Id.* at 51, 158 L. Ed. 2d at 193. " 'Testimony,' in turn, is typically '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.' " *Id.* at 51, 158 L. Ed. 2d at 192.

In light of these definitions, Officer George's exclamation, "campus police officer, stop[,]" cannot be considered testimonial in nature. His statement was not made for the purpose of later establishing in court that defendant resisted arrest. Rather, Officer George made the statement while carrying out his duties as an officer by attempting to apprehend defendant who was under suspicion of improper behavior. Thus, the statement was non-testimonial and *Crawford* does not apply.

Moreover, even if the statement was inadmissible hearsay, we conclude its admission did not prejudice defendant. Defendant asserts Officer George's statement was the only evidence that he resisted a public officer. The State presented substantial evidence, however, that defendant attempted to elude campus police officers, including Officer George, by running and hiding in an old tobacco warehouse located off-campus. In light of this uncontradicted evidence, the exclusion of Officer George's statement would not have resulted in a different outcome. We overrule defendant's second assignment of error.

[3] By his final assignment of error, defendant argues the trial court improperly instructed the jury. Defendant failed to object at trial, however. Where a defendant fails to make a proper objection at trial, he waives the issue on appeal, absent a finding of plain error. *State v. McNeil*, 350 N.C. 657, 691, 518 S.E.2d 486, 507 (1999). Where a defendant fails specifically and distinctly to allege plain error, the defendant waives his right to have the issues reviewed for plain error. *State v. Forrest*, 164 N.C. App. 272, 277, 596 S.E.2d 22, 25-26, *disc. review denied*, 359 N.C. 193, 607 S.E.2d 653 (2004). Defendant does not allege plain error in his brief on appeal, and he has therefore waived his right to appeal the jury instructions. We overrule defendant's final assignment of error.

In conclusion, we find no error by the trial court.

No error.

Judges HUDSON and BRYANT concur.

IN RE: T.B., J.B., C.B., MINOR CHILDREN

No. COA05-1059

(Filed 6 June 2006)

Termination of Parental Rights— standing to bring petition— DSS custody of children required—not reflected in record

DSS does not have standing to file a termination of parental rights proceeding when it does not have legal custody of the children. Orders for the termination of parental rights in this case were vacated (without prejudice to bringing new petitions) for lack of subject matter jurisdiction where the petition did not have attached an order awarding custody of the children to DSS, and the omission was never remedied by amending the petition or otherwise making the custody order a part of the record before the trial court.

Appeal by respondents from orders entered 2 December 2004 by Judge Daniel F. Finch in Vance County District Court. Heard in the Court of Appeals 16 March 2006.

Law Offices of Carolyn J. Yancey, P.A., by Carolyn J. Yancey, for petitioner-appellee Vance County Department of Social Services.

Duncan B. McCormick, for respondent mother.

Winifred H. Dillon, for respondent father.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Heather Adams, Ellen Jernigan, and Martin H. Brinkley, for Guardian ad Litem.

LEVINSON, Judge.

Respondents appeal from orders terminating their respective parental rights in their minor children, T.B., C.B., and J.B. For the reasons that follow, we vacate these orders.

In December 2002 the Vance County Department of Social Services (DSS) filed petitions to terminate respondents' parental rights in the minor children. Prior to a hearing, respondents filed motions to dismiss the petitions for failure to comply with the requirements of N.C. Gen. Stat. § 7B-1104. The trial court denied their motions, and on 2 December 2004 the court entered orders terminating respondents' parental rights in their children. From these orders respondents appeal.

The sole issue raised on appeal is the trial court's denial of respondents' motions to dismiss for failure to comply with the requirements of N.C. Gen. Stat. § 7B-1104 (2005). Specifically, respondents assert that petitioner's failure to attach to the petition a copy of an order awarding legal custody of the children to DSS deprived the trial court of subject matter jurisdiction. We first review the applicable statutory and common law on this issue.

"Subject matter jurisdiction refers to the power of the court to deal with the kind of action in question[, and] . . . is conferred upon the courts by either the North Carolina Constitution or by statute." *Harris v. Pembaur*, 84 N.C. App. 666, 667, 353 S.E.2d 673, 675 (1987) (citation omitted). "Moreover, a court's inherent authority does not allow it to act where it would otherwise lack jurisdiction. 'Courts have the inherent power to do only those things which are reasonably necessary for the administration of justice within the scope of their jurisdiction.' " *In re McKinney*, 158 N.C. App. 441, 443, 581 S.E.2d 793, 795 (2003) (quoting *In re Transportation of Juveniles*, 102 N.C. App. 806, 808, 403 S.E.2d 557, 559 (1991)) (citation omitted).

"Subject matter jurisdiction cannot be conferred upon a court by consent, waiver or estoppel, and failure to demur or object to the jurisdiction is immaterial." *Stark v. Ratashara*, 177 N.C. App. 449, ——, —— S.E.2d ——, —— (2006) (citing *McKinney*, 158 N.C. App. at 447, 581 S.E.2d at 797). The issue of subject matter jurisdiction may be considered by the court at any time, and may be raised for the first time on appeal. "This Court recognizes its duty to insure subject matter jurisdiction exists prior to considering an appeal." *In the Matter of E.T.S.*, 175 N.C. App. 32, 35, 623 S.E.2d 300, 302 (2005) (citation omitted).

Under N.C. Gen. Stat. § 7B-1101 (2005), the trial court has "exclusive original jurisdiction to hear and determine any petition or motion relating to termination of parental rights to any juvenile who resides in, is found in, or is in the legal or actual custody of a county department of social services . . . at the time of filing of the petition or motion." This statute confers upon the court general jurisdiction over termination of parental rights proceedings.

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

Transportation of Juveniles, 102 N.C. App. at 808, 403 S.E.2d at 558-59). N.C. Gen. Stat. § 7B-1103 (2005), identifies the parties with standing to file a termination of parental rights petition, and provides in pertinent part that:

> (a) A petition or motion to terminate the parental rights of either or both parents to his, her, or their minor juvenile may only be filed by one or more of the following:
>
> . . . .
>
> (3) Any county department of social services, consolidated county human services agency, or licensed child-placing agency to whom custody of the juvenile has been given by a court of competent jurisdiction.

G.S. § 7B-1103(a)(3).

Consequently, where DSS "no longer had custody as of the date of the filing of the petition[,] DSS, therefore, lacked standing to file the petition." *In re D.D.J., D.M.J.*, 177 N.C. App. 441, ——, —— S.E.2d ——, —— (2006).

In *In re Miller*, 162 N.C. App. 355, 590 S.E.2d 864 (2004), the respondent contended that, because DSS no longer had custody of the child at the time the petition was filed, it lacked standing to file a petition for termination of parental rights. This Court agreed, and held:

> Standing is jurisdictional in nature[.] . . . Because DSS no longer had custody of the child, DSS lacked standing, . . . to file a petition to terminate respondent's parental rights. A North Carolina court has subject matter jurisdiction only if the petitioner or plaintiff has standing. . . . Here, because the trial court lacked subject matter jurisdiction over the case, the proceedings to terminate respondent's parental rights were a nullity.

Id. at 357, 358-59, 590 S.E.2d at 865-66 (emphasis added).

Thus, to have standing to file for termination of parental rights, DSS must prove that it has legal custody of the child at the time the petition is filed. "Courts of record speak only in their records. They preserve written memorials of their proceedings, which are exclusively the evidence of those proceedings[.]" *State v. Tola*, 222 N.C. 406, 408, 23 S.E.2d 321, 323 (1942) (internal quotation marks omitted). Therefore:

> The proceedings of courts of record can be proved by their records only; that is by reason of the vagueness and uncertainty of

> parol proof as to such matters, and of the facility which the record affords of proving them with certainty. Public policy and convenience require the rule, and a necessary consequence from it is the absolute and undeniable presumption that the record speaks the truth.

State v. Michaels, 11 N.C. App. 110, 112, 180 S.E.2d 442, 443 (1971) (internal quotation marks omitted).

We conclude that, where DSS files a motion for termination of parental rights, the trial court has subject matter jurisdiction only if the record includes a copy of an order, in effect when the petition is filed, that awards DSS custody of the child. This is implicitly recognized by N.C. Gen. Stat. § 7B-1104(5) (2005), which sets out the requirements for a petition for termination of parental rights, and provides in relevant part that the petition "shall set forth . . . (5) The name and address of any person or agency to whom custody of the juvenile has been given by a court of this or any other state; and a copy of the custody order shall be attached to the petition or motion." G.S. § 7B-1104(5) (emphasis added).

In the instant case, because the petition was not accompanied by a copy of the custody order then in effect, we conclude that the petition failed to confer subject matter jurisdiction on the trial court. This omission need not have been fatal if petitioner had simply amended the petition by attaching the proper custody order or otherwise ensured the custody order was made a part of the record before the trial court. Thus, it was the failure by DSS either to attach the custody order to the petition or to remedy this omission that ultimately deprived the court of subject matter jurisdiction.

"A universal principle as old as the law is that the proceedings of a court without jurisdiction of the subject matter are a nullity." *Burgess v. Gibbs*, 262 N.C. 462, 465, 137 S.E.2d 806, 808 (1964). We conclude that, because the omission of the custody order from the petition was never remedied by amendment of the petition or later production of the order, the trial court never obtained subject matter jurisdiction. Accordingly, the orders for termination of parental rights are vacated without prejudice to petitioner's right to bring proper petitions before the Court.

Vacated.

Judges McCULLOUGH and TYSON concur.

