

NORTH CAROLINA
COURT OF APPEALS
REPORTS

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1. Deceased 11 May 2003.
2. Deceased 7 November 2006.
3. Deceased 29 November 2000.
4. Deceased 29 January 2006.
5. Deceased 29 October 2002.

Administrative Counsel
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-
1. Retired 31 December 2007.
 2. Appointed and sworn in 2 January 2008.
 3. Appointed and sworn in 25 February 2008.
 4. Appointed and sworn in 2 March 2008.

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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

RONALD G. HAMMONDS, REV. H.E. EDWARDS, CLIFTON SAMPSON, JR., JOHN KERSHAW, MERNELLE BAXTER DELIA QUAISON, JOHN GINGRAS, PETER COOPER AND JEANETTE LOCKLEAR, INDIVIDUALLY AND DERIVATIVELY AS MEMBERS OF LREMC, PLAINTIFFS v. LUMBEE RIVER ELECTRIC MEMBERSHIP CORPORATION, ROGER OXENDINE, AMBROSE LOCKLEAR, JR., RUTH OXENDINE, MADIE RAE LOCKLEAR, ROBERT LOCKLEAR, ROBERT STRICKLAND, BROUGHTON OXENDINE, PROCTOR LOCKLEAR, JR., JAMES HARDIN, HERBERT CLARK, MAGGIE HUNT, LACY CUMMINGS, IN THEIR OFFICIAL CAPACITY AS DIRECTORS OF LREMC, RONNIE HUNT, IN HIS OFFICIAL CAPACITY AS PRESIDENT AND CHIEF EXECUTIVE OFFICER OF LREMC, DEFENDANTS

No. COA05-733

(Filed 20 June 2006)

1. Civil Procedure— nonjury trial—motion to dismiss—Rule 41(b)

It is well settled that in actions tried without a jury a motion to dismiss is under N.C.G.S. § 1A-1, Rule 41(b), not Rule 50(a), and the “directed verdict” in this case was reviewed on appeal as a dismissal. The distinction is significant because the judge under N.C.G.S. § 1A-1, Rule 41(b) does not consider the evidence in the light most favorable to plaintiffs, but considers and weighs all the competent evidence, including the credibility of testimony and reasonable inferences, and may find the facts against the plaintiffs even though they have made a prima facie case.

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2. Appeal and Error— absence of record references—assignments of error and brief—no prejudice—importance of issue

Plaintiffs' appeal was not dismissed in a case alleging racial discrimination, despite their failure to provide adequate transcript or record references in their assignments of error and brief in violation of the Rules of Appellate Procedure, where the assignments of error were specific enough that defendants were not substantially prejudiced. Maintaining the integrity of the law outweighs the importance of dismissal where rules violations have little to no impact. N.C. R. App. P. 10, 28.

3. Utilities— electric co-op—board members—community diversity

Plaintiffs did not present evidence of a violation of any diversity rule in Chapter 117 of the General Statutes regarding electric co-op boards where plaintiffs contended that the election of board members did not reflect the diversity of the communities served by the co-op. There are no provisions in the General Statutes requiring electric membership corporations to reflect community diversity.

4. Civil Rights— racial discrimination—electric co-op board—evidence not sufficient

Plaintiffs did not make an evidentiary showing of intentional racial discrimination in the election of electric co-op board members sufficient to survive a motion to dismiss.

5. Utilities— business judgment rule—electric co-op board

The Delaware common law standard of enhanced judicial scrutiny was not adopted in a case involving the election of electric co-op board members. The trial court did not err by applying the business judgment rule, and its determination that plaintiffs had not demonstrated bad faith was overwhelmingly supported by the evidence.

6. Utilities— electric co-op—bylaws—election of board members—racial discrimination not proven

The evidence fully supported the opinion of a trial judge, sitting without a jury, that plaintiffs had failed to prove racial discrimination in the election of the board members for an electric co-op, even assuming that a statement printed in the bylaws constituted an actual bylaw.

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7. Utilities— electric co-op—board election—preliminary injunction not violated

The board of an electric membership co-op did not violate the terms of a preliminary injunction against further board elections by creating and filling two new boards seats. Reading applicable statutes in para materia, it is plain that the board had the authority to fill vacant director positions, including those created by increasing the number of directors.

Appeal by Plaintiffs from orders entered 15 March 2004 by Judge G. K. Butterfield, Jr. and 27 September 2004 by Judge Robert F. Floyd, Jr. in Robeson County Superior Court. Heard in the Court of Appeals 20 February 2006.

Barry Nakell for Plaintiffs-Appellants.

Smith and Christensen, LLP, by W. Britton Smith, Jr. and Aaron M. Christensen for Defendants-Appellees.

STEPHENS, Judge.

This case was commenced by the filing of a summons and complaint on 25 September 2002. It arises out of Plaintiffs' allegations that the methods of electing members of the Board of Directors of the Lumbee River Electric Membership Corporation ("LREMC"), a private North Carolina nonprofit rural electric cooperative distributing retail electricity in sections of four North Carolina counties, are racially discriminatory. In particular, Plaintiffs alleged that the Board of Directors and officers of LREMC refused to reform a voting system which produced a lack of diversity on the Board by (1) requiring that all LREMC members who vote in elections for Board members vote for each of the four seats up for election in order to cast a valid ballot (the "Rule of Four"), (2) permitting candidates to campaign together on a "slate" which enabled the incumbent Board members, all Native American, to entrench themselves in power, and (3) requiring voters to attend an annual meeting in order to vote in Board elections, and scheduling the meeting at a time and in a place that made it difficult for many of the working members of LREMC to attend. By answer filed 24 October 2002, Defendants denied all of Plaintiffs' allegations of discriminatory voting procedures.

On 6 February 2004, Plaintiffs filed an amendment and supplement to their complaint alleging numerous irregularities surrounding the 7 October 2003 election of LREMC Board members.

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Specifically, Plaintiffs challenged the deadline set by LREMC for candidates to file for the election, the manner in which notice of that deadline was given, the content of the application required by LREMC for candidates filing for the election, the advertisements published by LREMC regarding the election, and the notice to members about the annual meeting for the election. Plaintiffs further alleged multiple irregularities in the voting procedures at the annual meeting, including the numbering of ballot boxes, the failure of LREMC personnel to maintain security of the ballot boxes, an inadequate amount of general and handicapped parking spaces, the site of the meeting and election “in the center of the Native-American population,” inaccurate counting of ballot slips, and unauthorized and fraudulent resolution voting. On 3 March 2004, Defendants responded to the amendment and supplement and denied all allegations of irregularities in the 7 October 2003 election process and results.

In furtherance of their position, Plaintiffs filed a motion for a temporary restraining order and injunction seeking to overturn the 2003 election and requesting that a new election be ordered. By order filed 15 March 2004, the Honorable G.K. Butterfield, Jr. denied Plaintiffs’ motion to set aside the election, but enjoined Defendants from “scheduling or conducting any further elections . . . until a trial on the merits.”

The case was then tried non-jury before the Honorable Robert F. Floyd, Jr. from 28 to 30 July 2004. At the conclusion of Plaintiffs’ evidence, Defendants moved for dismissal of all claims based on (1) the business judgment rule, (2) the absence of evidence to support Plaintiffs’ position, and (3) conflict with federal law. On 27 September 2004, Judge Floyd entered an Order in which he made detailed findings of fact and concluded that Plaintiffs’ claims were not supported by facts or applicable law. He thus granted Defendants’ motion for a directed verdict and ordered that all of Plaintiffs’ claims were “dismissed in their entirety.” From Judge Butterfield’s and Judge Floyd’s orders, Plaintiffs appeal.

[1] Plaintiffs bring forth five arguments on appeal. Each asserts that Plaintiffs presented sufficient evidence “to survive a motion for directed verdict.” These arguments require this Court to review the evidence presented below under the applicable standard of review. At the outset, we note that Defendants inaccurately characterized their motion to dismiss as a motion for a directed verdict, and the trial judge erroneously stated in his order dismissing Plaintiffs’ claims that

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he was granting the motion for a directed verdict. It is well settled that in actions tried before the judge without a jury, a motion to dismiss is made under N.C. Gen. Stat. § 1A-1, Rule 41(b), not Rule 50(a). *Crumpp v. Coffey*, 59 N.C. App. 553, 297 S.E.2d 131 (1982). The distinction is significant since, under Rule 41(b), the trial judge does not consider the evidence in the light most favorable to the plaintiff, as he would when considering a Rule 50(a) motion for a directed verdict in a trial before a jury. *Dealers Specialties, Inc. v. Neighborhood Hous. Services, Inc.*, 305 N.C. 633, 291 S.E.2d 137 (1982). Instead, under Rule 41(b), the trial judge “must consider and weigh all the competent evidence before him, passing upon the credibility of the witnesses, the weight to be given their testimony, and the reasonable inferences to be drawn therefrom.” *Inland Bridge Co. v. North Carolina State Highway Comm’n*, 30 N.C. App. 535, 544, 227 S.E.2d 648, 653-54 (1976) (citations omitted). Under Rule 41(b), the judge, as the trier of the facts, may “find the facts against plaintiff and sustain defendant’s motion . . . even though plaintiff has made out a prima facie case which would have precluded a directed verdict for defendant in a jury trial.” *United Leasing Corp. v. Miller*, 60 N.C. App. 40, 45, 298 S.E.2d 409, 413 (1982) (citation omitted), *disc. review denied*, 308 N.C. 194, 302 S.E.2d 248 (1983). When the trial court grants a motion to dismiss under this rule, the judge must make detailed findings of fact and separate conclusions of law in accordance with N.C. Gen. Stat. § 1A-1, Rule 52(a). The trial court’s findings of fact are conclusive on appeal if they are supported by competent evidence, even if there is evidence to the contrary. *Lumbee River Elec. Membership Corp. v. City of Fayetteville*, 309 N.C. 726, 309 S.E.2d 209 (1983).

We thus review Judge Floyd’s dismissal of Plaintiffs’ claims to determine whether his findings of fact are supported by any competent evidence.¹

The Lumbee River Electric Membership Corporation is organized and operates under N.C. Gen. Stat. § 117-6, *et seq.*, the “Electric Membership Corporation Act” originally enacted in 1935 to implement the act of Congress creating the Rural Electrification Administration. The statutory purpose of the LREMC is to promote and encourage “the fullest possible use of electric energy in the rural section of the State by making electric energy available . . . at the

1. We reject Plaintiffs’ argument that our standard of review is to determine whether there is more than a scintilla of evidence to support all the elements of a prima facie case in Plaintiffs’ favor, as that is the standard of review applied to rulings under Rule 50(a).

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lowest cost[.]” N.C. Gen. Stat. § 117-10 (2005). Electric membership corporations may serve only persons who “shall use energy supplied by such corporation and [who] shall have complied with the terms and conditions [of] membership contained in the bylaws of such corporation[.]” N.C. Gen. Stat. § 117-16 (2005). LREMC serves members residing in parts of Cumberland, Hoke, Robeson, and Scotland counties. Its members include Caucasians, African-Americans, and Native Americans as well as a relatively small percentage of Hispanics. LREMC has estimated the racial composition of its Robeson County members as 48 percent Native American, 29 percent Caucasian and 20 percent African-American. No evidence was presented to establish the racial composition of the membership in LREMC’s three other county service areas, nor was there any evidence that any racial group constitutes a majority of the corporation’s total membership.

By statute, each rural electric membership corporation is required to have a board of directors, elected as set out in N.C. Gen. Stat. § 117-13. In pertinent part, this provision provides that the members of the corporation’s board of directors “shall be elected annually by the members entitled to vote . . . [and] must be members of the corporation[.]” N.C. Gen. Stat. § 117-13 (2005). Election of directors on a staggered-term basis is permitted if the corporation’s bylaws so provide. *Id.* All directors must be elected for terms of equal duration, and no term may be longer than three years. *Id.* The statute grants the board of directors broad powers “to do all things necessary or convenient in conducting the business of a corporation, including . . . [t]o make its own rules and regulations as to its procedure.” N.C. Gen. Stat. § 117-14 (2005). In addition, the board is given power to

adopt and amend bylaws for the management and regulation of the affairs of the corporation[.] The bylaws . . . may make provisions not inconsistent with law . . . regulating . . . the number, times and manner of choosing, qualifications, terms of office, official designations, powers, duties, and compensations of its officers . . . [and] the date of the annual meeting and the giving of notice thereof[.]

Id.

In 1999, the General Assembly enacted a number of amendments to various provisions of Chapter 117, none of which is at issue here. The 1999 Session Laws regarding those amendments, however, in section 8, provide as follows:

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It is the intent of the General Assembly that both the election of board members and the hiring of employees of electric membership corporations *should reflect* the diversity of the communities those corporations serve. To those ends, the General Assembly directs that each electric membership corporation of North Carolina *shall report* minority representation on its board and in its workforce to the North Carolina Association of Electric Cooperatives so that the Association can report on minority representation to the Joint Legislative Commission on Governmental Operations.

1999 N.C. Sess. Laws ch. 180, § 8 (emphasis added).²

In support of their allegations that the LREMC violated (1) a legislative mandate contained in the foregoing session laws, (2) its own bylaws, and (3) Title VI of the Civil Rights Act of 1964 against racial discrimination in the election of members of the Board of Directors, Plaintiffs offered evidence tending to establish the following:

Before 1966, LREMC's Board of Directors was made up exclusively of white members. In 1967, the first Native American Director was elected to the Board. From 1967 through 1971, the Cooperative had a bi-racial Board of Directors. The Board was tri-racial from 1972 through 1982 and bi-racial from 1983 through 1993. From 1994 to 20 April 2004, the Board was composed entirely of Native Americans. As of 20 April 2004, following bylaw changes which included the creation of two additional director positions and the appointment by the Board of one white and one African-American to fill those positions, the LREMC Board became tri-racial again.

Before 20 April 2004, the Board consisted of twelve Directors, with nine of them residing in particular geographic districts and elected by the total membership to represent the district in which each lived, and three of them elected at-large. All served staggered three-year terms. From at least 1958, a "Rule of Four" required members to vote for one candidate in each contested Director race. Voting in fewer than all of the contested races was not acceptable. Thus, if members turned in ballots that did not comply with the "Rule of Four," the ballots were considered "spoiled" and were not counted.

Defendant Robert Locklear, called by Plaintiffs, testified that he had been a director of the Board for approximately six years and had

2. The interim report of the Association was due to the Legislature by 16 June 2001, and the final report was due two years later.

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been elected twice. He was familiar with the changes made in the bylaws in 2004 and said they abolished the procedure which required the voter to vote for four different candidates on one ballot (*i.e.*, the “Rule of Four”). The changes allowed a voter to vote for one to four candidates according to the voter’s choice, but he did not think the changes would prohibit candidates from running together on a slate. Robert Locklear had run on a slate of four candidates in each of his elections. He testified that being on a slate with other candidates who would get out and see the LREMC members would help get the entire slate elected. “[T]o get a seat on this board, on the LREMC board, you got to get out and work. If you don’t get out and work, you don’t get a seat on it.” He did not believe that running candidates on a slate made it difficult for people who were not already on the Board to get elected. “If you got out and worked, I think most anyone could get a seat on that board.”

Robert Locklear was also familiar with the bylaw change in 2004 that increased the number of Board directors. He testified that the additional seats were added to diversify the Board. He said LREMC staff and their attorneys recommended that the Board place a Caucasian and an African-American in the two new seats. Robert Locklear knew that the two new Board directors were from Raeford, North Carolina, and one was white while the other was black. He recalled that the new white Board member, Mr. Upchurch, was in business and had “high qualifications,” although he could not recall Mr. Upchurch’s specific qualifications. He also knew that the new black member was a businessman. Before this change, during Robert Locklear’s tenure, all Board directors were Native American.

In addition to the elimination of the “Rule of Four” and the addition of two new Board members, the Board reapportioned its district boundaries to try to achieve an equal number of consumers in each district. Robert Locklear did not know the racial breakdown of the members in his district. He did not know the breakdown at the time he was originally elected or when the bylaw changes were made in 2004.

Defendant Ambrose Locklear was also called as a witness by Plaintiffs. He testified that he had been a director of the Board for almost ten years and had been elected three times. In his last two elections, he had run on a “slate” with three other candidates. In the earlier election, he ran with three other incumbent Board members.

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In his last election, he ran with two incumbents and a non-incumbent. Ambrose Locklear described the “slate” as consisting of a piece of paper, or campaign literature, on which the four candidates’ names were listed. The candidates on the slate do not necessarily receive the same number of votes. In his opinion, he had been re-elected because of “getting out and working with all races of people[,] [p]oliticking, asking people to ask consumers to vote for me[.]”

Ambrose Locklear testified further that the “Rule of Four” voting procedure had been changed at the recommendation of LREMC’s Credentials and Election Committee because of the high number of “spoiled ballots,” or ballots where voters voted for fewer than four candidates. He clarified that the Board changed in 2004 from nine districts to five districts upon the recommendation of LREMC staff to equalize the population of the districts. He stated that the two new director seats were added because of consumer growth in the Cumberland County portion of the service area, and to “[d]iversify the board [racially].” Ambrose Locklear knew that one new Board member, Mr. Hollingsworth, was black, and the other new member, Mr. Upchurch, was white. Before the Board appointed Mr. Hollingsworth and Mr. Upchurch, the LREMC staff provided Board members with background information regarding their education and occupation, as well as their qualifications to serve on the Board. Based on the staff recommendations and the qualifications of Mr. Hollingsworth and Mr. Upchurch, Ambrose Locklear voted to appoint them to the new Board seats because he felt “that they would make good board members.” Before the appointment of Mr. Hollingsworth and Mr. Upchurch, Ambrose Locklear had never voted for or supported a Caucasian or African-American candidate, but he had advised whites and blacks to run.

Ambrose Locklear did not know the racial breakdown of the LREMC members in the district which he served as a Board member.

Plaintiffs next called Defendant Herbert Clark as a witness. Mr. Clark testified that he had been a director on the LREMC Board for sixteen years. Mr. Clark explained that when Board members ran on a slate, they supported each other and asked for the consumers to support all candidates on the slate. He stated that the Board grew from twelve members to fourteen members “because of the uneven areas up in the northern part of our district [that] was (sic) heavily populated with members.” Mr. Clark voted to appoint Mr. Upchurch and Mr. Hollingsworth as the new Board members, but he did not

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know their educational background or whether they had experience with electric membership corporations. Mr. Clark believed that the bylaw changes made by the Board were in the best interests of the LREMC consumers, although he was unable to articulate the reasons for his opinion. Mr. Clark was not questioned about the racial breakdown of the LREMC members in his district.

Defendant Broughton Oxendine, called by Plaintiffs, testified that he has been a Board member for three years and served on the annual meeting committee. Mr. Oxendine said that running on a slate was helpful to a campaign because he would have more people working for him. He stated that he did not support electing candidates by district because it would make the process too political. He did support the 2004 bylaw changes, testifying that he voted to extend the hours for members to vote at the annual meeting and to eliminate the “Rule of Four” as recommended by the Credentials and Election Committee. He also supported the redistricting changes because of rapid growth in parts of the LREMC service area which had resulted in disparity in the number of customers represented by Board members. With respect to the appointment of the two new Board members, Mr. Oxendine testified that the Board needed Mr. Upchurch and Mr. Hollingsworth for diversity. He considered Mr. Upchurch to be a “pretty sharp businessman” and was aware that Mr. Hollingsworth managed a radio station. Mr. Oxendine was not questioned about the racial composition of the district he represents.

Angus Thompson, II, employed as the Robeson County Public Defender, testified regarding his familiarity with voting rights litigation and expressed his opinion that the use of slates and multi-member districts can adversely affect a minority group’s ability to participate in the electoral process. He testified further that, in his opinion, the reduction in the number of LREMC districts from nine to five could operate to “submerge” minority groups and thereby create safer districts for Native Americans. Mr. Thompson acknowledged that he was unaware of the racial breakdown of the LREMC membership and conceded that his testimony about submerging minority groups was based on his familiarity with the racial composition of the population as a whole and not on the composition of LREMC consumers. As for the LREMC membership, Mr. Thompson had no information or knowledge regarding the percentage of black, white, Hispanic and Native American members. Although he expressed an opinion that the voting methods employed by LREMC would present obstacles to the election of black members to the Board of Directors,

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he was not aware of any black member who had filed a petition to run for the Board. Mr. Thompson also testified that in a number of North Carolina counties, including Robeson County, “there is some racial block voting, there is racially polarized voting[.]”

Frank Boyette, a Caucasian, testified that he had been a member of the Credentials and Election Committee for approximately twenty years and had chaired the Committee for fifteen years, including during the 2003 election. He thus presided at a hearing conducted by the Committee to consider a protest of the 2003 election brought by Ronald Hammonds, who is also a plaintiff in this lawsuit. After the hearing, the Committee recommended that all ten challenges to the election procedures and results be denied, and that Mr. Hammonds’ request to set aside the election likewise be denied. The Committee also recommended that the LREMC Board consider elimination of the “Rule of Four” because “[w]e ordinarily have between 60 and 80 spoiled ballots every year, and it appears that most of those spoiled ballots are the result of not understanding exactly how the process works.” Additionally, even though 2003 was the first year in Mr. Boyette’s experience that a complaint was made regarding the amount of voting time, the Committee recommended that the Board consider extending the time in subsequent elections.

Ronnie Hunt, CEO of LREMC, testified that the corporation’s annual meeting had been held at Pembroke State University (now The University of North Carolina at Pembroke) since 1978. Before 1978, the meeting was held at the armory in Red Springs with the exception of 1977 when it was held at the Charlie Rose Agricultural Center in Cumberland County. Six Greyhound buses transported Native Americans from other parts of LREMC’s service areas to participate in the 1977 meeting and election. Half of the incumbent Board members lost their bids for re-election that year.

The only Plaintiff called to testify was Ronald Hammonds, a Native American. Mr. Hammonds had previously served on the LREMC Board of Directors from 1982 to 1994. Before the 1994 election, Mr. Hammonds had spoken out about the lack of diversity on the Board. He believed that this caused other directors to exclude him from running on a slate with them. In 1994, Mr. Hammonds lost his bid for re-election. Mr. Hammonds has run for election to the Board on at least three occasions since 1994, testifying that “I’ve ran for that board, I’ve ran every way possible, with a slate, without a slate, any way that’s possible, I have ran for it.” He has not been successful in

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his efforts. In his opinion, the “Rule of Four” and slate campaigns contributed to his defeat every time.

Mr. Hammonds testified further that he believed the “Rule of Four” procedure was not eliminated earlier because of a mistaken belief by Board members that they were prohibited from making such a change under the terms of a prior lawsuit. He agreed that the Board members did give consideration to the question of which bylaw rules are best for Board elections, stating, “I’m sure in their own mind, in their own conscience, they . . . gave it the very best.”

Mr. Hammonds protested several elections and was concerned about the security of ballot boxes. He further testified that, in his opinion, slate voting, coupled with intimidation, changing filing deadlines, refusing to allow candidates to track ballot boxes, and refusing candidates the right to inspect ballot boxes contributed to election obstacles. “[A]ll we are asking for is just a reasonable opportunity to be elected.” In the 2003 election, he lost to the incumbent Board member, Ambrose Locklear, by 121 votes.

With this evidentiary backdrop and in light of the standard of appellate review for Rule 41(b) dismissals, we examine the arguments brought forward by Plaintiffs. First, however, we address Defendants’ argument that Plaintiffs’ appeal should be dismissed for violations of the Rules of Appellate Procedure.

[2] Defendants contend that this Court should dismiss this appeal due to Plaintiffs’ failure to comply with Rules 10 and 28 of the North Carolina Rules of Appellate Procedure. Specifically, Defendants raise two procedural flaws in Plaintiffs’ brief: (1) failure to provide record or transcript references in their assignments of error, in violation of the requirements of Rule 10, and (2) failure to provide record or transcript citations in the Argument section of their brief, in violation of Rule 28. Although Defendants advance sound legal arguments to support their position and Plaintiffs’ brief does not conform completely to the mandates of the Rules, thereby subjecting their appeal to dismissal, for the reasons stated below we nevertheless elect to reach the merits of this appeal.

Rule 10(c)(1) provides in relevant part that “[a]n assignment of error is sufficient if it directs the attention of the appellate court to the particular error about which the question is made, with clear and specific record or transcript references.” N.C. R. App. P. 10(c)(1). Rule 28(b)(6) provides in relevant part that “[e]vidence or other pro-

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ceedings material to the question presented may be narrated or quoted in the body of the argument, with appropriate reference to the record on appeal or the transcript of proceedings, or the exhibits.” N.C. R. App. P. 28(b)(6). “The North Carolina Rules of Appellate Procedure are mandatory and failure to follow these rules will subject an appeal to dismissal.” *Viar v. North Carolina Dep’t of Transp.*, 359 N.C. 400, 401, 610 S.E.2d 360, 360, *reh’g denied*, 359 N.C. 643, 617 S.E.2d 662 (2005) (internal quotations omitted).

In *Viar*, our Supreme Court admonished this Court for invoking Rule 2 and suspending the rules. Rule 2 allows either appellate court, upon application of a party or upon its own initiative, to suspend or vary the requirements of any of the rules “[t]o prevent manifest injustice to a party, or to expedite decision in the public interest[.]” N.C. R. App. P. 2. In nevertheless dismissing the appeal in *Viar*, the Supreme Court stated that “[i]t is not the role of the appellate courts, however, to create an appeal for an appellant.” *Viar*, 359 N.C. at 402, 610 S.E.2d at 361. The *Viar* Court continued to warn that without the consistent application of the rules, they would “become meaningless, and an appellee is left without notice of the basis upon which an appellate court might rule.” *Id.* The Court dismissed the appeal for the appellant’s failure to number the assignments of error, failure to make specific record references within each assignment of error, and failure to “state plainly, concisely and without argumentation the legal basis upon which error [was] assigned.” *Id.* at 401, 610 S.E.2d at 361.

Since *Viar*, this Court has dismissed appeals based on procedural flaws and, by distinguishing *Viar*, continued to rule on the merits of cases despite procedural errors. For example, in *North Carolina Dep’t of Crime Control & Pub. Safety v. Greene*, 172 N.C. App. 530, 616 S.E.2d 594 (2005), this Court did not address assignments of error that were deemed too broadsided. The Court was especially troubled by assignments of error that were not followed by record or transcript citations, nor an indication regarding which findings the appellant challenged. *Id.* In *Broderick v. Broderick*, 175 N.C. App. 501, 503, 623 S.E.2d 806, 807 (2006), this Court dismissed an appeal where appellant’s “assignment of error places no limit on the legal issues that could be addressed on appeal and the appellee fails to receive adequate notice of the basis upon which the appeal might be resolved.” See also *Consol. Elec. Distributors v. Dorsey*, 170 N.C. App. 684, 613 S.E.2d 518 (2005) (appeal dismissed for failure to separate each question presented in the argument section of the appel-

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lant's brief, failure to reference each assignment of error with numbers and pages to the record on appeal, failure to support arguments with legal authority, failure to provide a full and complete statement of the facts, and failure to number each assignment of error separately in the record on appeal).

Conversely, in *Welch Contr'g, Inc. v. North Carolina Dep't of Transp.*, 175 N.C. App. 45, 49-50, 622 S.E.2d 691, 694 (2005), despite appellant's violation of Rules 10 and 28 (the assignment of error in the record on appeal did not correspond to the question presented in the brief), this Court reached the merits of the case because appellee "had sufficient notice of the basis upon which our Court might rule." Additionally, in *Davis v. Columbus County Sch.*, 175 N.C. App. 95, 98, 622 S.E.2d 671, 674 (2005), this Court determined that, despite appellant's failure to direct the Court's attention to which findings of fact or conclusions of law were being contested in the assignments of error, dismissal was unwarranted because appellant included "assignments of error with record references in their brief." Finally, in *Youse v. Duke Energy Corp.*, 171 N.C. App. 187, 192, 614 S.E.2d 396, 400 (2005), despite eight alleged rule violations, this Court ruled on the merits because the Court was still "able to determine the issues in this case on appeal." The Court also determined that "in filing a brief that thoroughly responds to [appellant's] arguments on appeal," appellee was clearly on notice of the pertinent issues upon which the Court could rule. *Id.*

In the case at bar, Defendants contend that Plaintiffs' assignments of error fail to provide clear record or transcript citations. In the record on appeal, Plaintiffs raise twenty errors assigned to the trial court. However, Plaintiffs do not provide any record or transcript references. This is a violation of Rule 10 and grounds for dismissal under *Viar, Greene and Dorsey*.

Plaintiffs do provide broad record and transcript citations for each assignment of error in the Argument section of their brief. Under *Davis*, this may be adequate to allow the Court to reach the merits. However, each argument cites to the same record and transcript references. Specifically, Plaintiffs direct the Court to certain pages of the record on appeal where the trial court's order granting a directed verdict (dismissal) appears. The order contains fourteen findings of fact and ten conclusions of law. Plaintiffs make no effort to narrow the Court's attention to particular findings or conclusions to which error is assigned.

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Similarly, the portion of the transcript cited by Plaintiffs is of the trial judge explaining the rationale for his ruling and directing the Defendants to draw a proposed order. Once again, Plaintiffs fail to direct the attention of the Court to a particular statement, finding or conclusion to which error is assigned. Since Plaintiffs' brief fails to comply with the requirements of Rule 10, the appeal is subject to dismissal.

Additionally, the Argument section of Plaintiffs' brief continues for eighteen pages, and although Plaintiffs allege evidence or narrate facts from the trial, the Argument section contains only three transcript or record references. Plaintiffs do provide ample citations in their "Statement of Facts." However, not providing record or transcript citations in their Argument section is a violation of Rule 28(b)(6). Accordingly, Plaintiffs' appeal is also subject to dismissal for violation of this Rule.

Since the decision of the Supreme Court in *Viar*, this Court has not treated violations of the Rules as grounds for automatic dismissal. Instead, the Court has weighed (1) the impact of the violations on the appellee, (2) the importance of upholding the integrity of the Rules, and (3) the public policy reasons for reaching the merits in a particular case. We will conduct the same analysis here.

Even though the Rule violations in this case are troublesome, we do not believe that Defendants were substantially prejudiced. Plaintiffs' assignments of error are specific enough to put Defendants on notice of the contested issues and upon what basis this Court might rule. Moreover, like appellee in *Youse*, Defendants' brief establishes that they received sufficient notice of the issues being brought to this Court for determination.

Further, while the integrity of the Rules is important and must be upheld, lest the Rules become meaningless, we believe that maintaining the integrity of our laws through proper interpretation and application outweighs the importance of dismissal in a case in which Rule violations had little to no impact.

Finally, at the heart of this case are issues of potential racial discrimination. This Court would not serve the citizens of this State well if it elected to pass on issues with far-reaching implications. We believe that it is more important to "expedite decision in the public interest" than it is to dismiss a case due to a technical violation of the rules. Accordingly, we reach the merits.

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By his Order filed 27 September 2004 on Defendants' motion to dismiss, Judge Floyd made the following pertinent findings of fact:

3. The members of LREMC elect their Cooperative's Directors in a political process established by the Cooperative's bylaws. See N.C. Gen. Stat. §§ 117-13; 117-15.

....

6. The predominant racial groups within the Cooperative's membership base are Native American, African American and White. Hispanic members constitute a relatively small segment of the membership population. *It has neither been alleged nor shown that any racial group constitutes a majority, i.e., more than fifty percent (50%), of the total membership.*

7. The Cooperative's Board of Directors had been all White prior to 1966.

8. The first Native American Director was elected to the Board in 1967.

9. The Cooperative had a bi-racial Board of Directors from 1967 through 1971, a tri-racial Board from 1972 through 1982, and a bi-racial Board from 1983 through 1993.

10. As of April 20, 2004, the Cooperative once again operates under the direction of a tri-racial Board of Directors.

....

12. Acting on the recommendations of the [Credentials and Election] Committee, the Board eliminated the "Rule of 4" and will expand the hours of voting.

13. Until the recent elimination of the contested "Rule of Four," the Bylaw rules governing LREMC elections had remained substantively unchanged since at least 1958.

14. As part of a comprehensive update to the LREMC bylaws, and in an effort to address a growing population imbalance among the Director districts, the Board voluntarily re-apportioned its districts and added two (2) new Director seats.

(Emphasis added). On these findings of fact, Judge Floyd entered the following pertinent conclusions of law:

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1. North Carolina General Statute § 117-14 grants broad discretionary powers and authorities to a rural electric Cooperative's Board of Directors.

2. Under N.C. Gen. Stat. § 117-17, each North Carolina Cooperative is "vested with all power necessary or requisite for the accomplishment of its corporate purpose and capable of being delegated by the legislature."

...

4. It is not the role of the Court to second-guess the business decisions of a private corporation. Instead, under the applicable business judgment rule, the Court presumes that the Cooperative's Directors conduct their affairs in good faith and in accordance with their fiduciary duties . . . unless there could be no rational basis for the Board's decisions.

...

6. Plaintiffs have failed to demonstrate bad faith by the Board of Directors concerning the establishment, maintenance or amendment of the Cooperative's voting rules. In this regard, Plaintiffs have failed to demonstrate that racial discrimination, relating to any rule of the Cooperative or any conduct by any of the Defendants in this action, is responsible for the transition of the racial composition of the Board of Directors since 1966.

7. Despite requests for the Court to order race-based changes to the Cooperative's election rules, Plaintiffs have failed to demonstrate (1) that Native Americans constitute a racial majority of eligible voting members, (2) that "district only" voting rules would, as a matter of law, serve the Cooperative's best interests, (3) that it would be possible or practical for the Court to draw a District where non-Native American racial groups within the Cooperative's membership would be sufficiently large in number and geographically compact to constitute a majority in such a District, or (4) that African American and White members of the Cooperative are politically active and/or cohesive with regard to matters involving their rural electric Cooperative.

Upon these findings and conclusions, Judge Floyd dissolved the 15 March 2004 Order of Judge Butterfield and dismissed Plaintiffs' claims in their entirety.

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[3] By their first argument, Plaintiffs contend they presented sufficient evidence that the election of LREMC Board members does not reflect the diversity of the communities served by LREMC in violation of 1999 N.C. Sess. Laws ch. 180, § 8. We disagree.

As noted above, in discussing various amendments to Chapter 117 enacted in 1999, the Editor's Note to §§ 117-6 and 117-13 describes section 8 of these session laws to establish "the intent of the General Assembly that both the election of board members and the hiring of employees of electric membership corporations *should reflect* the diversity of the communities those corporations serve." 1999 N.C. Sess. Laws ch. 180, § 8 (emphasis added). The only mandate contained in the session laws, however, is that electric membership corporations "*shall report*" minority representation on their boards and workforces to the North Carolina Association of Electric Cooperatives so that, in turn, the Association can make the required reports to the legislature. *Id.* (Emphasis added). We note that the General Assembly did not enact any provisions in the General Statutes requiring electric membership corporations to reflect community diversity. Further, the session laws describing the intent of the 1999 amendments do not state that the boards of electric membership corporations *shall* reflect community diversity, nor is there any language sufficient to infer any such requirement contained in the discussion. On the contrary, the only diversity requirement resulting from the 1999 amendments to Chapter 117 is a reporting requirement, and Plaintiffs have made no showing that Defendants failed to report minority representation to the North Carolina Association of Electric Cooperatives. We thus agree with Defendants that, in the absence of a mandate from the legislature, it would have been error for the trial court to create new law regarding the racial composition of the LREMC Board of Directors. Accordingly, we hold that Plaintiffs have failed to present sufficient evidence of a violation of any diversity rule contained in Chapter 117 of the North Carolina General Statutes.

[4] By their second argument, Plaintiffs contend their evidence was sufficient to establish that African-American and white LREMC members are intentionally excluded from the LREMC Board on the ground of race, in violation of the Civil Rights Act of 1964. Plaintiffs base this argument on their position that the methods and "strategies" for electing Board members were operated as a purposeful device to maintain and further racial discrimination. Again, we disagree.

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Section 601 of Title VI of the Civil Rights Act of 1964 provides:

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C. § 2000d (2004). It is undisputed that LREMC receives federal funds and is thus subject to Title VI.