STATE OF NORTH CAROLINA, PLAINTIFF v. KASEY LEE NIPPER, DEFENDANT

No. COA05-909

(Filed 6 June 2006)

Arson— outbuilding—common law definition

Defendant was properly indicted and convicted for first-degree arson under N.C.G.S. § 14-58, rather than burning an outbuilding under N.C.G.S. § 14-62, where the garage that was burned was within the curtilage of an inhabited house. Although there is tension between N.C.G.S. § 14-62 and the common law definition of arson, binding precedent from an earlier Court of Appeals panel upholds the common law definition.

Appeal by Defendant from judgment entered 2 December 2004 by Judge Beverly T. Beal in Superior Court, Catawba County. Heard in the Court of Appeals 28 March 2006.

Attorney General Roy Cooper, *Assistant Attorney General Sandra Wallace-Smith*, *for the State.*

David Childers, *for defendant-appellant.*

WYNN, Judge.

A defendant may be properly charged with arson when he burns an outbuilding within the curtilage of an inhabited house.[1] In this case, Defendant argues that he was erroneously indicted for arson under section 14-58 of the North Carolina General Statutes when he should have been charged for burning an outbuilding under section 14-62. Because the outbuilding burned was located within the curtilage of the house, we hold that Defendant was properly indicted and convicted for the first-degree arson.

The facts pertinent to this case indicate that following an altercation with his ex-girlfriend, Defendant Kasey Lee Nipper drove to her home where she stayed with her parents, entered the home's detached garage, waited in the garage for his ex-girlfriend's return, slashed the tires on her father's truck with a pocket knife, drank a beer found in the cooler beside the truck, and smoked marijuana. Thereafter, Defendant noticed "real thick black-gray smoke roaring up from the left

1. *See State v. Teeter*, 165 N.C. App. 680, 682, 599 S.E.2d 435, 436, *disc. review denied*, 359 N.C. 74, 605 S.E.2d 147 (2004).

side of the freezer," left the garage and returned to his own apartment. At the time of the fire, Defendant's ex-girlfriend's father and her son were in the house.

Defendant was arrested and charged with injury to personal property, second-degree burglary, and first-degree arson. At trial, he was convicted of injury to property, non-felonious breaking or entering, and first-degree arson. Defendant was sentenced for sixty days for injury to personal property, 120 days for breaking and entering, and sixty-five to eighty-seven months for first-degree arson.

On appeal, Defendant argues that he was erroneously indicted for arson under section 14-58 of the North Carolina General Statutes when he should have been charged for burning an outhouse under section 14-62.

Section 14-58 provides that "[i]f the dwelling burned was occupied at the time of the burning, the offense is arson in the first degree and is punishable as a Class D felony." N.C. Gen. Stat. § 14-58 (2005). Moreover, while the statute states that arson involves the burning of an occupied dwelling, our caselaw has held that a defendant may also be charged with arson under section 14-58 for burning a building located within the curtilage of an occupied dwelling. *Teeter*, 165 N.C. App. at 682, 599 S.E.2d at 436. Curtilage is defined as including " 'at least the yard around the dwelling house as well as the area occupied by barns, cribs, and other outbuildings.' " *State v. Browning*, 28 N.C. App. 376, 379, 221 S.E.2d 375, 377 (1976) (quoting *State v. Frizzelle*, 243 N.C. 49, 51, 89 S.E.2d 725, 726 (1955)). The burning of buildings located within the curtilage is included in the definition of arson because the proximity of the buildings to the dwelling house increases the risk of danger to any inhabitants of the house. " '[T]he main purpose of common law arson [] is to protect against danger to those persons who might be in the dwelling house[.]' " *Teeter*, 165 N.C. App. at 683, 599 S.E.2d at 437 (quoting *State v. Pigott*, 331 N.C. 199, 207, 415 S.E.2d 555, 560 (1992)).

In *Teeter*, the defendant had been charged with arson in the first degree for burning a garage located approximately ten to fifteen yards from the home. *Id.* at 681, 599 S.E.2d at 435. At the close of the State's evidence, the defendant moved for dismissal on the grounds of a fatal variance between the evidence indictment and the evidence offered at trial. *Id.* The defendant argued that while there was evidence that he had burned the garage, there had been no evidence introduced that he had burned a dwelling, the requirement for arson. *Id.*, 599 S.E.2d at 436.

The defendant asserted that to get a conviction of arson, the State would have to prove that he had burned a dwelling. *Id.* The trial court granted the nonsuit motion and dismissed the arson charge. *Id.*

On appeal, this Court began its analysis by noting that the "common law definition of arson is still in force in North Carolina[.]' " *Id.* at 682, 599 S.E.2d at 436 (quoting *State v. Jones*, 110 N.C. App. 289, 291, 429 S.E.2d 410, 412 (1993)). The Court then outlined the common law definition of arson: " 'the malicious and voluntary or willful burning of another's house. . . **or outhouse appurtenant to or a parcel of the dwelling house or within the curtilage**.' " *Id.* (quoting 5 AM. JUR. 2D Arson and Related Offenses § 1 (2004)) (emphasis in original). Applying this law to the facts, this Court determined that "the original indictment charging defendant with arson was sufficient to support a conviction for burning the garage within the curtilage of the house." *Id.* at 683, 599 S.E.2d at 437.

The present case is factually indistinguishable from *Teeter*. Here, Defendant set fire to a garage located within the curtilage of the dwelling, thirty feet from the house. *See Browning*, 28 N.C. App. at 379, 221 S.E.2d at 377. At the time of the fire, the house was occupied. Accordingly, following *Teeter*, we must hold that the indictment for first-degree arson was proper. *Teeter*, 165 N.C. App. at 683, 599 S.E.2d at 437.

Nonetheless, Defendant argues that *Teeter* conflicts with the application of section 14-62 of the North Carolina General Statutes which states "[i]f any person shall wantonly and willfully set fire to or burn . . . any uninhabited house, or any . . . outhouse . . . he shall be punished as a Class F felon." N.C. Gen. Stat. § 14-62 (2005). He relies on *State v. Woods* to support his contention that the language of section 14-62 has removed the burning of outbuildings within the curtilage of a dwelling house from application of the common law offense of arson. *State v. Woods*, 109 N.C. App. 360, 427 S.E.2d 145 (1993).

In *Woods*, this Court held that a defendant was properly charged and convicted under section 14-62 for burning a storage building within the curtilage of a dwelling. *Id. at* 365, 427 S.E.2d at 148. The defendant argued that section 14-62 did not apply to buildings like the one he burned. This Court first examined the term "outhouse" as used in section 14-62, concluding that " '[a]n out-house is [a building] that belongs to a dwelling house, and is in some respect parcel of such dwelling house and situated within the curtilage.' " *Id.* at 364, 427 S.E.2d at 147 (quoting *State v. Roper*, 88 N.C. 656, 658 (1883)). The Court next con-

sidered whether the storage house was located within the curtilage of the home. While no exact measurement was given in the record, the distance from the home to the storage house was described as "half the length of the courtroom." *Id.* at 365, 427 S.E.2d at 148. The Court determined that this distance meant that the storage building was within the home's curtilage. *Id.* Accordingly, the Court concluded that the storage house qualified as an outhouse for purposes of section 14-62 and affirmed the conviction. *Id.* at 366, 427 S.E.2d at 149.

While we recognize the tension between the application of section 14-62 in *Woods* and this Court's holding in *Teeter*, we must reject Defendant's first assignment of error as barred by binding precedent. When a panel of the Court of Appeals has decided the same issue, a subsequent panel is bound by that precedent, unless the previous case has been overruled by a higher court. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989).

In sum, because *Teeter* holds that buildings within the curtilage of an inhabited home are included in the definition of arson, we must affirm the trial court's denial of Defendant's motion to dismiss the charge of first-degree arson. *Teeter*, 165 N.C. App. at 682, 599 S.E.2d at 436.

No error.

Judges ELMORE and LEVINSON concur.

IN RE: A.R.H.

No. COA05-1507

(Filed 6 June 2006)

1. Child Abuse and Neglect— burden of proof—neglect not shown

The trial court did not err by dismissing a child neglect and abuse petition where findings not challenged on appeal supported the court's conclusion that petitioner failed to meet its burden of proof.

2. Appeal and Error— assignment of error to evidence—evidence in question not sufficiently identified

An assignment of error concerning the evidence in a child abuse and neglect proceeding was dismissed where the evidence was not identified with particularity.

Appeal by Guardian *Ad Litem* from order entered by Judge James A. Harrill, in the District Court in Rockingham County. Heard in the Court of Appeals 18 May 2006.

The Teeter Law Firm, by Kelly Scott Lee, for appellant Guardian Ad Litem.

County Attorney Wendy Walker, for petitioner Rockingham County Department of Social Services.

Farver, Skidmore & McDonough, L.L.P., by H. Craig Farver, and Folger and Tucker, P.A., by Benjamin F. Tucker, for respondent-appellees.

HUDSON, Judge.

Petitioner Rockingham County Department of Social Services ("DSS") filed a petition on 15 June 2004 alleging that A.R.H. was an abused and neglected juvenile. On 15 June 2004, the court entered an order for non-secure custody, giving DSS placement authority for A.R.H. and removing her from her parents. On the same date, the court appointed a guardian *ad litem* ("appellant"). Following two additional non-secure custody hearings, A.R.H. was continued in DSS custody. Following an adjudicatory hearing, in September and October 2004, the court found that petitioner failed to meet its burden of showing by clear, cogent and convincing evidence that A.R.H. was an abused and neglected juvenile. The guardian *ad litem* appeals. As discussed below, we affirm.