Title VI only prohibits *intentional* discrimination. *Alexander v. Sandoval*, 532 U.S. 275, 149 L. Ed. 2d 517 (2001). Although “[d]isproportionate effect may . . . constitute evidence of intentional discrimination[,]” *Hernandez v. New York*, 500 U.S. 352, 375, 114 L. Ed. 2d 395, 416 (1991), we agree with the trial court that, on the evidence presented in this case, Plaintiffs failed to prove that “racial discrimination, relating to any rule of the Cooperative or any conduct by any of the Defendants . . ., is responsible for the transition of the racial composition of the Board of Directors since 1966.” We believe that the following evidence supports the trial court’s determination:

Until the amendments of the bylaws in 2004, the same voting procedures under which an all Native American Board was elected from 1994 through 7 October 2003 resulted in an all-white Board before 1966, a bi-racial Board from 1967 through 1971, a tri-racial Board from 1972 through 1982, and a bi-racial Board from 1983 through 1993.

Two witnesses testified that the biggest factor in gaining a position on the LREMC Board of Directors is hard work: “If you got out and worked, I think most anyone could get a seat on that board.” The only evidence Plaintiffs presented which even approached proof of a discriminatory disproportionate effect in the Board’s election methods was the testimony of Angus Thompson, II regarding slates, multi-member districts and submergence of minority groups. As already discussed, however, Mr. Thompson conceded that his testimony related to the racial composition of the population as a whole and not the composition of the LREMC membership. Indeed, Mr. Thompson acknowledged that he had no information or knowledge regarding the percentage of black, white, Hispanic and Native American members of LREMC. In addition, while an estimate of the racial composition of LREMC members in Robeson County appears in the evidence, no evidence was presented to establish the racial composition of LREMC members in its three other county service areas, and there is

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no evidence that any racial group constitutes a majority of the corporation's total membership.

No witness described any LREMC rule or action by Board members which would permit even an inference, much less prove, intentional discrimination in the election of the LREMC Board of Directors. Plaintiff Ronald Hammonds complained about election methods, but ultimately admitted that he had lost several election bids regardless of whether he followed established election procedures or ran outside the rules. As he put it, “[A]ny way that’s possible, I have ran for it.” Since Mr. Hammonds is not a member of either racial group that Plaintiffs have identified as victims of racial discrimination, it occurs to us that reasons other than the methods for electing LREMC Board members could explain Mr. Hammonds’ lack of success. In any event, Mr. Hammonds also testified that he believes the members of the LREMC Board have tried to do “the very best” in deciding the rules for Board elections. This testimony is undisputed.

Given the evidence which was presented, we agree with Judge Floyd that, at most, Plaintiffs made a “cursory showing” to sustain their position, but failed to make a “sufficient evidentiary presentation” of intentional racial discrimination to survive Defendants’ motion to dismiss. Accordingly, we overrule this argument.

[5] Plaintiffs next argue that they presented sufficient evidence of a breach of fiduciary duty by the LREMC Directors in the election of Board members, and that Judge Floyd erred in applying the business judgment rule to this issue. Plaintiffs urge this Court to substitute Delaware common law, as applied to that state’s for-profit corporations, for the business judgment rule historically applied in this state to the issue of director liability. For the reasons which follow, we decline to do so.

As described by *Robinson on North Carolina Corporation Law*, the business judgment rule

operates primarily as a rule of evidence or judicial review and creates, first, an initial evidentiary presumption that in making a decision the directors acted with due care (i.e., on an informed basis) and in good faith in the honest belief that their action was in the best interest of the corporation, and second, absent rebuttal of the initial presumption, a powerful substantive presumption that a decision by a loyal and informed board will not be

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overturned by a court unless it cannot be attributed to any rational business purpose.

Russell M. Robinson, II, *Robinson on North Carolina Corporation Law*, § 14.06, at 14-16-14-17 (2005). Further, this Court has held that the business judgment rule “protects corporate directors from being judicially second-guessed when they exercise reasonable care and business judgment.” *HAJMM Co. v. House of Raeford Farms*, 94 N.C. App. 1, 10, 379 S.E.2d 868, 873, *review on additional issues allowed*, 325 N.C. 271, 382 S.E.2d 439 (1989), *and modified, aff’d in part, rev’d in part on other grounds*, 328 N.C. 578, 403 S.E.2d 483 (1991). Noting the broad discretionary powers granted to a rural electric cooperative’s board of directors under N.C. Gen. Stat. §§ 117-14 and 117-17, including the power to regulate the election of Board members, and applying the foregoing principles of the business judgment rule to the issue of whether the LREMC Directors breached their fiduciary duties in the establishment, maintenance or amendment of election rules, Judge Floyd presumed “that the Cooperative’s Directors conduct[ed] their affairs in good faith and in accordance with their fiduciary duties.” He thus determined that the trial court had no authority to intervene in the private affairs of the LREMC Board “unless there could be no rational basis for the Board’s decisions.” Judge Floyd further determined that Plaintiffs “failed to demonstrate bad faith” on the part of the LREMC Board members.

We note, first, that Judge Floyd clearly understood the principles of the business judgment rule and correctly applied those principles to the issue before him. Second, his determination is overwhelmingly supported by the evidence presented by Plaintiffs. For example, as set out above, Plaintiff Ronald Hammonds testified that the Board members “in their own conscience and mind . . . done the best they could under the circumstances” in setting bylaw election rules. There is no evidence to the contrary. Additionally, Mr. Hammonds’ testimony establishes that, prior to 2004, the Directors failed to accept recommendations from the Credentials and Election Committee to abolish the “Rule of Four” because they mistakenly believed that they were prohibited from doing so under the terms of a prior lawsuit. Further, as soon as a complaint was made that the time for conducting the election was too short, the Board agreed to extend the time. Similarly, when the LREMC staff and attorneys recommended increasing the number of Directors to address customer growth, the Board immediately acted to do so and, upon the additional recommendation to appoint one white and one African-American to the new

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Board positions, the Directors did just that, after considering the qualifications of the proposed new members. In our view, given the evidence presented, Judge Floyd could have reached no other determination than that Plaintiffs failed to demonstrate bad faith on the part of the LREMC Board members and that the presumption accorded their actions under the business judgment rule prevented the Board from being “judicially second-guessed.” *Id.*

Finally, we agree with Defendants that N.C. Gen. Stat. § 117-14 (a rural electric cooperative board of directors “shall have power to do *all things necessary or convenient* in conducting the business of a corporation[.]”) and § 117-17 (“[e]ach corporation formed under this Article is hereby vested *with all power necessary or requisite for the accomplishment of its corporate purpose and capable of being delegated by the legislature[.]*”) (emphasis added) unequivocally establish the legislature’s intent that a “rule of deference,” *i.e.*, the business judgment rule, be applied to restrict judicial oversight of the actions of rural electric cooperative Board members unless there is no rational basis for the Board’s decisions. Absent evidence of a contrary legislative intent, such as statutory limitations on the powers of the Board, we reject Plaintiffs’ argument that the trial court applied the wrong standard in its evaluation of the LREMC Board’s election procedures, and we decline to adopt the Delaware common law standard of “enhanced judicial scrutiny” for evaluating the actions of Board members under Chapter 117. (*See, e.g., MM Companies, Inc. v. Liquid Audio, Inc.*, 813 A.2d 1118, 1131 (Del. Supr. 2003)).

[6] We next consider Plaintiffs’ fourth argument, that they presented sufficient evidence of racial discrimination in the election of LREMC Board members in violation of the nondiscrimination statement contained in the LREMC bylaws. Even if we accept Plaintiffs’ argument that the Title VI statement printed on the inside page of the front cover of the bylaws constitutes an actual bylaw term, which Defendants dispute, we are of the opinion that this argument has no merit for the reasons discussed above in response to Plaintiffs’ second argument. The mere fact that Plaintiffs characterize this argument as a breach of contract claim does not provide the evidentiary support necessary for a determination of intentional racial discrimination. On the contrary, as previously discussed, the evidence fully supports Judge Floyd’s determination that Plaintiffs failed to prove “that racial discrimination, relating to any rule of the Cooperative or any conduct by any of the Defendants in this action, is responsible for

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the transition of the racial composition of the Board of Directors since 1966.” This argument is overruled.

[7] By their fifth and final argument, Plaintiffs contend their evidence was sufficient to establish that Defendants violated the preliminary injunction entered by Judge Butterfield in his order of 15 March 2004 enjoining Defendants from “scheduling or conducting any further elections for the Board of Directors until a trial on the merits.” Specifically, Plaintiffs argue that Defendants should have been held in contempt for creating two new Board seats as part of the bylaw amendments adopted in April 2004 and then filling those seats with one white and one African-American member. In support of their position that these actions by the LREMC Board violated the preliminary injunction, Plaintiffs cite N.C. Gen. Stat. § 117-13 which provides, in pertinent part, that “[e]ach corporation formed under this Article shall have a board of directors [who] shall be elected annually by the members entitled to vote[.]” For the following reasons, we find no merit to this argument.

Included in the sweeping power granted to a rural electric cooperative board of directors under N.C. Gen. Stat. § 117-14 is “[t]he power to adopt and amend bylaws . . . [including] provisions . . . defining a vacancy in the board . . . and the manner of filling it[.]” so long as those provisions are “not inconsistent with law or [the cooperative’s] certificate of incorporation[.]” The Record on Appeal in this case contains a copy of the LREMC bylaws, as amended in July 2001, and the LREMC bylaws, as amended in April 2004. Plaintiffs do not challenge any terms of the July 2001 bylaws. Instead, Plaintiffs argue that the Board improperly added two new seats under the April 2004 amendments and then improperly filled those seats through an “election” by Board members rather than an election by the cooperative’s membership. We note, however, that even under the bylaws as they existed before April 2004, the LREMC Board had the authority to “fill any vacant Director position, *including any vacant Director position resulting from increasing the number of Directors[.]*” by the affirmative vote of a majority of the remaining Directors. LREMC Bylaws, As Amended July 2001, § 4.09 (emphasis added). Although the 2004 amendments changed the bylaw language, the Board’s authority to fill a vacant Director position, including a vacancy created by an increase in the number of Directors, “by the affirmative vote of a majority of the remaining Directors,” remained unchanged. LREMC Bylaws, As Amended April 2004, § 5.10. This authority is granted to the Board by N.C. Gen. Stat. § 117-14. The LREMC certifi-

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cate of incorporation is not included in the Record on Appeal, and Plaintiffs do not argue that the bylaw provisions which give the Board the authority to increase the number of Directors and fill vacancies thus created are inconsistent with the certificate of incorporation. Additionally, Plaintiffs cite no authority, other than N.C. Gen. Stat. § 117-13, that these bylaw provisions are inconsistent with law.

Plaintiffs' reliance on N.C. Gen. Stat. § 117-13 is misplaced. Clearly, the general terms of this provision of Chapter 117 are modified by the specific terms of N.C. Gen. Stat. § 117-14 with respect to the particular powers granted to the Board by the latter provision. Those powers include defining a vacancy in the board and the manner of filling it. Additionally, Chapter 55A of the General Statutes, the North Carolina Nonprofit Corporation Act, specifically allows the board of directors of a nonprofit corporation to fill "a vacancy resulting from an increase in the number of directors[.]" N.C. Gen. Stat. § 55A-8-11(a)(2) (2005). Moreover, Chapter 55A recognizes the distinction between an election by the membership and appointment by the board: "If the corporation has members entitled to vote for directors, all the directors . . . shall be elected at . . . each annual meeting . . . , *unless the . . . bylaws provide some other time or method of election, or provide that some of the directors are appointed by some other person . . .*" N.C. Gen. Stat. § 55A-8-04(a) (2005) (emphasis added). When these provisions of Chapter 55A are construed *in pari materia* with N.C. Gen. Stat. §§ 117-13 and 117-14, it is plain that the Board of Directors of LREMC (1) has the authority to appoint directors to fill vacant director positions, including vacancies created by increasing the number of directors on the Board, and (2) in appointing directors to fill the two new seats added in April 2004, the LREMC Board did not violate the terms of Judge Butterfield's 15 March 2004 injunction.

In this case, "[h]aving conducted a full hearing of Plaintiffs' claims and determining that the same are not supported by fact or applicable law," Judge Floyd dissolved the 15 March 2004 order. Implicit in this determination is Judge Floyd's denial of Plaintiffs' motion to hold Defendants in contempt. Our standard of review of Judge Floyd's order on this issue is "whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law." *Sharpe v. Nobles*, 127 N.C. App. 705, 709, 493 S.E.2d 288, 291 (1997) (citation omitted). For the reasons discussed above, we affirm the trial court's order denying Plaintiffs' contempt motion and dissolving the preliminary injunction.

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Finally, we are compelled to address the following: During oral argument, Plaintiffs asserted that to affirm Judge Floyd's order would be to endorse and condone racial discrimination. A charge of racial discrimination is not something that this Court takes lightly and not something that should be asserted absent thorough, competent evidence. By affirming Judge Floyd's order, in no way do we demonstrate that this Court endorses, condones, or tolerates racial discrimination in any form. Rather, we affirm the decision below because, under the applicable standard of review, Judge Floyd's findings of fact are supported by competent evidence presented for his consideration, and his findings of fact support his conclusions of law.

The evidence presented before the trial court and reviewed by this Court through lengthy transcripts and documentary exhibits in no way demonstrates racial discrimination. On the contrary, all Plaintiffs were able to provide were accusations, speculation, and conjecture. Had Plaintiffs been able to present adequate evidence, they may have received a more favorable result. Absent such evidence, this Court will not be persuaded by an idle, seemingly offhanded remark.

AFFIRMED.

Chief Judge MARTIN and Judge WYNN concur.

WALTER LEE RAMSEY, JR., EMPLOYEE, PLAINTIFF v. SOUTHERN INDUSTRIAL CONSTRUCTORS INCORPORATED, EMPLOYER, RELIANCE INSURANCE COMPANY, CARRIER, AND GALLAGHER BASSET SERVICES, INCORPORATED, THIRD-PARTY ADMINISTRATOR, DEFENDANTS

No. COA04-1639

(Filed 20 June 2006)

1. Workers' Compensation— traveling employee rule— employee attacked at motel

An electrician was a traveling employee for workers' compensation purposes when he was beaten and robbed at the Richmond, Virginia motel at which he was staying while on a job. The traveling employee rule should not be confused with the coming and going rule.

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2. Workers' Compensation— employee attacked at motel— injuries arising from employment

A workers' compensation plaintiff suffered injuries arising out of his employment where he was attacked in the motel at which he was staying while he worked out-of-town. The risk to which plaintiff was exposed was not something to which he would have been equally exposed apart from his employment-required travel.

3. Workers' Compensation— total disability—inability to work—not proven

The Industrial Commission did not err by concluding that a workers' compensation plaintiff had not met his burden of proving total disability where there was no presumption from a prior award or agreement, no medical evidence that plaintiff was unable to work at any employment, and the receipt of Social Security disability benefits is not alone sufficient to establish that it would be futile to seek alternative employment.

4. Workers' Compensation— disability ended—not based on maximum medical improvement

The Industrial Commission ended plaintiff's disability because he had not proven continuing total disability, not because he had reached maximum medical improvement.

Appeal by plaintiff and defendants from opinion and award filed 1 September 2004 by the North Carolina Industrial Commission. Heard in the Court of Appeals 17 August 2005.

Kellum Law Firm, by Douglas B. Johnson, for plaintiff.

Cranfill, Sumner & Hartzog, L.L.P., by W. Scott Fuller and Meredith T. Black, for defendants.

Lewis & Roberts, PLLC, by Richard M. Lewis, Winston L. Page, Jr. and Jeffrey A. Misenheimer, for North Carolina Associated Industries, amicus curiae.

GEER, Judge.

Both plaintiff and defendants have appealed from an opinion and award of the Industrial Commission granting plaintiff temporary total disability compensation under N.C. Gen. Stat. § 97-29 (2005) for the period from 18 July 2000 through 5 April 2001 and compensation for

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partial permanent disability under N.C. Gen. Stat. § 97-31 (2005). Plaintiff Walter Lee Ramsey, Jr. was assaulted while staying at a motel in Richmond, Virginia in order to work for defendant Southern Industrial Constructors, Incorporated (“Southern”) on a project in Petersburg, Virginia. The issue on appeal is whether the Industrial Commission erred in determining that this assault arose out of and in the course of plaintiff’s employment with Southern. We hold that it did not err. We further hold, with respect to plaintiff’s appeal, that the record contains competent evidence to support the Commission’s conclusion that plaintiff failed to meet his burden of proving continuing total disability. Accordingly, we affirm the Commission’s opinion and award.

Facts

At the time of the hearing in the Industrial Commission, plaintiff was 58 years old. He had graduated from high school and had taken some college courses at Campbell University. Although plaintiff suffered from a speech impediment and had substantial limitation of motion in his left shoulder due to a congenital condition, he had been able to work for 20 years as a surveyor and for approximately 12 years as an electrician.

For about one and a half years, plaintiff worked as a journeyman electrician on projects for Southern. Southern’s home office was located in Raleigh, North Carolina, but the company sent plaintiff—who lived in Kinston, North Carolina—to various sites, including Columbia, South Carolina; Little Rock, Arkansas; Durham, North Carolina; and Petersburg, Virginia. The length of plaintiff’s assignments at these job sites varied from weeks to months. Sometimes, plaintiff was laid off after completing a particular assignment, only to be rehired a short time later to work at another Southern job site. Plaintiff typically received a \$25.00 per day per diem while working at the various job sites.

In early July 2000, Ken Parker, the Southern supervisor for a project in Petersburg, Virginia, asked his project manager in Raleigh for additional workers. At this time, plaintiff was working for Southern at a job site in Durham, North Carolina. On 10 July 2000, shortly before plaintiff was scheduled to be laid off from the Durham project, plaintiff’s supervisor, Charlie Sanders, informed him that he was needed at the Petersburg job site, starting that Thursday.

Plaintiff worked in Durham through Wednesday, 12 July 2000, and reported for work at the site in Petersburg, a steel mill, on Thursday,

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13 July 2000. He worked for two days while the plant was shut down. During this time, he received a per diem and stayed at the Flagship Inn in Richmond. Although plaintiff's assignment was supposed to last only through Friday, 14 July 2000, Parker offered plaintiff a position for at least the following week, beginning on Monday, 17 July 2000, because a regular maintenance employee had quit. Plaintiff accepted the second job, but told Parker that he would be late in arriving from his home in Kinston on Monday because he needed to renew his driver's license. While plaintiff had been receiving a more substantial per diem for the two-day job, Parker informed plaintiff that he would only receive a \$25.00 per day per diem for the maintenance job.

Plaintiff drove home to Kinston for the weekend and returned to work in Petersburg on Monday at 1:00 p.m. At 5:30 p.m., plaintiff left work for the day and went back to the Flagship Inn for lodging. Because plaintiff had not worked a full eight hours on Monday, he did not receive his per diem and was, therefore, required to pay for the entire cost of the motel room on his own.

Plaintiff ate his dinner in his motel room, but at approximately 11:30 p.m., he left his room to get ice to make his lunch for the next day. He was attacked by several assailants, who beat him, knocked him unconscious, and robbed him of \$81.00. An ambulance took plaintiff to the hospital. Plaintiff suffered abrasions and lacerations to his face, contusions under his eyes, a left eye subconjunctival hemorrhage, and a depressed right orbital floor fracture in his right shoulder. In addition, two of plaintiff's front teeth were knocked out.

After being released from the hospital two days later, on 19 July 2000, plaintiff returned home to Kinston, where he continued to have problems with his right shoulder and consulted with various doctors. Plaintiff was ultimately sent by the North Carolina Department of Vocational Rehabilitation to Dr. Lamont Wooten, an orthopedic surgeon. Dr. Wooten recommended surgery after an MRI revealed a large retracted rotator cuff tear as well as dislocation of the biceps tendon. On 13 September 2000, Dr. Wooten repaired a "massive" rotator cuff tear that included a medial dislocation of the biceps tendon. Following the operation, plaintiff was treated with medication, range of motion exercises, and physical therapy. Dr. Wooten released plaintiff from his care and to return to work on 5 April 2001.

At that time, plaintiff was still experiencing problems with overhead reaching and nighttime pain. Dr. Wooten believed that plaintiff

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would always have trouble with overhead activities due to the damage to the rotator cuff, and he expressed the opinion that plaintiff's limitations would likely prevent him from being able to perform the ordinary duties of an electrician. Subsequent to being released by Dr. Wooten, plaintiff did not attempt to return to work with Southern or look for work anywhere else.

Defendants denied that plaintiff had suffered an injury by accident. A hearing was conducted before the deputy commissioner, who, on 11 September 2003, entered an opinion and award, concluding that plaintiff was a "traveling employee" and that, as a result of the assault, plaintiff had sustained an injury by accident arising out of and in the course of his employment with defendant Southern. The deputy commissioner further determined that plaintiff had failed to prove actual disability after 5 April 2001 under N.C. Gen. Stat. §§ 97-29 or 97-30 (2005). Although the deputy concluded that plaintiff was entitled to permanent partial disability benefits under N.C. Gen. Stat. § 97-31, she made no award "at this time" because of the state of the evidence.

Both plaintiff and defendants appealed to the Full Commission. On appeal, the Commission, with Commissioner Sellers dissenting, "affirm[ed] with minor modifications the Opinion and Award of the Deputy Commissioner." The Full Commission agreed with the deputy commissioner that plaintiff was entitled to temporary total disability compensation for the period of 18 July 2000 through 5 April 2001 and that plaintiff had failed to establish that he was incapable of earning wages in any employment after 5 April 2001. The Commission awarded permanent partial disability benefits in the amount of \$588.00 per week for 60 weeks, but made no award at that time for plaintiff's loss of teeth because plaintiff had not adequately addressed that issue. Both plaintiff and defendants timely appealed to this Court.

Standard of Review

Our review of a decision of the Industrial Commission "is limited to determining whether there is any competent evidence to support the findings of fact, and whether the findings of fact justify the conclusions of law." *Cross v. Blue Cross/Blue Shield*, 104 N.C. App. 284, 285-86, 409 S.E.2d 103, 104 (1991). "The findings of the Commission are conclusive on appeal when such competent evidence exists, even if there is plenary evidence for contrary findings." *Hardin v. Motor Panels, Inc.*, 136 N.C. App. 351, 353, 524 S.E.2d 368, 371, *disc. review*

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denied, 351 N.C. 473, 543 S.E.2d 488 (2000). This Court reviews the Commission's conclusions of law *de novo*. *Deseth v. LensCrafters, Inc.*, 160 N.C. App. 180, 184, 585 S.E.2d 264, 267 (2003).

Defendants' Appeal

An injury is compensable under the Workers' Compensation Act only if the injury (1) is an "accident" and (2) "aris[es] out of and in the course of the employment." N.C. Gen. Stat. § 97-2(6) (2005). The requirement that the accident "aris[e] out of" the employment is separate from the requirement that the accident occur "in the course of" the employment, and an employee has the burden of proving both requirements. *Hoyle v. Isenhour Brick & Tile Co.*, 306 N.C. 248, 251, 293 S.E.2d 196, 198 (1982). On appeal, defendants contend that plaintiff failed to do so.

"As used in the [Workers' Compensation] Act the phrase, 'in the course of the employment,' refers to the time, place, and circumstances under which an accidental injury occurs; 'arising out of the employment' refers to the origin or cause of the accidental injury." *Bartlett v. Duke Univ.*, 284 N.C. 230, 233, 200 S.E.2d 193, 194-95 (1973). This Court has held that "while the 'arising out of' and 'in the course of' elements are distinct tests, they are interrelated and cannot be applied entirely independently." *Culpepper v. Fairfield Sapphire Valley*, 93 N.C. App. 242, 247-48, 377 S.E.2d 777, 781, *aff'd per curiam*, 325 N.C. 702, 386 S.E.2d 174 (1989). "Both are part of a *single test of work-connection*." *Id.* at 248, 377 S.E.2d at 781. Because "the terms of the Act should be liberally construed in favor of compensation, deficiencies in one factor are sometimes allowed to be made up by strength in the other." *Hoyle*, 306 N.C. at 252, 293 S.E.2d at 199.

The Commission's determination that an accident arose out of and in the course of employment is a mixed question of law and fact. *Cauble v. Soft-Play, Inc.*, 124 N.C. App. 526, 528, 477 S.E.2d 678, 679 (1996), *disc. review denied*, 345 N.C. 751, 485 S.E.2d 49 (1997). This Court reviews the record to determine if the findings of fact and conclusions of law are supported by the record. *Id.*

A. "In the Course of Employment" Requirement

[1] "North Carolina adheres to the rule that employees whose work requires travel away from the employer's premises are within the course of their employment *continuously* during such travel, except when there is a distinct departure for a personal errand." *Id.* The

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rationale underlying this rule “is that an employee on a business trip for his employer must eat and sleep in various places in order to further the business of his employer.” *Id.* (internal quotation marks omitted). In *Martin v. Georgia-Pacific Corp.*, 5 N.C. App. 37, 167 S.E.2d 790 (1969), the Court held that when a traveling employee was struck by a car while walking from his hotel to dinner, his death was a compensable accident:

He had to eat and he had to sleep. These were necessities incidental to the trip. . . . We think there was a reasonable relationship between Martin’s employment and the eating of meals. The eating of meals was reasonably necessary to be done in order that he might perform the act he was employed to do, to wit, attendance at the training program in Milwaukee. We are of the opinion and so hold that while Martin was on his way to eat the evening meal, under the circumstances of this case, that he was at a place where he might reasonably be at such time and doing what he, as an employee, might reasonably be expected to do, and that in so doing he was acting in the course of and scope of his employment.

Id. at 43-44, 167 S.E.2d at 794.

In this case, defendants, in challenging the Commission’s determination that the assault occurred in the course of plaintiff’s employment, contend that the Commission erred in finding that plaintiff was a traveling employee within the meaning of *Martin*. The North Carolina appellate courts have not specifically defined who qualifies as a “traveling employee.” The Indiana Court of Appeals has, however, adopted a definition that we find helpful: “A traveling employee is one whose job requires travel from place to place or to a place away from a permanent residence or the employee’s place of business.” *Olinger Constr. Co. v. Mosbey*, 427 N.E.2d 910, 912 (Ind. Ct. App. 1981). *See also Chicago Bridge & Iron, Inc. v. The Indus. Comm’n*, 248 Ill. App. 3d 687, 694, 618 N.E.2d 1143, 1148 (1993) (“The traveling employee is described . . . as one who is required to travel away from the employer’s premises in order to perform his job.”); *Boyce v. Potter*, 642 A.2d 1342, 1343 (Me. 1994) (“Traveling employees are employees for whom travel is an integral part of their jobs, such as those who travel to different locations to perform their duties, as differentiated from employees who commute daily from home to a single workplace.”); *Shelton v. Azar, Inc.*, 90 Wash. App. 923, 933, 954 P.2d 352, 357 (1998) (describing traveling employees as “[e]mployees whose work entails travel away from the employer’s premises”).

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The question before the Commission in this case was, therefore, whether plaintiff's employment with Southern required plaintiff to travel to a site away from his permanent residence or Southern's place of business. For the traveling employee rationale to apply in a case like this one, the travel must involve a distance sufficient to require plaintiff to find lodging at the site rather than commute from his home.

On the traveling employee issue, the Commission found:

11. On 17 July 2000, plaintiff was an employee whose job involved traveling to the job sites where defendant-employer assigned him work. Since he was then working at a steel mill in Petersburg, Virginia, he was a traveling employee. Defendant-employer did not pay a per diem allowance to local employees. As Mr. Sanders, plaintiff's former supervisor, testified, it was more cost effective for the company to hire local workers since local workers did not receive the per diem travel allowance. Nevertheless, the company routinely assigned employees, including plaintiff, to jobs that required them to travel and find lodging. The fact that defendant-employer's rules prohibited plaintiff from receiving the per diem amount for the night of 17 July 2000 does not negate the fact that plaintiff was required to stay in a motel in the area since he was so far from home, in order to be able to report for work on time the next morning.

Defendants argue that these findings are not supported by the evidence. We disagree.

Plaintiff's testimony and that of defendant Southern's supervisors provides ample evidence to support the Commission's finding that plaintiff's employment involved traveling to job sites where Southern assigned him to work. *See Chicago Bridge & Iron*, 248 Ill. App. 3d at 694, 618 N.E.2d at 1149 (holding that itinerant welder was a traveling employee when he was sent by the employer to various remote job sites, even though he was terminated from the payroll after each job). Further, plaintiff testified that Sanders told him that he was being transferred by Southern to Petersburg.

The evidence also supports the Commission's finding that Southern routinely assigned employees to jobs that required travel and lodging. Both Parker, the Petersburg supervisor, and Sanders, the Durham supervisor, indicated that it was more cost effective to hire local employees because of the lack of any need to pay a per diem,

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but that when local employees were unavailable, the job sites requested non-local employees from the project manager at Southern's home offices in Raleigh. Specifically, Parker testified: "[I]f we need help, then we let [Raleigh] know, and then they—[i]f we can't get them locally in the area—[w]e try to hire local help if we can get them. But if you can't, then our Raleigh office will, you know, let us know that they got people looking for a job."

In this case, Parker told his Raleigh project manager that he needed people for the plant shut-down and plaintiff was one of the employees that the project manager "sent." Based on this testimony, the Commission was justified in finding that plaintiff's employment at the Petersburg plant—work that Southern had contracted with the steel mill to perform—required that he travel and stay in motels overnight. Indeed, the evidence establishes, as the Commission found, that plaintiff was paid a per diem while working in Petersburg, although the amount varied between the shut-down job and the maintenance position. As Southern's supervisors confirmed, a per diem was necessary solely because plaintiff was not a local worker and was required to travel. *See Martin*, 5 N.C. App. at 43, 167 S.E.2d at 794 ("That [eating meals at a restaurant] was a necessary incident of the employment is recognized by the employer when it agreed to pay for his meals.").

Other jurisdictions have concluded that comparable facts justified a finding that the employee was a traveling employee. *See, e.g., Olinger*, 427 N.E.2d at 916 ("In a case such as this, however, where the employee's job was away from his home and his employer's offices, where his job location shifted as the employer required, and where the employer paid him on a *per diem* basis to help cover the cost of living away from home, we cannot dispute the Board's prerogative in finding the employee is a traveling employee."); *Brown v. Palmer Constr. Co.*, 295 A.2d 263, 266 (Me. 1972) (holding that plaintiff was a traveling employee when the necessity of his lodging in Vermont was because the employer needed him to complete the work it had contracted to perform in Vermont).

Defendants urge, however, that the Commission improperly labeled plaintiff a traveling employee because, rather than being assigned to work out-of-town by Southern, he chose to accept employment in another state away from home. While the record contains evidence that could support defendants' contention, it also contains evidence that Southern assigned plaintiff, a current employee in Durham, to work in Petersburg, thereby requiring plaintiff to travel

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and stay in a motel overnight; that the assignment was necessary in order for Southern to perform its contractual responsibilities at the Petersburg plant; and that plaintiff, therefore, fell within the rule for traveling employees.

Defendants argue alternatively that even if plaintiff was a traveling employee with respect to the shut-down job, the maintenance job was a separate, permanent job in which plaintiff was a regular employee rather than a traveling employee. Ken Parker, the plaintiff's foreman in Petersburg, testified that if there had not been a second job for the plaintiff to do in Petersburg, Southern would have laid plaintiff off—testimony indicating that plaintiff was not actually laid off between the first and second job in Petersburg, but instead his employment continued. The Commission found—in a finding of fact not challenged on appeal and, therefore, binding—that the offer of the maintenance position was only for “at least the next week.” Plaintiff continued to receive a per diem, although in a lower amount. Neither the Commission's findings of fact nor the record supporting those findings suggests that the nature of plaintiff's employment changed from that of a traveling employee to a local hire. *See Shelton*, 90 Wash. App. at 936, 954 P.2d at 359 (rejecting respondents' argument that the city where the out-of-town job was located had become the employee's home and holding that because the employee “was required to travel to a specific out-of-town location to fulfill the terms of his employment[,] [h]e, therefore, was exposed to greater risks than an employee required only to travel in an ordinary commute from home”).

Further, defendants contend that because the maintenance job involved fixed hours at a fixed location, plaintiff was not a traveling employee. Defendants have, however, confused the analysis of the “going and coming” rule with the rule for traveling employees.¹ As the leading commentators on workers' compensation law have stated: “[A] compromise on the subject of going to and from work has been arrived at, largely by case law, with a surprising degree of unanimity:

1. The cases relied upon by defendants do not involve overnight travel and, therefore, do not implicate the traveling employee rule. *See, e.g., Hunt v. Tender Loving Care Home Care Agency, Inc.*, 153 N.C. App. 266, 269, 569 S.E.2d 675, 678 (holding that “going and coming” rule applied to a nursing aide, who worked solely for one patient with regular hours and was not required, during the day, to attend to several patients at different locations), *disc. review denied*, 356 N.C. 436, 572 S.E.2d 784 (2002); *Kirk v. N.C. Dep't of Corr.*, 121 N.C. App. 129, 132, 465 S.E.2d 301, 303 (1995) (holding that “going and coming” rule was inapplicable when the employee was commuting from his home to a required training site each day), *disc. review improvidently allowed*, 344 N.C. 624, 476 S.E.2d 105 (1996).

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for an employee having fixed hours and place of work, going to and from work is covered only *on the employer's premises*.” 1 Arthur Larson and Lex K. Larson, *Larson's Workers' Compensation Law* § 13.01[1], at p. 13-3 (2005).

Traveling employees are, however, subjected to a separate rule. *See, e.g., Olinger*, 427 N.E.2d at 915 (holding that rationale behind the traveling employee rule “applies equally to an employee who travels to a fixed location and stays there to do his job”); *Ramirez v. Dawson Prod. Partners, Inc.*, 128 N.M. 601, 606, 995 P.2d 1043, 1048 (N.M. Ct. App. 2000) (“[T]he traveling-employee rule recognizes that the conditions faced by employees working ‘on the road,’ away from home and away from their employer’s home office, are sufficiently different from the conditions faced by employees merely going to or from their local place of employment on a daily basis to warrant a distinct rule.”); *Duncan v. Ohio Blow Pipe Co.*, 130 Ohio App. 3d 228, 235, 719 N.E.2d 1029, 1034 (1998) (holding that the fact that the employee had fixed hours and a fixed work location for purposes of the “coming-and-going” rule “does not end the inquiry,” and the employee may still prevail upon demonstrating that he is a traveling employee). The issue is not whether the assignment entails more than one location or varying hours, but whether traveling over night was a necessary incident of the employment.

In sum, because the record contains competent evidence that plaintiff was a traveling employee at the time of his injury, the Commission did not err in making such a determination. As a traveling employee, plaintiff met the requirement for establishing his injury occurred in the course of his employment.

B. “Arising Out of” the Employment Requirement

[2] In discussing the “arising out of” requirement, the parties each take the most extreme position. According to plaintiff, the mere fact that he was injured while traveling at the request of the employer renders the injury compensable as “arising out of” his employment. Under this approach, a finding that the employee was a “traveling employee” would resolve both the “in the course of” and the “arising out of” requirements. Our Supreme Court has, however, held that even if an employee amounts to a traveling employee for purposes of determining whether an injury occurred within the course of employment, the employee must still establish that the injury arose out of his employment. *See Roberts v. Burlington Indus., Inc.*, 321 N.C. 350, 354, 364 S.E.2d 417, 421 (1988) (noting that the employer did

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not dispute that the injury occurred in the course of employment, but proceeding to address the “arising out of” requirement); *Bartlett*, 284 N.C. at 235-36, 200 S.E.2d at 196 (reversing Commission because even conceding that the decedent, a traveling employee, died in the course of his employment, he had not established that his death arose from his employment).