On 7 June 2004, A.R.H.'s mother discovered her daughter, then aged six months, limp and unresponsive and took her to Annie Penn Hospital. The hospital airlifted A.R.H. to Wake Forest Baptist Medical Center's ("BMC") emergency trauma center. Dr. Barbara Specter of BMC, an expert in pediatric radiology, testified that x-rays of A.R.H. revealed a fracture of the right clavicle approximately two weeks old and a compression fracture of the vertebrae in the spine. Dr. Specter testified that the compression fracture was an unusual injury generally seen only in children who have been swung or shaken. Dr. Specter also

found a widening of the sutures in the brain, which in conjunction with A.R.H.'s other injuries, led her to an expert opinion that A.R.H.'s injuries were non-accidental.

Dr. Grey Weaver, an expert in pediatric ophthalmology at BMC, testified that A.R.H. had sustained hemorrhages in the retina of the right eye, hemorrhages of the left eye and a vitreous hemorrhage of the left eye. Based on his examination of A.R.H., Dr. Weaver gave his opinion that the injuries were non-accidental, specifically from shaken baby syndrome. Dr. Dan Williams, another expert in radiology, reviewed a number of head CT scans and brain MRIs of A.R.H. Dr. Williams testified that the type of bleeding in A.R.H.'s brain indicated non-accidental trauma, "shaken baby for example." Dr. Lynn Fordham, an expert in pediatric radiology from the University of North Carolina School of Medicine ("UNC"), examined A.R.H.'s CT scans and concluded that "I don't know for sure what happened." Dr. Michael Lawless, professor of pediatrics at Wake Forest University School of Medicine, supervised A.R.H.'s case and testified that he examined her several times and reviewed all of her medical records and interviewed her parents. Dr. Lawless testified that the injuries were severe and that no underlying medical condition could adequately explain them other than non-accidental trauma.

Before and on 7 June 2004, respondent mother was the primary care-giver for A.R.H. She testified that her daughter's injuries were the result of bumps she received hitting her head on a kitchen island at home, a fall from a "bouncy seat" to the floor, and a hit from a plastic golf club by a sibling. Respondent mother also stated that A.R.H. had seizures and an undiagnosed blood disorder. A.R.H. suffered several seizures while hospitalized, including a focal seizure in which she stared fixedly and was unresponsive, but did not shake. Family members had seen this behavior before, but did not realize what it was. Respondents called Dr. William Young, an expert in pediatric ophthalmology, who testified that the pattern of hemorrhaging in A.R.H.'s left eye could be due to an accident. On cross-examination Dr. Young stated that respondents had not informed him of A.R.H.'s other injuries, and that if he had known about all of the injuries, he would have considered it a suspicious constellation of injuries. Respondents also called Dr. Faith Crosby, a pediatrician, in order to show that Dr. Crosby's office was responsible for A.R.H.'s clavicle fracture due to improper restraint during a catheterization. Dr. Crosby testified that she had never injured a child during any procedure.

The court found that

> 39. Medical testimony was presented from eight physicians, whose opinions ranged from "consistent with non-accidental trauma, specifically shaken baby syndrome" to "I don't know what happened to this child."

The court then concluded that petitioner failed to meet its burden of showing by clear, cogent and convincing evidence that A.R.H. was abused and neglected.

[1] Appellant first argues the trial court erred in dismissing the petition. We do not agree.

"The allegations in a petition alleging abuse, neglect, or dependency shall be proved by clear and convincing evidence." N.C. Gen. Stat. § 7B-805 (2003). "A proper review of a trial court's finding of [abuse,] neglect[, and dependency] entails a determination of (1) whether the findings of fact are supported by 'clear and convincing evidence,' and (2) whether the legal conclusions are supported by the findings of fact." *In re Pittman*, 149 N.C. App. 756, 763-64, 561 S.E.2d 560, 566 (2002) (internal citation and quotation marks omitted). Where an appellant's brief to this Court "does not argue that the findings of fact are unsupported by the evidence . . . ., those facts are deemed supported by competent evidence." *In re Padgett*, 156 N.C. App. 644, 577 S.E.2d 337 (2003). Here, appellant fails to challenge any of the trial court's findings of fact in its brief to this Court. Thus, we need only consider whether those findings support the court's conclusions of law.

In addition to finding 39 above, the trial court made the following pertinent findings:

> 37. Dr. Crosby has been the family's regular pediatrician since the birth of [A.R.H.'s siblings]. She reports no concerns or "red flags" for child abuse in her dealings with the family.
>
> ***
>
> 42. There has been no evidence presented that the respondent-parents are anything other than loving and caring parents with exceptional family support. There is no evidence that there is any trouble in the marriage, that either parent has anger management issues, that the respondent-mother has suffered from post-partum depression or that either parent has any psychiatric or psychological condition that affects their ability to parent their children appropriately.

These findings support the court's conclusion that the petitioner failed to meet its burden of showing by clear, cogent, and convincing evidence that A.R.H. was abused or neglected. We overrule this assignment of error.

[2] Appellant also argues that the trial court erred by dismissing the petition for abuse and neglect at the adjudication phase, using evidence of A.R.H.'s best interest from the dispositional phase. We disagree.

Appellant's assignment of error II and the argument in her brief challenge the admissibility of certain "dispositional evidence," but fails to identify this evidence with any particularity. Rule 10 of the Rules of Appellate Procedure requires that

> [e]ach assignment of error shall so far as practicable, be confined to a single issue of law; and shall state plainly, concisely and without argumentation the legal basis upon which error is assigned. An assignment of error is sufficient if it directs the attention of the appellate court to the particular error about which the question is made, with clear and specific record or transcript references. Questions made as to several issues or findings relating to one ground of recovery or defense may be combined in one assignment of error, if separate record or transcript references are made.

N.C. R. App. P. 10(c)(1). Appellant's assignment of error cites 105 consecutive pages of the transcript and the argument in her brief does not specify what pieces of evidence were improperly admitted. Instead, appellant's brief discusses on various comments by the court and disagrees with the weight given to certain testimony in making findings. Without the appellant having identified specific pieces of evidence, this Court cannot evaluate the propriety of its admission or determine whether petitioner made timely objections to the admissibility of the evidence at trial. "The North Carolina Rules of Appellate Procedure are mandatory and failure to follow these rules will subject an appeal to dismissal." *Viar v. N.C. DOT*, 359 N.C. 400, 401, 610 S.E.2d 360, 360 (2005) (internal quotation marks omitted). We dismiss this assignment of error.

Affirmed.

Judges McCULLOUGH and TYSON concur.

DAVID B. STEFFES, PLAINTIFF v. RONNIE LEE DELAPP AND RLD INVESTMENTS, LLC, DEFENDANTS

No. COA05-864

(Filed 6 June 2006)

1. Appeal and Error— appealability—interlocutory order—denial of motion for arbitration—substantial right

Although defendants' appeal from the denial of a motion to stay and compel arbitration is an appeal from an interlocutory order, it is immediately appealable because the denial of a demand for arbitration affects a substantial right which might be lost if appeal is delayed.

2. Arbitration and Mediation— motion to stay and compel arbitration—failure to state grounds

The trial court erred by denying defendants' motion to stay and compel arbitration, and the matter is reversed and remanded for further factual findings and conclusions of law, because: (1) the order failed to state the grounds for the trial court's denial of the motion to stay and compel arbitration; and (2) as the reason for the denial cannot be determined, the Court of Appeals cannot conduct a meaningful review of the trial court's conclusions of law.

Appeal by defendants from an order entered 14 February 2005 by Judge J. Gentry Caudill in Mecklenburg County Superior Court. Heard in the Court of Appeals 15 March 2006.

Hanzel & Newkirk, by Robert B. Newkirk, III, for plaintiff-appellee.

Andresen & Associates, by Kenneth P. Andresen, for defendant-appellants.

HUNTER, Judge.

Ronnie Lee DeLapp ("DeLapp") and RLD Investments, LLC ("RLD") (collectively "defendants") appeal from an order entered 14 February 2005 denying defendants' motion to compel arbitration. For the reasons stated herein, we reverse and remand the order for further findings.

RLD and David B. Steffes ("plaintiff") were co-owners of a corporation known as Elkanah Productions, Inc. ("Elkanah"). Elkanah executed a promissory note in favor of plaintiff on 26 October 2000 in the

amount of $150,000.00. Elkanah began operating a nightclub in March 2001 known as the Varga Lounge at 305 West 4th Street in Charlotte, North Carolina. A judgment against Elkanah was awarded to plaintiff, and the amount of the award was added to the promissory note between Elkanah and plaintiff on 31 December 2002, increasing the value to $550,592.12. On 10 January 2003, RLD purchased a third of Elkanah's shares. RLD later purchased further shares and gained a two-thirds controlling interest in Elkanah.

On 6 November 2003, RLD called for a special meeting of Elkanah's shareholders to be held on 18 November 2003. Plaintiff did not attend the shareholders' meeting. Immediately following the shareholders' meeting, the Board of Directors met and voted to dissolve Elkanah, although proper notice of the meeting to dissolve was not given.

Elkanah's dissolution terminated its lease of the property at 305 West 4th Street. The terms of the lease specified that fixtures added by Elkanah which could not be removed without damage to the property were to remain on the property. RLD transported the removable fixtures to a storage facility, notifying plaintiff as to the location of the facility and providing access.

Plaintiff brought an action against RLD and DeLapp, alleging that defendants purposefully dissolved Elkanah and used the assets to operate a substantially similar club under another corporate name. Plaintiff also alleged that defendants did not properly wind up Elkanah's affairs and avoided paying the promissory note owed to plaintiff. Finally, plaintiff alleged that defendants improperly maintained personal properties that were not fixtures.