Defendants, on the other hand, urge this Court to hold that a traveling employee may not meet the “arising out of” requirement unless the injury occurred while he was performing his work duties. This approach would eviscerate the “traveling employee” rule adopted by our courts, which provides that employees are considered “to be within the course of their employment *continuously* during the trip, except when a distinct departure on a personal errand is shown.’” *Chandler v. Nello L. Teer Co.*, 53 N.C. App. 766, 768, 281 S.E.2d 718, 720 (1981) (emphasis added) (quoting *Brewer v. Powers Trucking Co.*, 256 N.C. 175, 179, 123 S.E.2d 608, 611 (1962)), *aff’d per curiam*, 305 N.C. 292, 287 S.E.2d 890 (1982). This Court has held that, under this rule, “injuries arising out of the necessity of sleeping in hotels or eating in restaurants away from home are usually held compensable.” *Martin*, 5 N.C. App. at 41, 167 S.E.2d at 793. If we were to adopt defendants’ view, no injury arising out of sleeping in hotels or eating away from home would be compensable because it would not occur while the employee was working. *See Ramirez*, 128 N.M. at 607, 995 P.2d at 1049 (“[G]iven the rationale behind the [traveling employee] exception, it would make little sense to provide coverage for traveling employees only while they are actually performing the duties of their jobs.”).

In short, neither of the approaches urged by the parties is consistent with North Carolina precedent regarding traveling employees. We agree with defendant, however, that our courts have applied an “increased risk” analysis and have rejected the “positional risk” doctrine in applying the “arising out of” requirement. This Court has explained:

[T]he “increased risk” analysis . . . focuses on whether the *nature* of the employment creates or increases a risk to which the employee is exposed. *Roberts*, 321 N.C. at 358, 364 S.E.2d at 422. This “increased risk” analysis is different from the “positional risk” doctrine, “which holds that ‘[a]n injury arises out of the employment if it would not have occurred but for the fact that the conditions and obligations of employment placed claimant in the position where he was killed.’” *Id.* (quoting 1 A. Larson, *The Law*

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of *Workmen's Compensation* § 6.50 (1984)). Our Supreme Court has chosen to follow and apply the "increased risk" analysis instead of relying on the more liberal "positional risk" doctrine.

Dildy v. MBW Invs., Inc., 152 N.C. App. 65, 69, 566 S.E.2d 759, 763 (2002). We disagree, however, with defendants' application of the "increased risk" test.

Defendants assert that the Commission failed to find and the evidence failed to show that "there was anything about the peculiar nature of plaintiff's employment *as an electrician* that increased his risk of injury at the Flagship Inn." (Emphasis added.) Defendants have not taken into account the fact that an incident of plaintiff's employment is that he was a traveling employee. See *Martin*, 5 N.C. App. at 43, 167 S.E.2d at 794 ("While lodging in a hotel or preparing to eat, or while going to or returning from a meal, [the employee] is performing an act incident to his employment, unless he steps aside from his employment for personal reasons.") (quoting *Thornton v. Hartford Accident & Indem. Co.*, 198 Ga. 786, 790, 32 S.E.2d 816, 819 (1945)); *Duncan*, 130 Ohio App. 3d at 237, 719 N.E.2d at 1035 (holding that because plaintiff, at the direction of his employer, traveled to an employment assignment in another state, his "exposure to the risks associated with travel were quantitatively greater than that of the general public"). Both *Bartlett* and *Roberts* establish that when the employee is a traveling employee, the question is whether the employee was subjected to an increased risk because of the requirement that he travel.

In *Bartlett*, the Supreme Court held that for an employee to meet the "arising out of" requirement, the injury

must come from a risk which might have been contemplated by a reasonable person familiar with the whole situation as incidental to the service when he entered the employment. The test excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which the workmen would have been equally exposed apart from the employment. The causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence.

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284 N.C. at 233, 200 S.E.2d at 195 (internal quotation marks omitted). In *Bartlett*, the employee, who was a traveling employee, died after choking on a piece of meat he was eating at a restaurant. The Court held that the plaintiff had failed to establish that this death arose out of his employment because:

[t]he risk that [the employee] might choke on a piece of meat while dining at the Orleans House was the same risk to which he would have been exposed had he been eating at home or at any other public restaurant in the Washington area. Whether employed or unemployed, at home or traveling on business, one must eat to live. *In short, eating is not peculiar to traveling*; it is a necessary part of daily living, and one's manner of eating, as well as his choice of food, is a highly personal matter.

Id. at 234, 200 S.E.2d at 195 (emphasis added). Thus, under *Bartlett*, a traveling employee's injury may be compensable if it results from a risk that is "peculiar to traveling."²

In *Roberts*, 321 N.C. at 355, 364 S.E.2d at 421, the Court stated that "[t]he basic question is whether the employment was a contributing cause of the injury." The Court noted that "[a]t times this Court has applied an 'increased risk' analysis in determining whether the 'arising out of the employment' requirement has been met." *Id.* at 358, 364 S.E.2d at 422. Under that approach, "the injury arises out of the employment if a risk to which the employee was exposed because of the nature of the employment was a contributing proximate cause of the injury, and one to which the employee would not have been equally exposed apart from the employment." *Id.*, 364 S.E.2d at 423. With respect to traveling employees, the Court held "that when an employee's duties require him to travel, the hazards of the journey are risks of the employment." *Id.* at 359, 364 S.E.2d at 423. In *Roberts*, the employee was struck by a car and killed after he attempted to help an injured pedestrian. The Court concluded that the plaintiff had failed to meet the "arising out of" requirement because "the required travel merely placed decedent in a position to seize the opportunity to rescue the injured pedestrian. His decision to render aid created the danger; *the risk was not a hazard of the journey.*" *Id.* (emphasis added).

The question before the Commission was, therefore, whether the risk of assault at the motel was a hazard of the journey or, in other

2. The Supreme Court subsequently acknowledged "peculiar to traveling" as the *Bartlett* test in *Roberts*, 321 N.C. at 359, 364 S.E.2d at 423.

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words, as articulated in *Bartlett*, a risk peculiar to traveling. The Commission made the following pertinent finding of fact:

12. At the time of the assault, plaintiff was getting ice at the motel where he was staying. This was an activity that a traveling employee would reasonably be expected to do. The purpose of the assault was robbery. Plaintiff did not know his assailants. There was no personal motive involved with the attack. A traveler staying in a motel would be expected to be carrying cash in order to pay for meals, drinks, fuel and other incidental expenses. Consequently, as a traveling employee at a low cost motel, plaintiff would have been placed at some risk for being robbed. The risk was incidental to his employment, which required him to obtain lodging away from home in places where he was unfamiliar with the neighborhood.

This reasoning is sufficient to meet the *Bartlett* and *Roberts* test. The hazard to which plaintiff in this case was exposed, assault and robbery, was not something to which he would have been equally exposed apart from his employment-required travel, that necessitated plaintiff's stay in an inexpensive motel located in unfamiliar surroundings. Being assaulted and robbed while obtaining ice from an ice machine to make lunch is a hazard of the journey and a risk peculiar to traveling.

Other jurisdictions reviewing facts analogous to those in this case have reached similar conclusions. In *Ark. Dep't of Health v. Huntley*, 12 Ark. App. 287, 292, 675 S.W.2d 845, 848-49 (1984), the court held that an employee suffered compensable injuries when her out-of-town service calls required her to check into a motel room and she was assaulted as she walked back to her motel room from a nearby bar. Similarly, in *Jean Barnes Collections v. Elston*, 413 So. 2d 797, 798 (Fla. Ct. App. 1982), the court held that a traveling employee sustained a compensable accident when she was raped in her hotel room. In *Brown*, 295 A.2d at 267, the court held that an employee, who was assigned to an out-of-town job and who was provided with additional money to cover living expenses while away from home, was entitled to workers' compensation when the gas stove in his rented apartment blew up.

Defendants' contention that the Commission applied a "positional risk" analysis fails to take into account the fact that plaintiff was a traveling employee. Plaintiff has not been awarded compensa-

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tion simply because his employment placed him a position to be injured, but rather because—as required by the “increased risk” doctrine—an incident of his employment, traveling, increased his risk of incurring precisely this type of injury.

Dodson v. Dubose Steel, Inc., 358 N.C. 129, 591 S.E.2d 548 (2004), *rev'g per curiam for the reasons in the dissent*, 159 N.C. App. 1, 582 S.E.2d 389 (2003), does not provide otherwise. In *Dodson*, the dissenting opinion adopted by the Supreme Court specifically noted that confrontations while driving could occur “at anytime to any member of the general public in the normal course of operating a motor vehicle.” 159 N.C. App. at 15, 582 S.E.2d at 398 (Steelman, J., dissenting). The fact that the plaintiff was on a business trip did not increase his risk of being a victim of road rage beyond the risk he ran when driving while at home.

Even more significantly, the dissenting opinion in *Dodson* stressed that once the plaintiff exited his truck to confront the driver, “his conduct was no longer related to his employment.” *Id.* at 16, 582 S.E.2d at 398. He was on a personal, rather than an employment-related, mission: “[I]t was [plaintiff’s] independent and voluntary act of getting out of his truck to confront [the driver] which created the risk that he could be struck by another vehicle. The risk of injury was not created by the nature of his employment.” *Id.* By contrast, plaintiff’s injuries in this case were the result of a risk arising from staying in a motel and eating away from home—a type of risk that our appellate courts have already determined is incident to the employment of a traveling employee. *Martin*, 5 N.C. App. at 42, 167 S.E.2d at 793 (noting that traveling employees, whether or not on call, usually do receive protection when the injury has its origin in a risk created by the necessity of sleeping and eating away from home).

Nothing in *Dodson* suggests that the Supreme Court or the dissenting opinion intended to *sub silentio* overrule the *Bartlett* and *Roberts* test or the well-established law regarding traveling employees. If, however, we adopted defendants’ application of *Dodson*, it would necessarily preclude recovery for injuries arising out of the risk of staying in hotels or eating in restaurants. We decline to so construe *Dodson* without affirmative guidance from our Supreme Court.

Because we believe the circumstances in their entirety furnished competent evidence for the Commission to decide that plaintiff’s injuries arose out of his employment, we affirm the Commission’s ruling that plaintiff suffered a compensable injury by accident. Since

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defendants present no other basis for overturning the Commission's determination, we affirm the Commission's award of compensation.

Plaintiff's Appeal

[3] Plaintiff argues that the Commission erred in concluding that he failed to meet his burden of proving that he is totally disabled. In order to support a conclusion of compensable disability, the Commission must find:

(1) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in the same employment, (2) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in any other employment, and (3) that this individual's incapacity to earn was caused by plaintiff's injury.

Hilliard v. Apex Cabinet Co., 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982). Under this test, the employee "bears the burden of showing that [he] can no longer earn [his] pre-injury wages in the same or any other employment, and that the diminished earning capacity is a result of the compensable injury." *Gilberto v. Wake Forest Univ.*, 152 N.C. App. 112, 116, 566 S.E.2d 788, 792 (2002).

An employee may meet his or her burden of proving disability in one of four ways:

(1) the production of medical evidence that he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment; (2) the production of evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment; (3) the production of evidence that he is capable of some work but that it would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, to seek other employment; or (4) the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury.

Russell v. Lowes Prod. Distribution, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993) (internal citations omitted).

Plaintiff, however, argues that he had no burden under *Russell* because he was entitled to a presumption of disability. This Court has previously held that a presumption of disability arises only "(1) by a previous Industrial Commission award of continuing disability, or (2)

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by producing a Form 21 or Form 26 settlement agreement approved by the Industrial Commission.” *Cialino v. Wal-Mart Stores*, 156 N.C. App. 463, 470, 577 S.E.2d 345, 350 (2003). Since there was neither a previous award of continuing disability nor a Form 21 or Form 26 agreement, plaintiff could not rely upon a presumption of disability and was required to meet his burden of proof under *Russell*.

Plaintiff relies only on the first and third methods of proof under *Russell*. With respect to the first method, a review of the record reveals, as the Commission found, a lack of any medical evidence that plaintiff was unable to work at “any employment.” Dr. Wooten testified that plaintiff could not lift objects over his head anymore, that he suffered a 25% permanent loss of the use of his arm because of the injury, and that, since he had other congenital problems with his left arm, the partial loss of the use of his right arm might make him more disabled than he would otherwise be as a result of the injury. We are in agreement with the Commission that although this medical evidence may suggest plaintiff might not be able to secure all types of employment, it does not meet plaintiff’s burden of proving that he could not obtain work in any type of employment because of his work-related injury.

With respect to the third method of proof under *Russell*, the Commission similarly found the evidence insufficient to establish that it would have been futile for plaintiff to seek alternative employment. Plaintiff contends that the Commission erred in failing to take into account his receipt of Social Security disability benefits when making this finding.

In *Demery v. Perdue Farms, Inc.*, 143 N.C. App. 259, 266-67, 545 S.E.2d 485, 491, *aff’d per curiam*, 354 N.C. 355, 554 S.E.2d 337 (2001), this Court held:

[E]vidence Plaintiff received payments pursuant to an employer-funded disability plan is not evidence Plaintiff is disabled within the meaning of the Workers’ Compensation Act unless the evidence shows those payments were made because Plaintiff was incapable, due to her carpal tunnel syndrome [work-related injury], of earning wages she had earned before this injury in the same or any other employment.

The only evidence in the record regarding plaintiff’s Social Security disability benefits is the following testimony by plaintiff:

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Q. And the only form of income that you personally have is Social Security Disability?

A. Yes, sir.

Q. And that was approved January of 2001; is that right?

A. Right, yes, sir.

Q. And that [was] retroactive back to the date of this injury we're here to talk about today, July 17th of 2000; is that right?

A. Right, yes, sir.

This evidence, standing alone, is not sufficient to meet the requirements of *Demery*. In any event, the evidence—limited to a bare statement regarding receipt of benefits—certainly did not compel the Commission to conclude that plaintiff met his burden of proving total disability.

[4] Lastly, plaintiff argues the Commission erred by ruling that plaintiff's period of disability ended at the date he reached maximum medial improvement ("MMI"), citing cases that stand for the proposition that MMI does not preclude a claimant from receiving ongoing temporary disability benefits. *See Knight v. Wal-Mart Stores, Inc.*, 149 N.C. App. 1, 14, 562 S.E.2d 434, 443 (2002) ("[T]he concept of MMI does not have any direct bearing upon an employee's right to continue to receive temporary disability benefits once the employee has established a loss of wage-earning capacity pursuant to N.C. Gen. Stat. § 97-29 or § 97-30."), *aff'd per curiam*, 357 N.C. 44, 577 S.E.2d 620 (2003). Nowhere, however, in its decision, did the Commission suggest that plaintiff's benefits were being terminated because he had reached MMI. Instead, the Commission asserted only that plaintiff had failed to prove continuing total disability after 5 April 2001, the date that Dr. Wooten released plaintiff to return to work.

In conclusion, plaintiff has failed to demonstrate any basis for overturning the Commission's denial of ongoing total disability benefits following 5 April 2001. We, therefore, affirm the Commission's opinion and award.

Affirmed.

Judges CALABRIA and ELMORE concur.

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STATE OF NORTH CAROLINA v. KAREN ELAINE EVERETT

No. COA05-1197

(Filed 20 June 2006)

1. Evidence— character—victim’s propensity for violence—self-defense—neutral witness

The trial court erred in a second-degree murder case by excluding a witness’s testimony concerning the victim’s propensity for violence, including the victim’s prior violent behavior at a car dealership where he damaged property, because: (1) the evidence was relevant and admissible to show whether defendant’s apprehension of death and bodily harm was reasonable; and (2) the error was prejudicial in light of defendant’s assertion of self-defense, the witness was defendant’s only neutral witness, and defendant’s testimony regarding the car dealership incident would possibly be viewed by the jury as self-serving.

2. Evidence— hearsay—character—victim’s propensity for violence—state of mind exception—victim’s plan or intent to engage in future act

The trial court erred in a second-degree murder case by excluding defendant’s testimony regarding an incident between the victim and defendant’s former subordinate employee to show the victim’s violent nature, because: (1) N.C.G.S. § 8C-1, Rule 103(a)(2) provides that an offer of proof is not necessary to preserve an issue for appellate review if the substance of the excluded testimony is apparent from the context within which the question was asked, and the grounds under which defendant sought to have this evidence admitted were apparent in the record from the context of the trial and the exchange; (2) defendant’s testimony that her employee told her that the victim threatened to shoot up his house should have been admitted as further evidence of the victim’s violent character to show defendant’s fear of the victim was reasonable; and (3) the statement was not offered for the truth of the matter asserted, but instead to show that defendant’s apprehension of death and bodily harm was reasonable.

3. Evidence— prior crimes or bad acts—shot a dog

The trial court erred in a second-degree murder case by admitting evidence that defendant once shot a dog, because: (1)

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whether defendant was knowledgeable about firearms or had experience shooting them does not make it more or less probable that she shot her husband in self-defense; (2) defendant admitted that she shot the victim with a pistol; and (3) if the State seeks to establish relevance on remand, the evidence is equally relevant to show the victim also shot and killed the dog.

Judge GEER dissenting.

Appeal by defendant from judgment entered 12 August 2004 by Judge Leon Stanback in Wake County Superior Court. Heard in the Court of Appeals 12 April 2006.

Attorney General Roy Cooper, by Assistant Attorney General Thomas G. Meacham, Jr., for the State.

Amos Granger Tyndall, P.A., by Amos Granger Tyndall, for defendant-appellant.

TYSON, Judge.

Karen Elaine Everett (“defendant”) appeals from judgment entered after a jury found her to be guilty of second degree murder. We award defendant a new trial.

I. Background

A. State’s Evidence

On 26 November 2000 at approximately 5:40 p.m., Wake County Sheriff’s Deputy Joel Holt (“Deputy Holt”) was serving warrants when he was dispatched to a call reporting a shooting at the 6100 block of Highway 401 in Fuquay-Varina. Deputy Holt arrived at the residence and saw defendant standing in the doorway and speaking on the telephone. As Deputy Holt walked into the yard toward the house, defendant entered her home. Deputy Holt went to the front door, identified himself, looked into the house, and saw a pistol laying on the coffee table. Deputy Holt identified himself again upon entering the house and heard a child crying, “My daddy, my daddy, I want my daddy.” A blanket covered the child’s head. Deputy Holt observed the body of Michael Everett (“the victim”) in the hallway. The victim was lying on his right shoulder with his feet toward the kitchen and head toward the hallway. Deputy Holt detected no movement in the victim and observed a large puddle of blood on the floor. He testified defendant was calm, not emotional or upset, and was trying to prevent her

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child from seeing the victim's body. He also testified defendant's clothes were not torn, contained no blood, and he did not observe marks on defendant's face or neck. Defendant straightforwardly acknowledged that she had shot the victim.