Plaintiff moved for summary judgment. On 22 December 2004, defendants moved to stay the proceedings, compel arbitration, and in the alternative to dismiss. The motions were denied by an order entered 14 February 2005. Defendants appeal from this order.

In their sole assignment of error, defendants contend the trial court erred in denying the motion to stay and compel arbitration. We are unable to review this assignment of error.

[1] We first note that defendants appeal from an interlocutory order. Although such orders "are not usually appealable . . . this Court has held that the denial of a demand for arbitration is an order that affects 'a substantial right which might be lost if appeal is delayed[.]' " *Raspet v. Buck*, 147 N.C. App. 133, 135, 554 S.E.2d 676, 677 (2001) (citation omitted).

[2] "The question of whether a dispute is subject to arbitration is a question of law for the trial court, and its conclusion is reviewable *de novo*." *Pineville Forest Homeowners v. Portrait*, 175 N.C. App. 380, 385-86, 623 S.E.2d 620, 624 (2006). "The determination involves a two-pronged analysis in which the court 'must ascertain both (1) whether the parties had a valid agreement to arbitrate, and also (2) whether "the specific dispute between the parties falls within the substantive scope of that agreement." ' " *Id.* at 386, 623 S.E.2d at 624-25 (citation omitted).

"In considering the first step, '[t]he trial court's findings regarding the existence of an arbitration agreement are conclusive on appeal where supported by competent evidence, even where the evidence might have supported findings to the contrary.' " *Ellis-Don Constr. Inc. v. HNTB Corp.*, 169 N.C. App. 630, 633-34, 610 S.E.2d 293, 296 (2005) (citations omitted). However, the trial court must state the basis for its decision in denying a defendant's motion to stay proceedings in order for this Court to properly review whether or not the trial court correctly denied the defendant's motion. *Barnhouse v. American Express Fin. Advisors, Inc.*, 151 N.C. App. 507, 509, 566 S.E.2d 130, 132 (2002). In *Barnhouse*, where the trial court made no findings regarding the existence of an arbitration agreement between the parties, this Court held that "[b]ecause the trial court failed to determine whether or not an agreement to arbitrate existed between the parties, the trial court erred in denying defendants' motion to stay proceedings." *Id.* (footnote omitted).

Similarly, in *Ellis-Don*, the order appealed to this Court stated:

> "This Matter came before the Court on Defendant's Motion to Dismiss and on Defendant's Motion to Stay and Compel Arbitration. After reviewing all matters submitted and hearing arguments of counsel, the Court is of the opinion that both motions should be denied. It is therefore, ordered, adjudged and decreed that Defendant's Motion to Dismiss is denied and that Defendant's Motion to Stay and Compel Arbitration is Denied."

Id. at 634, 610 S.E.2d at 296. Relying on *Barnhouse* and *Appalachian Poster Advertising Co. v. Harrington*, 89 N.C. App. 476, 366 S.E.2d 705 (1988), *Ellis-Don* held that as the order did not "state the grounds for the trial court's denial of defendant's motion to stay and compel arbitration[,]" and contained no findings of fact, "the appellate court cannot conduct a meaningful review of the conclusions of law and 'test the correctness of [the lower court's] judgment.' " *Ellis-Don*, 169 N.C. App. at 634-35, 610 S.E.2d at 296-97 (quoting *Appalachian Poster*, 89 N.C. App.

at 480, 366 S.E.2d at 707). *Ellis-Don* reversed the denial of the defendant's motion to stay and compel arbitration and remanded the matter for further factual findings and conclusions of law. *Id.* at 635, 610 S.E.2d at 297. Recently, in *Pineville Forest*, this Court again reversed and remanded an order denying a motion to compel arbitration based on the trial court's failure to make findings. See *Pineville Forest*, 175 N.C. App. at 386, 623 S.E.2d at 625 (stating that as the order in *Pineville Forest* was indistinguishable from that in *Ellis-Don*, the previous holdings in *Ellis-Don* and *Barnhouse* required reversal and remand of the order).

Here, the trial court's order stated:

> THIS MATTER COMING on to be heard and being heard before the undersigned . . . upon Defendants' Motion to Stay Proceeding, Compel Arbitration and in the Alterative to Dismiss and upon Plaintiff's Motion for Summary Judgment . . . .
>
> IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED:
>
> 1. That the Defendants' Motion to Stay Proceeding, and in the Alternative to Dismiss is DENIED.

As in *Ellis-Don* and *Pineville Forest*, the order fails to state the grounds for the trial court's denial of the motion to stay and compel arbitration. The trial court's denial may have resulted from a number of reasons, including: "(1) a lack of privity between the parties; (2) a lack of a binding arbitration agreement; (3) [that] this specific dispute does not fall within the scope of any arbitration agreement; or, (4) any other reason[.]" *Ellis-Don*, 169 N.C. App. at 635, 610 S.E.2d at 296.

As we cannot determine the reason for the denial, we cannot conduct a meaningful review of the trial court's conclusions of law and must reverse and remand the order for further findings. "On remand, the trial court may hear evidence and further argument to the extent it determines in its discretion that either or both may be necessary and appropriate." *Pineville Forest*, 175 N.C. App. at 387, 623 S.E.2d at 625. "Thereafter, the court is to enter a new order containing findings which sustain its determination regarding the validity and applicability of the arbitration provisions." *Id.*

For the foregoing reasons, the trial court's denial of defendants' motion to stay and compel arbitration is reversed and the matter remanded for further factual findings and conclusions of law in accordance with this opinion.

Reversed and remanded.

Judges HUDSON and BRYANT concur.

CHARLES McCLENNAHAN, Plaintiff-Appellee v. NORTH CAROLINA SCHOOL OF THE ARTS AND DALE POLLACK, Defendants-Appellants

No. COA05-790

(Filed 6 June 2006)

Appeal and Error— appealability—interlocutory order—denial of motion to dismiss—no showing of substantial right

Defendants' appeal from the denial of their motion to dismiss plaintiff's complaint pursuant to N.C.G.S. § 1A-1, Rule 12(b)(1) is dismissed as an appeal from an interlocutory order, because: (1) generally, the denial of a motion to dismiss is an interlocutory order from which there may be no immediate appeal; (2) the appeal was not certified under N.C.G.S. § 1A-1, Rule 54(b); (3) the question presented for appellate review is not whether sovereign immunity bars plaintiff's cause of action, but whether plaintiff can directly sue under the North Carolina Constitution if alternative state law remedies exist; (4) the principle that interlocutory appeals raising issues of sovereign immunity affecting a substantial right warrant immediate review remains wholly unaffected; and (5) defendants failed to illustrate any substantial right will be lost regarding their statute of limitations argument.

Appeal by defendants from order entered 15 March 2005 by Judge Ronald E. Spivey in Forsyth County Superior Court. Heard in the Court of Appeals 25 January 2006.

Kennedy, Kennedy, Kennedy and Kennedy, L.L.P., by Harvey L. Kennedy and Harold L. Kennedy, III, for plaintiff-appellee.

Attorney General Roy Cooper, by Assistant Attorney General Katherine C. Galvin, for defendants-appellants.

CALABRIA, Judge.

The North Carolina School of the Arts ("the N.C.S.A.") and Dale Pollock ("Dean Pollock") (collectively known as "defendants") appeal

the denial of their motion to dismiss Charles McClennahan's ("plaintiff") complaint pursuant to N.C. R. Civ. P. 12(b)(1), (b)(2), and (b)(6). We dismiss as interlocutory.

Plaintiff taught at the N.C.S.A from 1996-2001. The N.C.S.A is a constituent state university of the University of North Carolina school system. Dean Pollock, the current Dean of the N.C.S.A., also served as Dean when plaintiff taught school from 1996-2001. On 8 November 2004, plaintiff filed a complaint against defendant N.C.S.A. and defendant Dean Pollock, in his official capacity, alleging both deprived him of his constitutionally guaranteed free speech rights under N.C. Const. Art. I, § 14. Specifically, plaintiff alleged the following: plaintiff reported to Dean Pollock that a white professor at the N.C.S.A. racially harassed him on several occasions including "h[a]ng[ing] a portrait on the walls of the School of the Arts of the founder of the Ku Klux Klan," but Dean Pollock "failed to take any action;" plaintiff reported to Dean Pollock that this same professor was engaged in an inappropriate relationship with a female student at the N.C.S.A., but Dean Pollock "failed to take any corrective action;" and, though plaintiff ultimately refused, he was pressured by a high ranking member of the N.C.S.A. administration to admit an unqualified applicant at the behest of Dean Pollock because the applicant's father was a prominent member of the surrounding business community. Plaintiff reported this "job intimidation" to the N.C.S.A.

Plaintiff further alleged he was subject to "retaliatory conduct" by reporting the above instances because Dean Pollock decided not to renew plaintiff's employment contract. Plaintiff appealed Dean Pollock's decision not to renew his contract to the N.C.S.A.'s Board of Trustees and Board of Governors ("Governors") and on 9 November 2001 the Governors affirmed Dean Pollock's decision. On 31 January 2005, defendants, pursuant to N.C. R. Civ. P. 12(b)(1), (b)(2), and (b)(6), filed a motion to dismiss plaintiff's complaint on the ground of sovereign immunity arguing because plaintiff had two adequate alternative statutory remedies, the Administrative Procedures Act ("the A.P.A.") and the Whistleblower Protection Act ("the W.P.A") to address his alleged injury, he could not maintain a direct cause of action under the North Carolina Constitution. The trial court denied defendants' motion and defendants appealed.

Plaintiff argues defendants' appeal is interlocutory and should be dismissed. We agree. " 'An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the

entire controversy.' " *Fabrikant v. Currituck County*, 174 N.C. App. 30, 36, 621 S.E.2d 19, 24 (2005) (quoting *Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950)). Generally, "the denial of a motion to dismiss is an interlocutory order from which there may be no immediate appeal." *Smith v. Jackson County Bd. of Educ.*, 168 N.C. App. 452, 457, 608 S.E.2d 399, 405 (2005). Nevertheless, "[a]n interlocutory appeal is ordinarily permissible . . . if (1) the trial court certified the order under Rule 54(b) of the Rules of Civil Procedure, or (2) the order affects a substantial right that would be lost without immediate review." *Fabrikant*, 174 N.C. App. at 36, 621 S.E.2d at 24 (citation omitted). Since the appeal in the instant case was not certified by the trial court under 54(b), defendants must illustrate a substantial right exists which will be lost absent immediate appellate review.

" '[T]his Court has repeatedly held that appeals raising issues of governmental or sovereign immunity affect a substantial right sufficient to warrant immediate appellate review.' " *Hines v. Yates*, 171 N.C. App. 150, 156, 614 S.E.2d 385, 389 (2005) (quoting *Price v. Davis*, 132 N.C. App. 556, 558-59, 512 S.E.2d 783, 785 (1999)). Defendants cite *Corum v. University of North Carolina*, 330 N.C. 761, 413 S.E.2d 276 (1992), for the proposition "[t]he North Carolina Supreme Court has held that *sovereign immunity* bars a direct cause of action under a provision of the state constitution if alternative state law remedies exist." (Emphasis added). Our Supreme Court determined in *Corum*, 330 N.C. at 782, 413 S.E.2d at 289, that "in 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." Further, our Supreme Court determined separately, "[t]he doctrine of sovereign immunity cannot stand as a barrier to North Carolina citizens who seek to remedy violations of their rights guaranteed by the Declaration of Rights." *Id.* at 785-86, 413 S.E.2d at 291. Specifically, our Supreme Court in *Corum* never links sovereign immunity and causes of action under the North Carolina Constitution in the manner defendants presume. Moreover, in the instant case, the question presented for appellate review is not whether sovereign immunity bars the plaintiff's cause of action, but rather whether plaintiff can sue directly under the North Carolina Constitution if alternate state law remedies exist. Thus, the long standing principle that interlocutory appeals raising issues of sovereign immunity affecting a substantial right warrant immediate review remains wholly unaffected. Here, because defendants primarily argue plaintiff could not sue directly under the state constitution since plaintiff possessed two alternative state law remedies, the A.P.A. and the W.P.A., defendants have not established they possess a substantial right

warranting immediate review of this interlocutory appeal. Likewise, defendants failed to illustrate any substantial right will be lost regarding their statute of limitations argument. Thus, this appeal is dismissed as interlocutory.

Dismissed.

Judges BRYANT and JOHN concur.

JAYE DAY, PLAINTIFF v. TIMOTHY A. NORDGREN, EXECUTOR OF THE ESTATE OF EDMUND A. RASMUSSEN, DEFENDANT

No. COA05-1317

(Filed 6 June 2006)

Appeal by plaintiff from an order entered 13 June 2005 by Judge James C. Spencer, Jr., in Wake County Superior Court. Heard in the Court of Appeals 20 April 2006.

Randolph M. James, P.C., by Randolph M. James, for plaintiff appellant.

Brady, Nordgren, Morton & Malone, PLLC, by Travis K. Morton, for defendant appellee.

McCULLOUGH, Judge.

Plaintiff Day filed a companion case in Wake County Superior Court and has appealed therefrom in which the facts and legal issues are identical, with the only difference being the named defendants. Therefore, the decision of *Day v. Rasmussen*, 177 N.C. App. ——, —— S.E.2d —— (filed 6 June 2006), is controlling in the instant case, and we therefore

Affirm.

Judges CALABRIA and STEELMAN concur.

OPINIONS REPORTED WITHOUT PUBLISHED OPINIONS

FILED 6 June 2006

BAKER v. DUNLAP No. 05-683	Mecklenburg (03CVD17497)	Affirmed
CLINARD OIL CO. v. OIL PRODS. CO. No. 05-1087	Davidson (03CVS3630)	Affirmed
CLOUGH v. HUNSECKER No. 05-964	Dare (01CVD637)	Reversed and remanded
COUNTY OF DURHAM v. DAYE No. 05-1022	Durham (03CVS457)	Dismissed
FARRELL v. FARRELL No. 05-166	Cumberland (01CVD6195)	Reversed and remanded
FIEDLER v. BLUE SKY SERVS., INC. No. 05-1315	Wake (04CVD6214)	Dismissed
HYDE v. ANDERSON No. 05-1430	Cabarrus (03CVS2520)	Affirmed
IN RE B.H. No. 05-1271	Durham (02J203)	Affirmed
IN RE C.A.L. No. 05-744	Orange (03J30)	Affirmed
IN RE C.J. H.-D. No. 05-939	Mecklenburg (04J288)	Affirmed
IN RE C.N.R. No. 05-1159	Johnston (02J89)	Reversed and remanded
IN RE C.S. & C.A.S. No. 05-1362	Randolph (04J21) (04J22)	Dismissed
IN RE E.M. & I.M. No. 05-1019	Pitt (04J10) (04J11)	Affirmed
IN RE G.G.A.R. No. 05-1084	New Hanover (04J449)	Affirmed
IN RE J.J.A.L. No. 05-745	Orange (03J28)	Affirmed
IN RE K.B. No. 05-1162	Forsyth (04J498)	Order affirmed; motion to dismiss denied

IN RE M.F.A.L. No. 05-746	Orange (03J29)	Affirmed
IN RE S.C.B. No. 05-1278	Mecklenburg (05J293)	Affirmed
IN RE T.S.F. & A.B.F. No. 05-1070	Catawba (03J111) (03J112)	Affirmed
KUNZE v. KUNZE No. 05-1244	Cabarrus (01CVD2466)	Vacated and remanded
LAFELL v. LAFELL No. 05-693	Moore (01CVD327)	Affirmed
LYNCH v. TWITTY No. 05-1333	Mecklenburg (05CVS1289)	Appeal dismissed
SABLE v. SABLE No. 05-664	Wake (01CVD5464)	Affirmed
SHELLA v. FOSTER No. 05-342	Guilford (02CVS11260)	Affirmed
SILVERS v. MASTERCRAFT FABRICS, LLC No. 05-895	Ind. Comm. (I.C. #204944)	Affirmed
SMITH v. STIDHAM No. 05-291	Guilford (03CVS7160)	Reversed
STATE v. BEST No. 05-1294	Durham (02CRS51899)	Affirmed
STATE v. BLANTON No. 05-1115	Gaston (01CRS53380)	Affirmed
STATE v. BROWN No. 05-305	Rowan (00CRS50898) (00CRS50899) (00CRS50900)	No error
STATE v. BYRD No. 05-397	Craven (02CRS55245) (02CRS55246) (03CRS5447)	No error
STATE v. CHAVIS No. 05-1313	Granville (04CRS50673) (04CRS50675) (04CRS50676) (04CRS50677)	No error

STATE v. CLINTON No. 05-508	Gaston (00CRS19808) (00CRS19809) (00CRS60854) (00CRS60856) (00CRS60858) (00CRS60859) (00CRS60860) (00CRS60829)	Remanded for resentencing
STATE v. COWAN No. 05-1394	Bladen (04CRS53140)	No error
STATE v. COX No. 05-1004	Richmond (04CRS50282) (04CRS50283)	No error
STATE v. DOUGLAS No. 05-821	Guilford (03CRS74319) (03CRS74320)	No error
STATE v. DUBOSE No. 05-1343	Johnston (01CRS11348) (01CRS56936)	Affirmed
STATE v. FARMER No. 05-1121	Catawba (03CRS61072)	No error
STATE v. FLORES-CHAVEZ No. 05-1222	Catawba (03CRS56600) (03CRS56601)	No error
STATE v. FREEMAN No. 05-844	Union (03CRS53975)	No error
STATE v. GRAVES No. 05-1238	Alamance (03CRS59287) (03CRS59288) (05CRS51611)	No error
STATE v. HAMMOND No. 05-993	Columbus (04CRS50247)	No error
STATE v. HARDIN No. 05-1017	Rutherford (04CRS52512)	Appeal dismissed
STATE v. HATCHETT No. 05-680	Guilford (03CRS24544) (03CRS24634) (04CRS24019)	Dismissed
STATE v. LIPSCOMB No. 05-1280	Durham (04CRS53630)	No error

STATE v. LOPEZ No. 05-983	Gaston (04CRS51868) (04CRS51875) (04CRS51876) (04CRS51877) (04CRS51878) (04CRS51880)	No error
STATE v. MAXWELL No. 05-1220	Craven (04CRS55726)	No error
STATE v. McGILL No. 05-1071	Catawba (03CRS9963) (03CRS9964)	No error
STATE v. MONROY No. 05-991	Davidson (03CRS58359)	Affirmed
STATE v. NETTLES No. 05-1386	Randolph (02CRS50278) (03CRS10)	No error
STATE v. OTIS No. 05-1170	Mecklenburg (04CRS231560) (04CRS52169)	No error
STATE v. PEAN No. 05-1293	Guilford (04CRS68948)	No error
STATE v. RITTER No. 05-888	Montgomery (01CRS50642)	No error
STATE v. ROBERTS No. 05-1032	Robeson (02CRS4078) (02CRS4079) (02CRS4080) (02CRS4081)	No error
STATE v. SPENCER No. 05-623	Beaufort (03CRS170)	No error
STATE v. STRINGFIELD No. 05-601	Pender (00CRS50486) (00CRS50487) (00CRS50677)	Vacated and remanded for new probation revocation hearings
STATE v. TALLEY No. 05-1358	Yadkin (03CRS2054) (03CRS2055) (03CRS2056) (03CRS2057) (03CRS2058) (03CRS2059) (03CRS2060)	No error