A volunteer fireman, Captain Lonnie Bridges ("Captain Bridges"), arrived at the scene. Captain Bridges observed pooled blood around the victim that appeared "congealed" and "old." The victim's body was cool.

Wake County Sheriff's Deputy James Landmark ("Deputy Landmark") arrived and asked defendant what had happened. Defendant responded that she did not want to talk with him in front of her daughter. Defendant's father-in-law came to the home and took custody of the child.

Defendant told Deputy Landmark that she and her husband, the victim, had been arguing for a couple of days after he accused her of seeing someone else. Defendant told Deputy Landmark her husband pushed her, threatened to kill her, and grabbed her by the throat. Defendant told the victim to "back off." The victim kept coming toward defendant, at which point she shot him.

Sergeant Gerald Baker ("Sergeant Baker") was the lead investigator at the scene and also interviewed defendant. Defendant told Sergeant Baker the victim had threatened to kill her and had put his hands around her neck. The victim told defendant, "I can kill you now, bitch." The victim came toward defendant in the kitchen. Defendant retrieved her gun from the living room. Defendant fired the gun toward the kitchen cabinets. The victim continued to come towards defendant and she fired the gun at him.

Agent Dave Edington ("Agent Edington") of the City-County Bureau of Investigation testified he recovered a bullet imbedded in the windowsill above the kitchen sink. Based on the method of entrance by the bullet, Agent Edington testified the gun was apparently fired from the living room near the Christmas tree.

Defendant's aunt, Eton Everett ("Everett"), also testified for the State. Defendant called Everett at 5:31 p.m. and told her, "call daddy and you guys get out here right away, I just shot Michael." Everett also testified defendant and the victim had suffered domestic problems over the years. Defendant had never told Everett she was afraid of the victim. Everett did not know of incidents where the victim had injured defendant. Everett never saw the victim act violently towards

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anyone. She never observed the victim with a gun. Everett admitted she was married to the victim's brother.

Agent David Santora ("Agent Santora") testified as an expert witness in firearm identification. Agent Santora testified that a bullet hole on the victim's right shirt sleeve was consistent with a contact shot. The other bullet holes on the victim were caused by shots fired less than eighteen inches away.

Dr. Cheryl Szpak ("Dr. Szpak") performed the autopsy on the victim. Dr. Szpak testified that no alcohol was found in the victim's blood. One bullet had entered the victim's right biceps, traveled through the sternum and the heart, and lodged in the victim's lung. Another bullet entered the left chest area below the nipple, perforated the lung and diaphragm, and lodged close to the spine. The remaining bullet entered the victim's lower back to the right of the spine and lodged in his spinal canal. Dr. Szpak testified the cause of the victim's death was massive blood loss in the chest and a rupture of the heart resulting from gunshot wounds.

B. Defendant's Evidence

Defendant testified she married the victim in 1988. In the early years of their marriage, the couple engaged in verbal and physical arguments. The victim would tear things up and defendant would try to "stay out of the way of it." Once in 1990, defendant was supposed to meet the victim after work, but defendant was unable to meet him. The victim accused her of leaving work with someone. The victim choked defendant and ripped her clothes. Defendant reported the incident to the police. The victim was charged with and convicted of assault.

Defendant also testified that there were "lots of incidents" in the early years of their marriage and that it was "easy for [her] to get away." Defendant slept in her office at times.

The couple engaged in another physical altercation in 1998. Defendant was helping her friend, Iris Bryant ("Bryant"), move a fish aquarium. Bryant owned a hair salon. Defendant was Bryant's client and friend. Defendant turned her back and the victim jumped on her and pushed her through a screen door. The victim "banged" defendant's head against a wall and choked her. Bryant corroborated defendant's account at trial. Bryant testified the victim "came and grabbed [defendant] by the neck, and he swung her out the door to the back of the porch, and her body was against the wall, and he tore

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off all her clothes.” Defendant’s breasts were exposed and she was “scarred up at the neck.” Defendant obtained a domestic violence protective order against the victim. The victim was charged and convicted of assault on a female as a result of this altercation.

Bryant further testified the victim dropped defendant off at her salon a couple of months before the shooting. The victim took defendant’s book bag out of the car, threw it at defendant, and called her a “bitch.”

Defendant testified beginning in 2000 their arguments became more violent and the victim’s temper worsened. The victim insisted that defendant was having extramarital affairs. One evening in November 2000, the same month as the shooting, defendant was asleep on the couch and awoke to find the victim holding an assault rifle pointed at her head. He told her he was going to “blow [her] head off.” Defendant coaxed the victim into putting down the gun by telling him that the gun had not been cleaned and it could explode if he fired it.

Defendant kept problems in their marriage private because her aunt, Eton Everett, was married to defendant’s brother. Defendant continued to live with the victim because she wanted her daughter “to have one more Christmas holiday with him as a family.” She believed that the marriage would work if she “kept working at it.”

During the day before the shooting, defendant and her daughter went to the movie theater with friends. When they returned home, the victim insisted defendant had been out with another man. The couple argued that evening. Defendant left and went to a female friend’s house for a couple of hours. Later, she returned home and slept on the couch.

Defendant described the day leading up to the shooting as a “normal day.” The victim came home and they argued again. Defendant laid down on the couch. When she tried to get up, the victim pushed her down and told her he “should have finished what he started . . . that he should have killed [her] when he had a chance.” The victim told defendant he was not leaving the house and that she would only leave “in a body bag or on a stretcher.”

Defendant got up and picked up the pistol because she wanted to “keep him off” of her. The victim saw the gun and stated, “What, you want to play with guns now?” The victim said he was going to get a gun and “kill everything [sic] up in there.” Defendant testified the vic-

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tim normally was “screaming and yelling” and “tearing things up” during prior arguments, but that he was “calm” and “cold” the evening of the shooting. Defendant further testified that she had never been more afraid of the victim.

Defendant testified she told the victim that she wanted to get her daughter and leave. The victim moved toward defendant and she shot at the kitchen window to scare him. The victim continued to move toward her. He refused to stop after she told him to. The victim moved toward her like he was going to grab her.

Defendant testified she believed the victim was going to take the gun away from her. At that point, defendant shot the gun at him. The victim did not initially react to the second shot defendant fired and continued to walk toward her. The victim turned toward the hallway and defendant continued to fire at him. Defendant testified she believed he was going to get a gun located in the hallway. Defendant did not think she had hit the victim. When the victim fell, defendant realized he had been hit. After he fell, she ran over to him, held his head in her lap, and called the victim’s name. Defendant did not see any blood and did not know the extent of his injuries. Defendant testified she does not remember further events after the shooting, and does not remember placing the call to 911.

Defendant testified that she was not trying to kill the victim and stated, “I wanted to leave, and when he started coming toward me, I felt he was either going to go get his gun or he was going to take the gun from me.” She further testified that she “just wanted him to stop.”

Defendant’s father, John Rowland (“Rowland”) testified that he was aware of the couple’s marital problems. Rowland recounted an incident in the early 1990s when the victim slapped defendant and threw her clothes into the yard. Rowland bailed the victim out of jail.

C. State’s Rebuttal Evidence

Eton Everett returned to the stand and testified about a 1998 incident where the victim had attacked defendant. Defendant told Everett that if she could have gotten her gun she would have shot the victim. Sergeant Baker also returned to the stand and corroborated that Everett had told him that defendant had said to her after the 1998 incident. Sergeant Baker’s notes said, “[Everett] stated [defendant] told her she and [the victim] fought and [the victim] had to force [defendant] out of the front door because, quote, ‘He knew I was going to get my gun and shoot his ass.’”

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Defendant was indicted for first-degree murder. The jury found defendant to be guilty of second degree murder. This Court vacated the judgement and ordered a new trial on 2 March 2004. *See State v. Everett*, 163 N.C. App. 95, 592 S.E.2d 582 (2004) (holding the trial court erred in failing to instruct the jury that defendant claiming self-defense had no duty to retreat). Defendant was retried and found to be guilty of second degree murder. Defendant was sentenced as a Prior Record Level I with no prior record points. Defendant presented evidence of multiple mitigating factors. The trial court made no findings of aggravation or mitigation and sentenced defendant to an active term within the presumptive range to a minimum of 135 months and a maximum of 171 months. Defendant appeals.

II. Issues

Defendant argues the trial court erred by: (1) excluding evidence of the victim's propensity for violence; and (2) admitting evidence of her prior conduct that was irrelevant and prejudicial.

III. Evidence of the Victim's Violent Character

[1] Defendant argues she should be granted a new trial because the trial court erred in excluding evidence of the victim's violent character. Defendant presented evidence that she shot the victim in self-defense. Defendant argues the trial court excluded specific instances of the victim's violent character that would have shown the reasonableness of her fear and why she used deadly force. We agree.

A. Virgil Rhodes's Testimony

Virgil Rhodes ("Rhodes") testified during *voir dire* that he worked at a used car dealership and had sold a car to the victim. The victim called the owner of the car dealership and complained the car's trunk would not remain latched. On 31 October 1999, the victim drove to the dealership after business hours and broke another car's windows. Rhodes was working late in the evening in his office when he heard glass shatter. Rhodes walked outside and saw the victim leaving the lot in the car he had purchased. The victim was arrested for damage to property. Defendant testified she knew of this incident. The trial court excluded this testimony, stating, "I don't see how this event is relevant in this case."

B. Character Evidence

Generally, evidence of the victim's character is not admissible to prove that the victim acted in conformity with his character on a par-

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ticular occasion. N.C. Gen. Stat. § 8C-1, Rule 404(a) (2005). This rule has exceptions. Rule 404(a)(2) provides that “evidence of a pertinent trait of character of the victim of the crime offered by an accused” is admissible. N.C. Gen. Stat. § 8C-1, Rule 404(a)(2) (2005).

In *State v. Winfrey*, our Supreme Court discussed the two exceptions under this rule.

Generally, evidence of a victim’s violent character is irrelevant, but *when the accused knows of the violent character of the victim*, such evidence is *relevant and admissible to show to the jury that defendant’s apprehension of death and bodily harm was reasonable*. Clearly, the reason for this exception is that, a *jury should, as far as is possible, be placed in defendant’s situation and possess the same knowledge of danger and the necessity for action, in order to decide if defendant acted under reasonable apprehension of danger to his person or his life*.

The second of the recognized exceptions to the general rule *permits evidence of the violent character of a victim because it tends to shed some light upon who was the aggressor since a violent man is more likely to be the aggressor than is a peaceable man*. The admission of evidence of the violent character of a victim which was unknown to the accused at the time of the encounter has been carefully limited to situations where all the evidence is circumstantial or the nature of the transaction is in doubt. The relevancy of such evidence stems from the fact that *in order to sustain a plea of self-defense, it must be made to appear to the jury that the accused was not the aggressor*.

298 N.C. 260, 262, 258 S.E.2d 346, 347 (1979) (internal quotations and citation omitted) (emphasis supplied).

Proof of the victim’s character may be made “by testimony as to reputation or by testimony in the form of an opinion.” N.C. Gen. Stat. § 8C-1, Rule 405(a) (2005). Proof may also be made by specific instances of conduct where “character or a trait of character of a person is an essential element of a charge, claim, or defense.” N.C. Gen. Stat. § 8C-1, Rule 405(b) (2005).

“In self-defense cases, the victim’s violent character is relevant only as it relates to the reasonableness of defendant’s apprehension and use of force, which are essential elements of self-defense.” *State v. Brown*, 120 N.C. App. 276, 277-78, 462 S.E.2d 655, 656 (1995) (citing

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State v. Shoemaker, 80 N.C. App. 95, 101, 341 S.E.2d 603, 607, *motion to dismiss allowed and disc. rev. denied*, 317 N.C. 340, 346 S.E.2d 145 (1986)).

Defendant presented evidence she killed the victim in self-defense and tendered Rhodes as a witness. Rhodes's testimony regarding the victim's violent behavior at the car dealership, which was known by defendant, is relevant and admissible to show whether her "apprehension of death and bodily harm was reasonable." *Winfrey*, 298 N.C. at 262, 258 S.E.2d at 347.

C. No Prejudicial Error

The State argues the trial court's exclusion of Rhodes's testimony was not prejudicial because defendant testified to the same incident on direct and redirect examination. *See* N.C. Gen. Stat. § 15A-1443(a) (2005) ("A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises."). We disagree.

On direct, defendant testified that she recalled an incident when the victim was arrested for damage to property. On redirect, defendant testified as follows:

Q: Do you recall an incident back in—on Halloween of 1999?

A: Yes. Yes, I do.

Q: Do you know what happened or did you find out what happened?

A: Michael had gotten upset and went to a car dealership and had busted out another car windows [sic].

Q: And—and was he charged with damaged property?

A: Yes, he was.

Q: And did he pay for the damages?

A: Yes, he did.

Q: During this period of time, did you—did you leave Michael after that?

A: I left after that.

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Q: Why?

A: Because that wasn't generally what he done. It was a little weird. I got afraid. I though he needed a little cool-off period so I left to try.

Q: And how long did you leave for, do you remember?

A: Probably a couple of weeks.

Q: Do you know what he was mad about?

A: The trunk wasn't latching on the back of the car. He was upset about that. I actually didn't find out he busted out the windows till the—the dealer—the man, the manager that called me while he was gone with the child for Halloween and they went trick or treating at the mall. The manager had called and asked where he was at, and I said he wasn't there. He said do you know what he said—

PROSECUTOR: I'm going to object to what the manager said.

COURT: All right, overruled. I'll let it in.

A: Do you know what he just did, and I said no. He said well I'm going to call the police. He was just here busting out windows and I got witnesses to the fact that he did it. I tried to calm him down and said well, we'll pay for the damages etc., etc. and I said could I call him back.

And I called Michael and I asked him had something happened and he said no, nothing had happened. I said well the dealership man had just called here threatening to call the police. And at that point in time I don't think he thought anyone saw him, said have witnesses saying they saw you busting out windows.

So I called the man back and said that we would pay for it, and he said that he was still going to call the police to have a record of it.

DEFENSE COUNSEL: That's all the questions I have.

The jury in this case heard testimony from the following defense witnesses: defendant; John Rowland, defendant's father; Adele Rowland, defendant's mother; and Iris Bryant, defendant's friend. All of these witnesses were either parents of or closely associated with defendant. Rhodes, a car salesman, was the only witness defendant tendered at trial not closely associated with defendant.

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Rhodes witnessed the victim's violent acts first hand. Rhodes's testimony would have provided the jury with the only evidence from a neutral source of the victim's violent character, a crucial element of defendant's claim of self-defense. The trial court erred in excluding Rhodes's testimony regarding the incident at the car dealership to show the victim's propensity for violent behavior. This error was prejudicial in light of defendant's assertion of self-defense, Rhodes being defendant's only neutral witness, and defendant's testimony regarding the car dealership incident possibly being viewed by the jury as self-serving.

D. Defendant's Testimony

[2] Defendant also argues the trial court erred in excluding defendant's testimony regarding an incident between the victim and defendant's former subordinate employee because it was admissible evidence of the victim's violent nature. We agree.

The following exchange occurred on direct examination of defendant:

Q: Okay. Did you have any problems with your work and Michael concerning your work at Wake Medical?

A: He had problems. He called quite a bit. He got into a verbal argument with one of my male employees.

Q: What was that over?

A: It was over me. He said that we were having an affair.

Q: What happened, or what was said, if you know?

A: I wasn't there. My employee paged me. I came back to the hospital, and he said he was very—

PROSECUTOR: Object as to what the employee said.

COURT: All right. Sustained.

Q: Did you talk to the employee in person or on the phone or—

A: In person.

Q: Without saying what he said, how did he act? What was his mental state?

PROSECUTOR: Objection

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COURT: Well, overruled as to what was in his mind. I'm sorry. Sustained as to what was in his mind.

....

Q: How did he appear to you?

A: He was quite anxious because Michael had told him he was going to shoot up his house.

PROSECUTOR: Objection. Move to strike.

COURT: All right. Sustained. Motion allowed.

Defendant preserved this argument for our review. North Carolina Rule of Evidence 103 provides in pertinent:

(a) Effect of erroneous ruling.—Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

....

(2) Offer of proof.—In case the ruling is one *excluding evidence*, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked. Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

N.C. Gen. Stat. § 8C-1, Rule 103(a)(2) (2005) (emphasis supplied).

An offer of proof is not necessary to preserve an issue for appellate review if the substance of the excluded testimony is apparent from the context within which the question was asked. *Id.*; *State v. Braxton*, 352 N.C. 158, 184, 531 S.E.2d 428, 443 (2000), *cert. denied*, 531 U.S. 1130, 148 L. Ed. 2d 797 (2001) (“Substance of the excluded testimony [must be] apparent from the context within which the question was asked.”). “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 he been permitted to testify.” *State v. Simpson*, 314 N.C. 359, 370, 334 S.E.2d 53, 60 (1985).

Here, the transcript clearly reveals the substance of the excluded testimony. Defendant testified that the victim told her former employee that he “was going to shoot up his house.” The court

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granted the State's motion to strike this testimony. Defendant was not required to make an offer of proof under Rule 103 because the substance of the excluded testimony was established and apparent.

Defendant did not argue in response to the State's motion and the trial court's ruling the specific grounds for admitting the testimony. However, the specific grounds were "apparent from the context." N.C. R. App. P. 10(b)(1) (2005). Defendant proceeded on a theory of self-defense in shooting the victim. She offered evidence throughout the trial of the victim's violent nature to show that her fear of the victim was reasonable. This testimony was clearly another example of the victim's violent nature to show the reasonableness of defendant's fear. The grounds under which defendant sought to have this evidence admitted are apparent in the record from the context of trial and the exchange. This issue was properly preserved under Rule 103(a)(2) of the North Carolina Rules of Evidence and Rule 10(b)(1) of the North Carolina Rules of Appellate Procedure.

Defendant's testimony that her employee told her that the victim threatened to "shoot up" his house should have been admitted as further evidence of the victim's violent character to show her fear of the victim was reasonable. *Winfrey*, 298 N.C. at 262, 258 S.E.2d at 347.