STATE v. TERRY No. 05-646	Caswell (03CRS51131) (03CRS51132)	Dismissed in part; affirmed in part
STATE v. WARD No. 05-1282	Cabarrus (04CRS53165)	No error
STATE v. WILSON No. 05-511	New Hanover (03CRS60059) (04CRS2365)	No error
STATE v. WINDLESS No. 05-1225	Guilford (04CRS68329) (04CRS68330) (04CRS65873)	No error
THORTEX, INC. v. STANDARD DYES, INC. No. 05-1274	Stanly (05CVS395)	Affirmed

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WORD AND PHRASE INDEX

HEADNOTE INDEX

TOPICS COVERED IN THIS INDEX

APPEAL AND ERROR—Continued

APPEAL AND ERROR—Continued

three different sexual offenses even though the indictments for all three are identical and allegedly do not put defendant on notice of three different crimes, this assignment of error is dismissed because defendant violated N.C. R. App. P. 28(b)(6) by failing to include a standard of review. **State v. Summers, 691.**

Appellate Rules violations—Rule 2 not invoked—Appellate Rule 2 was not invoked where plaintiffs' brief had no statement of the grounds for appellate review and there were no exceptional circumstances, significant issues, or manifest injustices to warrant invocation of Appellate Rule 2. **Hill v. West, 132.**

Assignments of error—insufficient to raise constitutional issue—The lack of a constitutional reference in an assignment of error meant that any constitutional question was not preserved for appellate review. **Houston v. Town of Chapel Hill, 739.**

Assignments of error and record references—insufficiency—An appeal was dismissed where the assignments of error did not provide a legal basis for the error alleged and the record references did not provide an additional understanding of the legal basis of the alleged errors. **Hubert Jet Air, LLC v. Triad Aviation, Inc., 445.**

Assignment of error to evidence—evidence in question not sufficiently identified—An assignment of error concerning the evidence in a child abuse and neglect proceeding was dismissed where the evidence was not identified with particularity. **In re A.R.H., 797.**

Hearing to determine jurisdiction—findings supported by competent evidence—binding on appeal—The trial court's findings were binding in a hearing to determine the existence of personal jurisdiction where those findings were supported by competent record evidence. The appellate court does not weigh the evidence or review questions of the credibility of witnesses. **Deer Corp. v. Carter, 314.**

Incriminating statement—properly admitted—harmless, but not error—A first-degree murder defendant's recorded jailhouse telephone statement that he was "getting back" at the victim when he shot him would not have been harmless (although there was no error) where defense counsel was arguing for second-degree murder based on a lack of premeditation. **State v. Hocutt, 341.**

Notice of appeal—court to which appeal taken not specified—fairly inferred—jurisdiction assumed—Jurisdiction to decide an appeal was assumed where plaintiffs mistakenly specified the Supreme Court rather than the Court of Appeals as the court to which appeal was taken. The intent to appeal to the Court of Appeals can be fairly inferred from the notice of appeal, which achieved the functional equivalent of an appeal to the Court of Appeals. **Stephenson v. Bartlett, 239.**

Notice of appeal—timeliness—Plaintiffs failed to file a timely notice of appeal from the 27 August 2004 order in an action seeking access to review defendant homeowners association's financial records, and plaintiffs' appeal is dismissed, because: (1) plaintiffs did not file notice until more than thirty days after entry of judgment for the 27 August 2004 order; and (2) contrary to plaintiffs' contention, the 27 August 2004 order was not an interlocutory order since it resolved all

APPEAL AND ERROR—Continued

Preservation of issues—failure to argue—The six assignments of error that respondent juvenile failed to argue in his brief are deemed abandoned under N.C. R. App. P. 28(b)(6). **In re K.T.L., 365.**

Preservation of issues—failure to argue—Assignments of error numbers one and four are abandoned pursuant to N.C. R. App. P. 28(b)(6) because defendant failed to argue them. **State v. Turner, 423.**

Preservation of issues—failure to argue—The remainder of defendant's assignments of error that were not briefed on appeal are deemed abandoned under N.C. R. App. P. 28(b)(6). **State v. McCollum, 681.**

Preservation of issues—failure to argue—The remaining assignments of error that defendant failed to argue are deemed abandoned under N.C. R. App. P. 28(b)(6). **State v. Summers, 691.**

Preservation of issues—failure to assign error—Although respondent juvenile contends that he was subjected to three separate instances of unlawful confinement, the juvenile failed to preserve his appeal on the two prior instances of confinement because his assignment of error only addresses the third instance of confinement from the entry of the 21 December 2004 disposition order until 28 February 2005. **In re K.T.L., 365.**

Preservation of issues—failure to make assignment of error in brief—Although plaintiff contends the trial court erred by relying on documentation submitted by defendant Board of Nursing (Board) in determining whether it is a state agency, this assignment of error is dismissed because: (1) this argument does not relate to plaintiff's assignments of error, and thus, is not a matter properly before the Court of Appeals; and (2) this assignment of error is irrelevant when the Court of Appeals has already determined that the Board is a state agency solely by examining the statutes. **Abbott v. N.C. Bd. of Nursing, 45.**

Preservation of issues—failure to make timely objection—Although defendant contends the trial court erred in a first-degree rape, attempted first-degree rape, triple first-degree sexual offense, attempted robbery with a dangerous weapon and first-degree kidnapping case by denying defendant's motion for a mistrial even though he contends the evidence of identification was so thoroughly tainted and defendant was prejudiced by his inability to properly present a defense, defendant failed to properly preserve this issue for review, because: (1) defense counsel knew about the alleged improper photo line-up prior to the victim's related testimony, but raised no objection when the victim testified about the photo line-up and instead waited until the testimony of an additional witness before objecting and moving for a mistrial; and (2) based on these facts, defendant failed to make a timely objection. **State v. Summers, 691.**

Preservation of issues—failure to object or make motion at trial—Although defendant contends the trial judge erred in a robbery with a firearm, felonious breaking or entering, and multiple first-degree kidnapping case by failing to recuse herself based on alleged bias against defense counsel, this assignment of error is overruled because: (1) defendant did not seek recusal of the trial judge from the case under the standards for recusal or disqualification of a judge in a criminal trial set out in N.C.G.S. § 15A-1223 and Canon 3(C)(1) of the Code of Judicial Conduct; (2) the question was not properly preserved for appeal since

COSTS—Continued

State of North Carolina, 348 N.C. 130, is not applicable. **Stephenson v. Bartlett, 239.**

CRIMINAL LAW

Deadlocked jury—supplemental instructions—The trial court did not abuse its discretion by denying a mistrial where a jury deadlocked on one of seven charges and the court instructed the jurors to consider each of the seven charges separately. The court's supplemental instruction did not threaten to require unreasonably long deliberations and was not a dynamite charge. **State v. Hagans, 17.**

Discovery—DWI case—The trial court did not err by denying a DWI defendant's pretrial motion to compel discovery from the State of written protocols regarding Intoxylizer operation, calibration, and measures. No statutory right to discovery exists for criminal cases originating in district court and there is no constitutional right to discovery other than for exculpatory evidence. **State v. Cornett, 452.**

Discovery violation—mistrial denied—no abuse of discretion—The trial court did not abuse its discretion by denying defendant's motions to dismiss and for a mistrial for discovery violations by the State, given the court's attention to the violation and its willingness to allow defendant time to contact experts. **State v. Hocutt, 341.**

Instruction—aggressor—collateral estoppel—double jeopardy—The trial court did not commit plain error in a voluntary manslaughter case by giving the jury an aggressor instruction where an earlier jury in defendant's first trial allegedly previously determined he was not the aggressor, because: (1) the doctrine of collateral estoppel did not apply, nor did jeopardy attach, when no unanimous verdict was reached by the earlier jury about whether defendant was the aggressor; and (2) the note from the prior jury stating it had determined that defendant was not the aggressor merely demonstrated a moment in time during the jury deliberations. **State v. Herndon, 353.**

Instruction—medical expert cannot testify to legal terms—The trial court did not err in a first-degree murder case by refusing to instruct the jury that a medical expert could not testify to legal terms. **State v. McCollum, 681.**

Joinder of defendants—abuse of discretion standard—The trial court did not abuse its discretion in a robbery with a firearm, felonious breaking or entering, and multiple first-degree kidnapping case by granting the State's motion for joinder over defendants' objections, because: (1) the State did not stand by and rely on the testimony of the respective defendants to convict them, but instead offered plenary evidence of the three defendants' guilt; and (2) the conflict between closing arguments for defendants was not of such a magnitude when considered in the context of the other evidence that the jury was likely to infer from that conflict alone that all three were guilty. **State v. Love, 614.**

Joinder of offenses—assault and possession of firearm by felon—not prejudicial—The joinder of assault and firearms possession charges for trial did not unjustly or prejudicially hinder defendant's ability to defend himself or to receive a fair hearing. Additionally, the evidence was not complicated and the

CRIMINAL LAW—Continued

CRIMINAL LAW—Continued

to any post-Miranda silence by defendant, but to the refusal of some eyewitnesses and the willingness of another to give statements to the investigators on the day of the shooting; and (3) the other pertinent portion of the closing argument was supported by the cross-examination of defendant's brother, the direct examination of the investigating detective, and the earlier argument regarding defendant's brother and his girlfriend. **State v. Herndon, 353.**

Prosecutor's argument—doctor's testimony could not impact or influence assessment of defendant's premeditation and deliberation—The trial court did not abuse its discretion in a first-degree murder case by failing to sustain defendant's objection to the prosecutor's closing argument that the jury was in a better position to assess defendant's state of mind than the doctor and that the doctor kept talking about terms of psychiatry which did not apply as opposed to legal terms. **State v. McCollum, 681.**

Prosecutor's argument—reference to World Trade Center attack—The trial court did not abuse its discretion in a first-degree murder case by failing to intervene ex mero motu during the State's closing argument that defendant contends included prejudicial matters outside the record, because: (1) the context for the prosecutor's comments was to explain that defendant's lack of a specific motive could not absolve him of responsibility for the criminal act; and (2) the prosecutor's reference to the World Trade Center attack was a reminder to the jury there is not always an explanation for why criminal actions occur, and was not an attempt to somehow equate defendant's actions with those of terrorists on 11 September 2001. **State v. McCollum, 681.**

Request to withdraw guilty plea—confusion as to terms of plea agreement—The trial court did not err in a trafficking in cocaine case by denying defendant's request to withdraw his guilty plea made before sentencing based on alleged confusion as to the terms of the plea agreement regarding whether he had to testify against his brother truthfully, or truthfully and consistently with his earlier statement to law enforcement. **State v. Robinson, 225.**

Request to withdraw guilty plea—meeting of minds—The trial court did not err in a trafficking in cocaine case by denying defendant's request to withdraw his guilty plea even though defendant contends the plea agreement was void as there was no meeting of the minds as to whether defendant was to testify against his brother truthfully, or truthfully and in conformity with his earlier statements to law enforcement, because: (1) defendant testified that he understood the plea agreement required him to testify truthfully and consistently with his previous statement to law enforcement officers; and (2) defendant presented no evidence that the prosecutor had a different understanding than that of the text of the agreement. **State v. Robinson, 225.**

Right to arraignment—proceeding to trial on same day as arraignment—The trial court erred in a resisting a public officer in the performance of his duties case by immediately proceeding to trial on the same day defendant was arraigned without defendant's consent when defendant adequately invoked N.C.G.S. § 15A-943(b) and did not waive his right to arraignment, because: (1) defendant twice moved the trial court to continue his case during his formal arraignment so he could obtain evidence he subpoenaed and so his witnesses would be available; (2) N.C.G.S. § 15A-941(d), which requires a defendant to file a written request for arraignment within twenty-one days, is inapplicable to

CRIMINAL LAW—Continued

defendants who are before the superior court for a trial de novo on charges which lie within the original jurisdiction of the district court; and (3) defendant was entitled to an arraignment in superior court since defendant's not guilty plea from the district court is completely disregarded when a trial de novo in the superior court is a new trial from the beginning to the end. **State v. Vereen, 233.**

Self-defense—omitted from final mandate—reversed—The failure to include not guilty by reason of self-defense in the final mandate was prejudicial error requiring a new trial in a prosecution for discharging a firearm into occupied property. **State v. Davis, 98.**

DISCOVERY

Attorney-client privilege—applicability—The trial court did not abuse its discretion by ruling that an email from counsel discussing revisions to a draft resolution and an email from in-house counsel were protected from discovery by the attorney-client privilege and that an email from attorneys requesting a meeting and an email from defendant shared with attorneys and nonattorneys were not so protected. **Isom v. Bank of Am., N.A., 406.**

Depositions allowed—further objections allowed—The trial court did not abuse its discretion by allowing plaintiff to depose individuals in connection with discoverable documents, while allowing defendant to raise further attorney-client and work-product objections. **Isom v. Bank of Am., N.A., 406.**

Documents—attorney-client privilege—work product doctrine—The trial court erred by denying plaintiff's motion to compel defendant hospital to produce documents in its risk management file pertaining to the perforation of plaintiff's esophagus during surgery on the ground that the documents were protected under N.C.G.S. 1A-1, Rules 26(b)(3) by the attorney-client privilege and the work product doctrine where the record is insufficient to show whether the documents were prepared in the ordinary course of business pursuant to hospital policy or were prepared in anticipation of litigation, and this cause is remanded for findings as to the author of each document, the date each document was prepared, the purpose for which each document was prepared, and the recipients of each document. **Diggs v. Novant Health, Inc., 290.**

Emails—attorney-client privilege—applicability—The trial court did not abuse its discretion by finding that certain emails were protected from discovery by the attorney-client privilege where the attorney-client relationship was firmly established at the time the emails were sent; the emails were apparently exchanged in confidence; they related to discovery matters about which the attorneys were being consulted; and they were exchanged in the course of litigation and arbitration. **Isom v. Bank of Am., N.A., 406.**

Emails—attorney-client privilege—inapplicability—Emails exchanged between bank officials were not protected from discovery by the attorney-client privilege where they suggested a purely business matter, were not for legal advice, and the attorneys were copied merely for information. A document without privilege in the hands of the client does not become privileged merely because it is handed to the attorney. **Isom v. Bank of Am., N.A., 406.**

EVIDENCE—Continued

Attempted bribe by defendant—door opened by defendant—An assault victim's testimony that defendant tried to bribe him was properly admitted. Defendant opened the door on cross-examination by asking the victim about conversations with defendant; the State was entitled to chase the rabbit released by defendant. **State v. Farmer, 710.**

Attorney-client privilege—draft document—pending litigation—A draft document prepared in relation to pending litigation but not as a confidential communication between attorney and client was not protected by attorney-client privilege. **Isom v. Bank of Am., N.A., 406.**

Credibility—instruction—defendant an interested witness—The trial court did not err in a driving while impaired case by instructing the jury that defendant was an interested witness. Further, N.C. R. App. P. 9(a)(3)f provides that the record on appeal in criminal cases needs to contain the transcript of the entire jury charge given by the trial court where error is assigned to the giving or omission of instructions to the jury, and this defect is not cured by filing the trial transcript with the Court of Appeals. **State v. Turner, 423.**

Cross-examination—prior statements—waiver—The trial court did not err in a driving while impaired case by permitting the State to cross-examine defendant regarding his prior district court testimony and further by instructing the jury regarding defendant's prior statements, because (1) absent proof defense counsel asked for and failed to receive the contents of defendant's prior statement, there was no violation of N.C.G.S. § 8C-1, Rule 613; and (2) although the transcript revealed defense counsel questioned the inclusion of the jury instruction regarding prior inconsistent and consistent statements made by defendant due to there being no presentment of the prior statement, defendant waived consideration of this issue by failing to submit any argument or citation of authority. **State v. Turner, 423.**

Cross-examination—right to remain silent—The prosecution was not improperly permitted to cross-examine defendant in a voluntary manslaughter case even though defendant contends it violated his right to remain silent, because: (1) it is not apparent that the State was commenting on post-Miranda silence when the testimony is reviewed in context; and (2) if the questioning related to defendant's conversation with a deputy on the day of the shooting, post-Miranda silence was not implicated. **State v. Herndon, 353.**

Emails—discovery—work product doctrine—The trial court did not abuse its discretion by determining that certain emails were not shielded from discovery by the work product doctrine. A review of the text of the emails yields a wholly reasonable determination that the intent of the exchange was not in anticipation of litigation. Business emails which are copied to an attorney are not protected by the work product doctrine solely due to the fact that they were sent while the business was contemplating litigation. **Isom v. Bank of Am., N.A., 406.**

Exhibit—credibility of codefendant—limiting instruction—plain error analysis—The trial court did not commit plain error in a common law robbery and assault inflicting serious bodily injury case by allowing the introduction of an exhibit pertaining to a real estate transaction between defendant Gadson and another man even though defendant Brown contends the taint attributed to his codefendant attached itself to his character and credibility as well, because: (1)

HIGHWAYS AND STREETS—Continued

Board of Adjustment (Board) determining that defendant town had a public right-of-way across petitioners' real property based on its erroneous determination that Home Place was a public street, and the case is remanded for further findings detailing whether Home Place became a public street by means of implied dedication. **Wright v. Town of Matthews, 1.**

Road closing—superior court hearing—no new evidence—Town council hearings were the proper place for petitioner to present and rebut evidence about the closing of a road, and the superior court did not err by refusing to allow petitioner to present evidence at the hearing on his petition to vacate an order closing the road. **Houston v. Town of Chapel Hill, 739.**

HOMICIDE

First-degree murder—evidence sufficient—There was sufficient evidence for a charge of first-degree murder where there was a history of violence and hostility between the parties, there was an incident on the night of the shooting, defendant twice said that he ought to shoot the victim, he told his girlfriend to stop the car and got a beer and a gun from the trunk, a beer can with defendant's DNA and sunglasses with his fingerprint were found near the victim, and defendant later said that he shot the victim because of an earlier incident in which the victim shot him. **State v. Hocutt, 341.**

First-degree murder—requested instruction—premeditation and deliberation—The trial court did not err in a first-degree murder case by failing to read the entire jury instruction listing all seven circumstances whereby proof of defendant's premeditation or deliberation could be inferred regarding the unlawful killing of the victim, because six of the seven circumstances listed as being indicative of premeditation and deliberation were given to the jury, and defense counsel admitted both the facts and the evidence did not warrant inclusion of the requested circumstance on infliction of lethal wounds after the victim was felled. **State v. McCollum, 681.**