The State's argument that this evidence is inadmissible hearsay is without merit. Rule 803 sets forth exceptions to the hearsay rule. The Rule provides:

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

. . . .

(3) Then Existing Mental, Emotional, or Physical Condition.—A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health)

N.C. Gen. Stat. § 8C-1, Rule 803 (2005). The statement from the victim to defendant's former employee falls under this exception to the hearsay rule. The statement was a statement of the victim's plan or intent to engage in a future act. *See State v. McElrath*, 322 N.C. 1, 17, 366 S.E.2d 442, 451 (1988) (telephone message written by a neighbor from the victim to his roommate that the victim was traveling to North Carolina with the defendant was admissible under Rule 803(3) because it was a statement of the victim's "then-existing intent to do

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an act in the future”); *Braxton*, 352 N.C. at 190-91, 531 S.E.2d at 447 (“Moore’s statement to McCombs that he was going to approach defendant about straightening out the victim’s debt was admissible as evidence of Moore’s then-existing intent to engage in a future act.”).

The statement from defendant’s former employee to defendant is not hearsay and was not “offered in evidence to prove the truth of the matter asserted.” N.C. Gen. Stat. § 8C-1, Rule 801(c) (2005). The statement was offered by the defense as evidence of the victim’s violent character to show defendant’s “apprehension of death and bodily harm was reasonable.” *Winfrey*, 298 N.C. at 262, 258 S.E.2d at 347. The statement was not offered to show that the victim and defendant’s former employee had a confrontation where the victim actually threatened to kill defendant’s former employee. It was instead offered for the jury to determine whether defendant’s fear of the victim was reasonable under the circumstances. *See State v. Faucette*, 326 N.C. 676, 682-83, 392 S.E.2d 71, 74 (1990) (a murder victim’s statement to her son that she did not want the defendant to come to her house because he had failed to pay her child support was not hearsay because it was not offered to prove the truth of the matter asserted, but to show the victim’s “frustration and impatience with the defendant.”).

The trial court erred in excluding Rhodes’s testimony regarding the victim’s violent behavior at the car dealership and defendant’s testimony regarding the victim’s threat to defendant’s former employee that he was going to “shoot up” the employee’s house.

IV. Evidence of Defendant’s Prior Conduct

[3] Defendant asserts the trial court erred in admitting evidence that she once shot a dog and argues this evidence was irrelevant and prejudicial.

Defendant filed a pretrial motion to exclude the evidence of the incident in which she shot a dog. Defendant argued this evidence constitutes impermissible character evidence. The State argued the incident is relevant to demonstrate defendant’s ability to use a gun and the fact that she had used a gun in the past. The trial court denied defendant’s motion and allowed the evidence to be admitted.

Defendant straightforwardly admitted to shooting the victim with the pistol plainly visible upon the officers’ arrival at the scene. Whether or not defendant knew how to use a pistol was not contested.

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Defendant testified regarding the incident:

Q: And do you recall making a statement at the time that you shot at a dog?

A: Uh-huh.

Q: Tell the jury about that.

A: We had a dog named Rambo. We had raised him from a puppy with my daughter. One day the neighbor and her husband came over and we went for daily walk with our children. And I heard the truck when it pulled up. And then I heard screaming and hollering and I heard the dog growling. And when I opened the door, she was in the screen door and her husband had ran back to the truck. The dog was biting her. Chased him off [sic]. He went to chase the other neighbors next door. Randy got her home because he didn't know how bad the bites were, and I went around back to get him because he was still chasing everybody, trying to bite, and I shot him.

Q: You shot the dog?

A: Yes, sir.

Q: Did you mean to shoot to kill him?

A: Yes, I meant to put him down, yes.

Q: And did he go down?

A: Yeah, I didn't kill him though.

Defendant testified on redirect examination that the dog was alive after she shot and her husband, the victim, later shot and killed the dog. Defendant further testified that she shot the dog to protect other neighbors from being bitten. Defendant argues this testimony was irrelevant and prejudicial, and serves no purpose but to disparage her in the eyes of the jury.

Relevant evidence is evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2005). On the record before us, we fail to see how this evidence was relevant to any issue in the case. Whether defendant was knowledgeable about firearms or had experience shooting them does not make it more or less probable that she shot her husband in self-defense.

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Defendant admitted that she shot the victim with a pistol. Defendant is entitled to a new trial based on the trial court's exclusion of testimony of the victim's violent character. If the State seeks to establish the relevancy of defendant's shooting the dog upon any retrial, this evidence is equally relevant to show the victim also shot and killed the dog and the victim's knowledge and use of firearms and his ability to kill for the reasonableness of defendant's fear of the victim.

V. Conclusion

The trial court erred in excluding Rhodes's testimony of the victim's violent conduct at the car dealership and defendant's testimony regarding the victim's death threats to defendant's co-worker. The exclusion of this testimony prejudiced defendant's assertion of self-defense and her knowledge of the victim's violent character. We hold the exclusion of this evidence was preserved for appellate review and was prejudicial to defendant's assertion of self-defense.

On this record, we fail to see the relevance of evidence admitted over defendant's motion to excluded evidence that defendant had shot her dog. If relevance is established, it would appear equally relevant that the victim also shot and killed the dog. We reverse and remand for a new trial.

New trial.

Judge JACKSON concurs.

Judge GEER dissents by separate opinion.

GEER, Judge, dissenting.

Because I believe defendant received a trial free of prejudicial error, I respectfully dissent.

With respect to the exclusion of the testimony of Virgil Rhodes regarding the victim's damaging a car, I would hold that any error was harmless based upon my review of the record. First, defendant was allowed to testify fully regarding the incident, the victim's being charged in connection with the incident, and the effect of the incident on her. While defendant argues—and the majority agrees—that Rhodes would have provided the only evidence from a neutral source of the victim's violent nature, the car dealership incident was not

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seriously disputed by the State and defendant introduced extensive testimony from other witnesses regarding the victim's physically violent character. Neither defendant nor the majority opinion demonstrates, in light of the substantial evidence admitted of the victim's violence towards defendant, how the exclusion of the Rhodes testimony, regarding violence to a car, gives rise to "a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C. Gen. Stat. § 15A-1443(a) (2005).

Notably, at the time of the initial ruling regarding Rhodes, the trial court indicated to defense counsel that he could ask the court to reconsider the issue later in the trial. Nevertheless, even though the court ultimately allowed defendant to testify regarding the incident, counsel did not then ask the court to permit the testimony of Rhodes to corroborate defendant.

I would observe, in addition, that the trial court precluded the testimony of Rhodes because the conduct involved property damage and no threat to any person—a decision I believe to be consistent with Rule 404 of the Rules of Evidence. Rule 404(a)(2) allows "[e]vidence of a *pertinent* trait of character of the victim of the crime." (Emphasis added.) I believe that the trial court could properly determine that the victim's willingness to damage a car was not "pertinent" to whether defendant's apprehension of death or bodily harm was reasonable.

I also cannot agree with the majority's conclusion that the trial court erred in excluding defendant's testimony that one of her employees had told her that the victim threatened "to shoot up" the employee's house. The majority holds that this statement was admissible because it falls within the exception to the hearsay rule set out in N.C.R. Evid. Rule 803(3) and because it was not offered to prove the truth of the matter asserted. While this may be true, defendant did not argue these bases for admission at trial and has not argued them on appeal. *See* N.C.R. App. P. 10(b)(1) ("In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context.").

The majority's discussion of the offer of proof requirements in N.C.R. Evid. 103(a)(2) is beside the point. The issue is not whether the nature of the intended testimony was apparent from the record, but rather whether defendant's trial counsel sufficiently identified for

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the trial judge a basis under the Rules of Evidence for admitting the testimony. Once the State objected, defendant never argued to the trial court any basis at all for the admission of the testimony. Counsel simply stood silent in response to the State's objection. Silence does not comply with N.C.R. App. P. 10(b)(1).

Even if defendant had made some response at trial, the fact remains that he has not made any argument on appeal to address the State's hearsay contention. The basis for the majority opinion was not the subject of an assignment of error and cannot by any stretch be gleaned from defendant's appellate brief. Our Supreme Court has made plain that these arguments may not, therefore, form a basis for granting a new trial. *See 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."). Simply stated, the majority has created a basis for appeal for defendant.

Finally, I disagree with the majority opinion's holding regarding the admission of testimony that defendant shot a dog. I believe the majority has misunderstood the State's argument as to the evidence's relevance. The State was not focusing simply on whether defendant knew how to use a gun, but rather was arguing that because the victim knew that defendant could—and would—use a gun to kill, the victim would not have charged defendant while she was pointing a gun at him and had already fired once. The State argued in closing:

If we have any such thing as common sense, say she's going to stand there with a .38 and we know she knows how to use it. She's already shot a dog, said she intended to kill it. She's taken target practice. *He knows she knows how to use that gun, which is another important thing when he's standing over here. He knows she's just not some person scared and she doesn't know how to use that gun. He's seen her shoot and he know [sic] she carries it every day. She bought it and carried it in that book bag. He knows that she can use that gun.*

(Emphasis added.) Thus, the State used *the victim's knowledge* of the dog shooting to suggest that defendant's version of what occurred was not credible. I believe the testimony was admissible for this purpose: to suggest that the victim would not have charged defendant.

For the foregoing reasons, I dissent from the majority's decision to grant a new trial. I would hold that defendant received a trial free of prejudicial error.

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DUKE ENERGY CORPORATION, A NORTH CAROLINA CORPORATION, TAX IDENTIFICATION No. 56-0205520, PLAINTIFF v. WENDELL COREY MALCOLM AND CALLABRIDGE/GRANITE, LLC, DEFENDANTS

No. COA05-755

(Filed 20 June 2006)

1. Easements— consent judgment—landowners' placement of trees and structures—dominant tenant's removal right

Easement rights contained in a consent judgment entered by plaintiff electric power company and defendant landowners' predecessors in interest gave the power company the right to have trees and structures placed by the landowners in the right-of-way removed where the consent judgment granted the power company the right to clear the right-of-way and to keep it clear of any and all structures and trees, notwithstanding the consent judgment also stated that the predecessors in interest reserved all other rights not inconsistent with the easement rights granted to the power company, since the reserved rights are restricted by the enumerated rights granted to the dominant tenant in the consent judgment.

2. Appeal and Error— preservation of issues—failure to cite authority

Although defendants contend the trial court erred by granting injunctive relief that was inconsistent with the consent judgment, this assignment of error is dismissed because defendant's argument is not supported by relevant authority as required by N.C. R. App. P. 28(b)(6).

3. Injunctions— permission required before placing objects within right-of-way

The trial court erred by enjoining defendants from placing other structures, trees, fire hazards and other objects of any nature within the right-of-way without plaintiff's permission insofar as the judgment requires defendants to obtain plaintiff's permission before placing objects within the right-of-way.

4. Appeal and Error— preservation of issues—costs—premature argument

Although defendants contend the trial court erred by awarding plaintiff costs in this action, this argument is premature

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because the trial court has not yet entered a specific order providing the nature or amount of costs awarded to plaintiff.

5. Appeal and Error— preservation of issues—no merit

Defendants' remaining assignments of error have not been preserved for appeal or are without merit.

Judge ELMORE dissenting.

Appeal by defendants from judgment entered 14 December 2004 by Judge James E. Lanning in Mecklenburg County Superior Court. Heard in the Court of Appeals 11 January 2006.

Parker, Poe, Adams & Bernstein, LLP, by Irvin W. Hankins, III and John W. Francisco, for plaintiff-appellee.

Kilpatrick Stockton, LLP, by Noelle E. Wooten, for defendant-appellant Callabridge.

James E. Scarbrough, for defendant-appellant Malcolm.

LEVINSON, Judge.

Wendell Corey Malcolm and Callabridge/Granite, LLC (defendants) appeal from the trial court's entry of summary judgment in favor of plaintiff Duke Energy Corporation. We affirm in part and reverse in part.

The pertinent facts may be summarized as follows: Defendants own a 48 acre tract of land located at the intersection of State Highway 16 and Mount Holly-Huntersville Road in Mecklenburg County (the property). Plaintiff purchased a 199 foot-wide easement across the property from the defendants' predecessor in interest in 1977. The agreement containing the easement was subsequently set forth in a consent judgment on 25 August 1977. The consent judgment grants plaintiff, *inter alia*, "[t]he right for [Duke Energy] at any time to clear said strip and to keep said strip clear of any and all structures, trees, fire hazards and other objects of any nature." However, the consent judgment reserves to the defendants all other rights "not inconsistent with the rights therein contained to Duke Energy."

Callabridge purchased the property on 25 August 2000 subject to the plaintiff's easement. On 31 May 2002, Callabridge sold a portion of the land to defendant Wendell Corey Malcolm. Sometime before 24 July 2002, Callabridge developed the land into a shopping center com-

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plex and constructed a concrete and stone “Callabridge Landing” sign as well as a pole and single wire fence on the easement. Callabridge also planted several Crepe Myrtle trees within the dimensions of the easement.

Plaintiff objected to the placement of the trees and other structures on its easement and, as a result, filed the subject action. Plaintiff contends that the consent judgment containing its easement rights required that the land be clear of the encroachments that Callabridge placed within the dimensions of the easement. Therefore, plaintiff maintains, defendants must remove the encroachments and refrain from further placement of impermissible structures within the boundaries of its easement. Callabridge contends that the transfer to plaintiff constituted an easement, not a transfer in fee simple, and that as long as the trees and structures do not interfere with Duke’s ability to transmit electricity, it is permitted to utilize its land in a manner consistent with its reserved rights under the terms of the 1977 consent judgment.

The trial court entered summary judgment in favor of plaintiff on 14 December 2004, concluding that there was no genuine issue of material fact, reasoning that the language of the consent judgment granted plaintiff the unambiguous right to clear the right of way of any trees, structures, fire hazards and other objects of any nature. The trial court also concluded that the plaintiff’s right to clear applied to the encroachments at issue in the instant case. Defendants appeal.

[1] On appeal, defendants contend that the trial court erred in granting summary judgment for the plaintiff because there exist genuine issues of material fact. Specifically, the defendants contend that there exists a material factual dispute of whether defendant’s use of the land interfered with plaintiff’s rights under the easement. We disagree.

Under N.C. Gen. Stat. §1A-1, Rule 56(c) (2005), summary judgment is proper when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” Thus, “the standard of review on appeal from summary judgment is whether there is any genuine issue of material fact and whether the moving party is entitled to a judgment as a matter of law. Further, the evidence presented by the parties must be viewed in the light

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most favorable to the non-movant.” *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998) (citation omitted).

Consent judgments delineating easement rights are foremost contracts. See *Hemric v. Groce*, 154 N.C. App. 393, 397, 572 S.E.2d 254, 257 (2002) (“A consent judgment is a contract between the parties entered upon the record with the sanction of the trial court and is enforceable by means of an action for breach of contract[.]”). In interpreting a contract, our courts adhere to the following central principles:

“[T]he goal of construction is to arrive at the intent of the parties when the [contract] was [written]. Where a [contract] defines a term, that definition is to be used. If no definition is given, non-technical words are to be given their meaning in ordinary speech, unless the context clearly indicates another meaning was intended. The various terms of the [contract] are to be harmoniously construed, and if possible, every word and every provision is to be given effect. . . . [I]f the meaning of the [contract] is clear and only one reasonable interpretation exists, the courts must enforce the contract as written; they may not, under the guise of construing an ambiguous term, rewrite the contract or impose liabilities on the parties not bargained for and found therein.”

Gaston County Dyeing Machine Co. v. Northfield Ins. Co., 351 N.C. 293, 299-300, 524 S.E.2d 558, 563 (2000) (quoting *Woods v. Nationwide Mut. Ins. Co.*, 295 N.C. 500, 505-06, 246 S.E.2d 773, 777 (1978)).

The trial court’s determination of whether the language in a consent judgment is ambiguous is a question of law and therefore our review of that determination is *de novo*. *Bicket v. McLean Securities, Inc.*, 124 N.C. App. 548, 553, 478 S.E.2d 518, 521 (1996). “An ambiguity exists where the language of a contract is fairly and reasonably susceptible to either of the constructions asserted by the parties.” *Glover v. First Union National Bank*, 109 N.C. App. 451, 456, 428 S.E.2d 206, 209 (1993).

This Court in *Hanner v. Power Co.*, 34 N.C. App. 737, 737, 239 S.E.2d 594, 595 (1977), held that the enumerated right granted to the defendant “to keep said strip of land free and clear of any or all struc-

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tures, trees and other objects of any nature . . .” was unambiguous. In *Hanner*, plaintiffs owned a track of land that was servient to an easement held by the defendant. *Id.* In addition, the plaintiff had the reserved right to grow “such crops and maintain[] such fences as may not interfere with the use of said right of way by the Power Company[.]” *Id.* at 738, 239 S.E.2d at 595. After defendant removed trees that plaintiff had planted within its easement, the plaintiff filed suit against defendant for the alleged unauthorized cutting of the trees. *Id.* The trial court granted, and this Court later affirmed, summary judgment in favor of defendants. *Id.* at 738-39, 239 S.E.2d at 595. The *Hanner* Court held that, as a matter of law, such contractual language was unambiguous. *Id.* In so holding, the *Hanner* Court reasoned that plaintiff’s right to grow crops was specifically limited by the contractual provision that gave the defendant the express right to clear trees and other objects from its right of way. *Id.*

We next turn to an application of the foregoing principles to the instant case. The 1977 consent judgment between plaintiff and Dunn Development Corporation, predecessors in interest to defendants, awarded the following enumerated rights to the plaintiff:

The right to enter said strip of land . . . and the right, within the limits of said strip of land to erect, construct, reconstruct, replace, maintain and use towers, poles, wires, lines, cables, and all necessary and proper foundations, footings, crossarms and other appliances and fixtures for the purpose of transmitting electric power and for [Duke’s] communication purposes, together with a right of way on, along, and in all of the said strip of land; together with the right for [Duke] at any time to make relocations, changes, renewals, substitutions, and additions on or to said structures within said strip; the right for [Duke] at any time to clear said strip and keep said strip clear of any and all structures, trees, fire hazards and other objects of any nature[.] (emphasis added).