Instruction—voluntary manslaughter—The trial court did not commit plain error by instructing the jury on voluntary manslaughter in addition to first-degree murder, second-degree murder, self-defense, and defense of others, because: (1) defendant's own evidence tends to show the elements of imperfect self-defense; and (2) substantial evidence was presented from which a rational trier of fact could find defendant employed excessive force in shooting the victim five times with three shots striking the victim in the back and buttocks while acting in self-defense. **State v. Herndon, 353.**

Self-defense—no duty to retreat—not included in instruction—The failure to instruct the jury that defendant had no duty to retreat when met with deadly force was plain error in a prosecution resulting in a second-degree murder conviction where there was evidence that defendant was not the initial aggressor. In the absence of the instruction, the jury may have believed that defendant acted with malice. **State v. Davis, 98.**

HUSBAND AND WIFE

Consent order to convey—insufficiency as deed of conveyance—A consent order in which a judgment debtor husband agreed to convey to his wife his half

MEDICAL MALPRACTICE—Continued

Novant Health, Inc. and Novant Health Triad Region, L.L.C., the owners of Forsyth Memorial Hospital, with respect to claims based on the acts of the hospital nursing staff, because: (1) these defendants did not employ the hospital nursing staff; and (2) plaintiffs did not offer evidence that the hospital loaned the employees to the owners or that the owners had in fact supervised and controlled the pertinent individuals. **Diggs v. Novant Health, Inc., 290.**

Anesthesiology services—apparent agency—The trial court erred in a medical malpractice case by entering summary judgment in favor of defendant Forsyth Memorial Hospital (FMH) but did not err by entering summary judgment in favor of defendants Novant Health Triad Region, L.L.C. (NHTR) and Novant Health, Inc. (NHI), the owners of FMH, with respect to the claims of negligence of the anesthesiology defendants based on apparent agency, because: (1) in regard to FMH, plaintiff submitted sufficient evidence of apparent authority when a jury could decide based on the consent form that plaintiff was, through the form, requesting anesthesia services from FMH and that, given the distinction made between plaintiff's personal physician and the unnamed anesthesiologist, plaintiff was accepting those services in the reasonable belief that the services would be provided by the hospital and its employees; and (2) in regard to NHTR and NHI, the record contains no evidence they, as opposed to the hospital, held themselves out as providing anesthesia services or that they contracted to supply the services. **Diggs v. Novant Health, Inc., 290.**

MOTOR VEHICLES

Driving while impaired—instruction—expiration date on vials used to collect blood samples—The trial court did not err in a driving while impaired case by failing to give the requested instruction on the expiration date of the vials used to collect the blood samples, because: (1) conflicting expert testimony was presented concerning whether the fact the tubes expired two months prior to their use affected the validity of the blood test; (2) the trial court instructed the jury from N.C.P.I. Crim. 104.94 on how they were to consider expert testimony; and (3) the trial court gave in substance the last two sentences of defendant's request, but declined the first two sentences since they were not accurate statements of the law when it was merely a reiteration of a defense expert's testimony. **State v. Turner, 423.**

Driving while impaired—public vehicular area—no private road signs—A road was open to vehicular traffic within the meaning of N.C.G.S. § 20-4.01(32)(c) and was a public vehicular area where defendant and an officer testified that they drove the road and that there were no gates or signs indicating that it was private. The trial court did not err by denying defendant's motion to dismiss a charge of driving while impaired. **State v. Cornett, 452.**

Driving while impaired—public vehicular area—road within subdivision—A road on which a DWI defendant was stopped was within or leading to a subdivision (and so was a public vehicular area) where there were six homes on the street, with five or six different owners, each with a driveway leading off the road. **State v. Cornett, 452.**

NEGLIGENCE

Sewage back-up—duty of reasonable care admitted—summary judgment motion—There was evidence sufficient to establish a triable issue of fact in a

SENTENCING—Continued

SEXUAL OFFENSES

STATUTES OF LIMITATION AND REPOSE

STATUTES OF LIMITATION AND REPOSE—Continued

not a case of a continuing injury. The statute of limitations did not begin to run until the date of this injury. **Harrison v. City of Sanford, 116.**

TERMINATION OF PARENTAL RIGHTS

Failure to appoint guardian ad litem—mental health issues of parent—The trial court did not err by terminating respondent mother's parental rights without appointing a guardian ad litem (GAL) under N.C.G.S. § 7B-1101 or N.C.G.S. § 1A-1, Rule 17 even though respondent contends her mental health problems were substantially intertwined with DSS's allegations of grounds to terminate her parental rights, because: (1) respondent did not request a GAL be appointed, and a psychologist who testified did not recommend the trial court appoint a GAL for respondent; and (2) the termination of respondent's parental rights was not based on mental health issues, but instead on neglect, willfully leaving the children in foster care for more than twelve months without showing reasonable progress, willfully failing to provide financial support to the children, and abandonment of the children for at least six months immediately preceding the filing of the petition. **In re D.H., C.H., B.M., C.H. III, 700.**

Guardian ad litem for parent—necessary allegations not present—no circumstances indicating incompetency—The trial court did not err by not appointing a guardian ad litem for the parent in a termination of parental rights proceeding where the petition referred to drug abuse and mental illness but did not contain allegations of inability to provide care for her children (which would have invoked a then-existing statutory requirement) and there were no allegations of circumstances raising a general question about respondent's competency. **In re S.N.H. & L.J.H., 82.**

Guardian ad litem for parent—no allegation of dependency—not required at adjudicatory hearing—Appointment of a guardian ad litem was not required by N.C.G.S. § 7B-1101 (amendment not yet applicable) for a mother facing termination of her parental rights where the motion to terminate did not allege that the children were dependent. The argument that a guardian ad litem was required for the adjudication proceeding has been rejected. **In re J.S.L., 151.**

Lack of jurisdiction—children not in custody of DSS—children not residing in or found in North Carolina—The trial court lacked jurisdiction in a termination of parental rights case, and the trial court's order is vacated, because: (1) the children were not in custody of the Department of Social Services at the time the petition to terminate respondent mother's parental rights was filed; and (2) the children were not residing in or found in North Carolina at that time as required by N.C.G.S. § 7B-1101. **In re D.D.J., D.M.J., 441.**

Minor mother in foster care—responsible for caring for child—DSS was not responsible for a seventeen-year-old mother's lack of compliance with her case plans, even though she was a minor and in foster care. Minor parents may be held responsible for caring for their children, and the failure to do so may result in the termination of their parental rights. **In re J.G.B., 375.**

Neglect—mother herself in foster care—The trial court erred in concluding that a mother neglected her child. Respondent lost custody before the termination of parental rights hearing, and evidence of failures after she lost custody

TERMINATION OF PARENTAL RIGHTS—Continued

WITNESSES—Continued

defendant Forsyth Memorial Hospital, Inc. (FMH), and the case is remanded for further proceedings with respect to the claims based on the acts of the hospital nursing staff, because: (1) plaintiff forecast sufficient evidence that her nurse witness was qualified to testify as an expert under N.C.G.S. § 8C-1, Rule 702(b)(2), and the difference between the witness's work experiences and the work experience of the hospital nursing staff goes to the weight but not the admissibility of the witness's evidence; (2) plaintiff's expert was qualified to give an opinion about medical causation even though she was a nurse and not a licensed physician; and (3) FMH employed the nurses. **Diggs v. Novant Health, Inc., 290.**

WORKERS' COMPENSATION

Disability—capacity to return to work—evidence sufficient—The record in a workers' compensation proceeding contains evidence supporting the Commission's determination that the plaintiff was capable of returning to work and that she had failed to carry her burden of showing that she remained disabled. **Perkins v. U.S. Airways, 205.**

Ex parte contact—failure to object—waiver—The failure to object in a workers' compensation case to an alleged ex parte contact between a doctor and the defendants resulted in the issue not being preserved for appeal. **Perkins v. U.S. Airways, 205.**

Findings—not required on every point—reasonable inferences of Commission not revisited—Although a workers' compensation plaintiff argued that the record supported additional findings, the Industrial Commission is not required to make findings on a particular point merely because plaintiff has presented evidence on that subject, so long as the findings are sufficient to address the issues and the evidence before it. Also, the Court of Appeals may not revisit the Commission's reasonable inferences. **Perkins v. U.S. Airways, 205.**

Lightning strike—denial of compensation—contrary testimony from one of several doctors—The testimony of one of the doctors in a workers' compensation case did not justify overturning the Industrial Commission's findings and conclusions denying compensation to a flight attendant who suffered a lightning strike injury. The testimony of other doctors supported the findings and conclusions. **Perkins v. U.S. Airways, 205.**

Partial disability—evidence presented—not addressed—The Industrial Commission erred in a workers' compensation case by failing to address whether plaintiff was entitled to partial disability benefits where there was medical testimony of a 10% partial disability rating. The case was remanded. **Perkins v. U.S. Airways, 205.**

Weight and credibility of medical testimony—sole purview of Commission—Arguments from a workers' compensation plaintiff about the weight and credibility of medical testimony did not justify overturning the Industrial Commission's denial of benefits. The Commission is entitled to give greater weight to the testimony of some doctors over others, and, as questions of weight and credibility are solely within the purview of the Commission to decide, the appellate court may not revisit those determinations. **Perkins v. U.S. Airways, 205.**

WRONGFUL INTERFERENCE

WORD AND PHRASE INDEX