Duke also acquired the right to trim and cut trees outside of the easement that might endanger its equipment, as well as the right of ingress and egress. However, the easement reserved to defendants:

all other rights to said strip of land not inconsistent with the rights and easements herein contained, but [Callabridge] cannot: (1) construct streets, roads, water lines . . . across said strip at an angle of less than forty-five (45) degrees . . . nor closer than 20 feet to any structures placed upon the right of way by [Duke] . . .

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(2) maintain fences that are not safely removed from [Duke's] structures . . . (3) dig wells on said strip; (4) place . . . underground storage tanks on said strip; (5) use said strip for burial grounds; (6) interfere with or endanger the construction, operation, or maintenance of [Duke's] facilities. (emphasis added).

Here, we are guided by the principles articulated in *Hanner*. The defendant's reserved power to retain all other rights "not inconsistent with the rights therein granted" is limited by plaintiff's "right . . . at any time to clear said strip and to keep said strip clear of any and all structures, trees, fire hazards and other objects of any nature." Whether the general reserved rights under the consent judgment are narrowly defined as in *Hanner*, or are more broadly etched as in the instant case, the reserved rights are restricted by the enumerated rights granted to the dominant tenant in accordance with the easement.

Defendants nevertheless argue that they are free to make use of their land so long as the use does not interfere with plaintiff's transmission of electricity pursuant to the reasoning set forth in *Power Co. v. Rogers*, 271 N.C. 318, 156 S.E.2d 244 (1967), and *Light Co. v. Bowman*, 229 N.C. 682, 51 S.E.2d 191 (1949). We disagree.

The gravamen of the line of cases cited by the defendants, which involved condemnation actions, is that:

the general rule in regard to land condemned for use for electric power transmission lines seems to be that the landowner has the right to make use of the strip of land condemned in any manner which does not conflict with the rights of the Power Company, and which is not inconsistent with the use of the land for the purposes for which condemnation was allowed, and which does not interfere with the free exercise of the easement acquired. (emphasis added).

Light Co., 229 N.C. at 687, 51 S.E.2d at 195.

In other words, the servient tenant may make any use of the land so long as the use (1) does not conflict with the power company's rights, and (2) is consistent with the purpose for which the easement was granted, and (3) does not interfere with the dominant tenant's free exercise of the easement. These requirements are conjunctive, and the landowner must meet all three conditions in order to use the land subject to an easement in the manner it chooses.

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In the instant case, the defendants' use of the land, *i.e.* the planting of trees and placement of other structures within the dimensions of the easement, is necessarily inconsistent with the enumerated right of the power company to keep the land clear of such trees and structures. It would be nonsensical to apply the consent judgment in a way that would permit defendants to plant trees and place other structures on the plaintiff's right of way, and simultaneously read the same contractual language to allow plaintiff to clear these same objects.

Defendants also argue that because planting trees, constructing monument signs and erecting fences are not mentioned in the prohibitions in the consent judgment that apply to them, they are allowed to leave the trees and structures in place. *See Power Co.*, 271 N.C. at 320, 156 S.E.2d at 248 (subject to the prohibitions specifically enumerated in the petition, the land owner may make any use of the land which will not interfere with the power company's transmission of electricity). We disagree.

The listed prohibitions in the consent judgment cannot fairly be seen as an exhaustive list of impermissible actions for defendants to undertake. Rather, while the initial reserved rights provision, which reserves all other rights "[n]ot inconsistent with the rights and easements therein contained" describes the defendants' retained bundle of rights, it simultaneously serves as a limitation of their rights. Stated differently, the reserved rights provision specifically prohibits the defendants from taking any action which is incompatible with the express right of the plaintiff to "at any time to clear said strip and to keep said strip clear of any and all structures, trees, fire hazards and other objects of any nature."

The trial court properly concluded that the language of the consent judgment was unambiguous and that plaintiff was entitled to have the trees and structures that defendants placed on its easement removed because plaintiff was exercising its enumerated right pursuant to the consent judgment.

[2] Defendants next contend that the trial court erred in granting injunctive relief that is inconsistent with the consent judgment. In its 14 December 2004 judgment, the trial court ordered the following injunctive relief:

22. The Defendant Callabridge is hereby ordered to completely remove the Encroachments from the Right-of-Way across the

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Property within thirty (30) days from the date of entry of this Judgment.

23. The Defendant Malcolm is hereby ordered to completely remove the Stone Monument Sign from the Right-of-Way across the Outparcel within thirty (30) days from the date of entry of this Judgment.

24. The Defendants, and their respective agents, members, officers, directors, shareholders and employees, are hereby enjoined from placing any other structures, trees, fire hazards or objects of any nature within the Right-of-Way without Duke Energy's permission and from otherwise violating the Consent Judgment, so long as Duke Energy continues to use the Right-of-Way for the purpose as set forth in the Consent Judgment.

[3] On appeal, defendants contend that the trial court erred in ordering the defendants to remove the encroachments from the right of way. However, because defendant's argument in this regard is not supported by relevant authorities, we do not address it. *See* N.C.R. App. P. 28(b)(6) (providing that assignments of error not set out in the appellant's brief, or in support of which no authority is cited will be taken as abandoned). In addition, defendants argue that the trial court erred by enjoining defendants from "placing other structures, trees, fire hazards and other objects of any nature within the Right-of-Way without plaintiff's permission[.]" We agree with defendants' contention insofar as the judgment requires defendants to obtain plaintiff's permission before placing objects within the right-of-way, and we reverse to this extent.

[4] The defendants next contend that the trial court erred in awarding the plaintiff costs in this action. However, this argument is premature because the trial court has not yet entered a specific order providing the nature or amount of costs awarded to plaintiff.

[5] We have evaluated defendants' remaining assignments of error and conclude that they have not been preserved for appeal or are without merit.

Affirmed in part, reversed in part.

Judge McCullough concurs.

Judge ELMORE dissents in a separate opinion.

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ELMORE, Judge dissenting.

In the narrowest of terms, the disagreement between these parties is how to interpret the phrase: “Respondent shall have all other rights to said strip of land not inconsistent with the rights and easements herein contained[.]” Broadly speaking, this appeal highlights the tension between contract law and property law. While I agree that consent judgments are *foremost* contracts, I do not agree that interpreting one dealing with property rights arising from a utility easement means we should ignore general concepts of property law known to the parties at the time of contracting and instead narrowly favor one clause of the contract over another.

Duke Energy Corporation (Duke) holds title to a utility easement across land owned and developed by Wendell Corey Malcolm and Callabridge/Granite L.L.C. (Callabridge) located on Highway 16 at the intersection of State Highway 16 and Mount-Holly Huntersville Road in Charlotte. Callabridge developed the land into a shopping center complex and constructed a concrete and stone “Callabridge Landing” sign and “pole and single wire fence” on the easement. The sign is about four feet high by thirty feet long and is located approximately sixty feet away from the nearest piece of Duke equipment. The fence, Callabridge contends, is necessary for the property to comply with transportation regulations. Callabridge also planted several trees on the easement. Duke contends all these items violate its easement right to keep the land clear of any structures, trees, and objects.

The majority isolates this easement right and determines that it is unambiguous. Thus, when it arrives at the phrase which leaves the landowner with “all other rights to said strip of land not inconsistent with” Duke’s rights, the majority concludes “the reserved rights are restricted by the enumerated rights granted to the dominant tenant in accordance with the easement.” As such, the majority holds that “the defendant’s use of the land, *i.e.* the planting of trees and placement of other structures within the dimensions of the easement, is necessarily inconsistent with the enumerated right of the power company to keep the land clear of such trees and structures.” Further, the majority discounts the latter half of the easement agreement—the enumerated prohibitions on the landowner’s exercise of rights—that I believe refines the understanding and intent among the parties. “[T]he reserved rights provision,” the majority states, “specifically prohibits the defendants from taking any action which is incompatible with the express right of the plaintiff to ‘[a]t any time to clear said strip and to

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keep said strip clear of any and all structures, trees, fire hazards and other objects of any nature.’ ”

This flawed analysis leads to only one misplaced conclusion: since Duke has the right to clear the strip and keep it clear at all times, there is no limitation or review of its right to effectively occupy, or otherwise exclude occupancy, of the entire surface of the easement.¹ Much to the contrary, however, Duke’s “right to clear” is intertwined with its ability to transmit electricity and protect its equipment, such that if Callabridge’s use of the land does not materially interfere with Duke’s purpose in maintaining the easement, then it should be permitted. This understanding is conveyed by reviewing the easement as a whole, not its isolated parts.

The controlling purpose of the court in construing a contract is to ascertain the intention of the parties as of the time the contract was made, and to do this consideration must be given to the purpose to be accomplished, the subject-matter of the contract, and the situation of the parties. . . . The intention of the parties is to be gathered from the entire instrument and not from detached portions. . . . An excerpt from a contract must be interpreted in context with the rest of the agreement. . . . When the language of a contract is clear and unambiguous, effect must be given to its terms, and the court, under the guise of constructions, cannot reject what the parties inserted or insert what the parties elected to omit.

Weyerhaeuser Co. v. Light Co., 257 N.C. 717, 719, 127 S.E.2d 539, 541 (1962) (internal citations omitted).

The 1977 consent judgment between Duke Power Company and Dunn Development Corporation, predecessors in interest to Duke and Callabridge respectively, stated:

There is hereby condemned and granted from the respondent, Dunn Development Corporation, to Duke Power Company, its successors and assigns, and Duke Power Company is declared to be the owner of, the property interest which is the subject of this proceeding: the easement rights being described in Exhibit “A”, the property and strip easement being described in Exhibit “B”, and a plat of the property and strip easement being shown on

1. The majority itself, although holding as such, is apparently nonetheless troubled by it. The Court holds that the trial court erred in allowing Duke to have a permanent injunction restricting Callabridge from placing any structure whatsoever on the easement. But that result is precisely what the Court’s holding provides to Duke.

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Exhibit “C”, all of such exhibits being attached hereto and incorporated as a part of this judgment.

Exhibit “A” memorialized the fact that the parties agreed to give the following rights to Duke Power.

The right to enter said strip of land . . . and the right, within the limits of said strip of land to erect, construct, reconstruct, replace, maintain and use towers, poles, wires, lines, cables, and all necessary and proper foundations, footings, crossarms and other appliances and fixtures for the purpose of transmitting electric power and for [Duke’s] communication purposes, together with a right of way on, along, and in all of the said strip of land; together with the right for [Duke] at any time to make relocations, changes, renewals, substitutions, and additions on or to said structures within said strip; the right for [Duke] at any time to clear said strip and keep said strip clear of any and all structures, trees, fire hazards and other objects of any nature[.]

Duke also acquired the right to trim and cut trees outside of the easement that might endanger its equipment, as well as the right of ingress and egress from the easement.

None of Duke’s acquired rights are absolute, however. Indeed, they are tempered by those rights reserved by Callabridge, the landowner.

[Callabridge] shall have all other rights to said strip of land not inconsistent with the rights and easements herein contained, but [Callabridge] cannot: (1) construct streets, roads, water lines or sewer lines across said strip at an angle of less than forty-five (45) degrees . . . nor closer than 20 feet to any structures placed upon the right of way by [Duke] . . . (2) maintain fences that are not safely removed from [Duke’s] structures . . . (3) dig wells on said strip; (4) place . . . underground storage tanks on said strip; (5) use said strip for burial grounds; (6) interfere with or endanger the construction, operation, or maintenance of [Duke’s] facilities.

The judgment at issue did indeed give Duke the right to clear “structures, trees, fire hazards and other objects of any nature” and keep the easement clear. And at first blush, Duke’s argument that Callabridge could use the land in any manner that did not involve placing a structure or object on the land seems valid, albeit severely

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limiting. But to look at this part of the easement in isolation, giving it greater weight to the exclusion of other parts, would be incorrect. *Weyerhaeuser Co.*, 257 N.C. at 719, 127 S.E.2d at 541.

Callabridge's retained right to use the strip of land is subject to six specifically enumerated prohibitions; five of the six restrict Callabridge from placing structures or objects on the easement, such as streets, fences, and underground storage tanks. Implicitly then, if Duke's "right to clear" were as broad and definite as it contends, these enumerated prohibitions that curtail Callabridge's use of the easement would be superfluous. For example, Duke maintains the fence placed by Callabridge must be removed because it is an object on the easement, not because the fence may not be "safely removed" from its equipment—a specific prohibition on Callabridge's rights. Duke ignores the prohibitions or otherwise minimizes their influence on the parties' intent in the easement agreement. This type of imbalanced interpretation is contrary to our rules of construction and would actually defeat the parties' intent.

A contract must be construed as a whole, and the intention of the parties is to be collected from the entire instrument and not from detached portions, it being necessary to consider all of its parts in order to determine the meaning of any particular part as well as of the whole. Individual clauses in an agreement and particular words must be considered in connection with the rest of the agreement, and *all parts of the writing, and every word in it, will, if possible, be given effect.*

Robbins v. Trading Post, 253 N.C. 474, 477, 117 S.E.2d 438, 440-41 (1960) (emphasis added) (internal quotation omitted).

Throughout this litigation one question has gone unanswered, and is the gravamen of the case: what rights does Callabridge have to its land encumbered by the easement? Duke's answer is that the rights retained by Callabridge, whatever those may be, cannot involve placing any structure or object of any nature on the easement. Callabridge responds that it has the right to use the easement in any manner that does not interfere with Duke's use. I agree with the majority that the "right to clear" within the easement is unambiguous; however, that phrase's effect on the balance of rights within the easement as a whole is where I disagree. The fact that the landowner's retained rights are couched in terminology that provides the maximum allowable breadth when dealing with a utility easement makes me hesitant to restrict them unnecessarily.

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To me, the parties' respective rights are better focused by viewing the whole contract through the lens of our case law regarding easements. At the summary judgment hearing and on appeal, Duke argues interpretation of this contract is controlled by *Hanner v. Power Co.*, 34 N.C. App. 737, 239 S.E.2d 594 (1977), and Callabridge argues that *Power Company v. Rogers*, 271 N.C. 318, 156 S.E.2d 244 (1967), controls. These cases do involve interpretation of the contract rights between an easement holder and a landowner, but to properly resolve this issue, one must look further than these two cases.

In *Light Company v. Bowman*, 229 N.C. 682, 51 S.E.2d 191 (1949), our Supreme Court addressed the rights of a landowner that had constructed a large building on an easement granted to the utility company. The power company had obtained an easement by consent judgment that provided it with the right to construct and maintain power lines across defendant's land. The power company also had the right to clear trees or objects from in and around the easement that might fall on the electrical wires. Notably the power company limited its rights by stating "except for the purpose aforesaid, [which was the transmission of electricity and phones] petitioner shall not interfere with the rights of the defendants[.]" *Id.* at 684, 51 S.E.2d at 193. Thus, the landowner retained the right to use the land within the easement "for any and all purposes not inconsistent with said easement of petitioner, its successors and assigns." *Id.* Specifically enumerated as a valid use was that "defendants and their heirs and assigns shall have the right and privilege to use a portion of the land condemned in this proceeding for agricultural purposes when not necessary for the use of the plaintiff." *Id.*

The power company had requested jury instructions that asked the jury to determine whether the building's location and size was a "use of the land inconsistent with the easement." *Id.* at 686, 51 S.E.2d at 194. The Supreme Court agreed that instruction should have been given.

To draw a definite line between the reciprocal and oftentimes overlapping rights and obligations of the owners of the dominant and servient tenements in an easement is not always simple. But the general rule in regard to land condemned for use for electric power transmission lines seems to be that the landowner has the right to make use of the strip of land condemned in any manner which does not conflict with the rights of the Power Company, and which is not inconsistent with the use of the land for the pur-

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poses for which condemnation was allowed, and which does not interfere with the free exercise of the easement acquired.

Id. at 687, 51 S.E.2d at 195 (citations omitted). Evaluating the competing interests, however, the Court stated it would be an “unwise precedent” to leave a power company without remedy to prevent construction or otherwise remove a “permanent building of the size, height, and dimensions shown.” *Id.* at 690, 51 S.E.2d at 197. As such, the Court held that where

the electric power company has erected steel towers and strung therefrom its wires carrying powerful electric current over and upon such strip of land for the purposes . . . declared, the servient owner may not be permitted, against its protest and over its objection, to erect and maintain a large permanent building, covering almost the entire width of the right of way and extending upward within a few feet of the power charged wires, and that if these facts are properly made to appear from the evidence, this would constitute a use by the landowner inconsistent with the easement and an encroachment on the rights acquired.

Id. at 689, 51 S.E.2d at 196.

In *United States v. Sea Gate, Inc.*, 397 F. Supp. 1351 (D.N.C. 1975), the federal district court summarized *Bowman* and stated the general rule regarding a landowner’s use of an easement hinges on whether that use “obstructs or materially impairs the easement holder’s use and enjoyment of his rights under the easement.” *Id.* at 1358. A material impairment can be any use that generates an inconvenience, creates a safety hazard, or increases the cost of the easement holder’s exercise of their rights. *Id.*; see also 1 Patrick Hetrick & James McLaughlin, Jr., *Webster’s Real Estate Law in North Carolina* § 15-23 (5th ed. 1999) (adopting general rule). Accordingly, the court in *Sea Gate* found that unchecked home construction within an easement owned by the Government on either side of the Atlantic Intercoastal Waterway created a material impairment to the rights given to the Government under the easement. But, the Court held that building homes only on one side of the waterway, and in further specified areas, would not materially impair the rights of the easement holder and therefore would be allowed. *Id.* at 1359.

The Court today dismisses the general rule of material impairment on the grounds that the parties’ rights expressed in the consent judgment are unambiguous; in other words, the parties intended to contract against that general rule. As such, there is no room for appli-

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cation of general principles, only contractual interpretation. However, the overall language of this consent judgment expresses a balance of rights wholly consistent with the general rule.

In *Rogers* the Supreme Court reviewed an easement remarkably similar to the easement in dispute here, and assessed the parties' rights under the general rule. The consent judgment between the parties there allowed the power company to construct and maintain electric transmission lines over the land as well as "the right to keep the right-of-way clear of all structures, trees, fire hazards, and other natural objects of any nature[.]" *Rogers*, 271 N.C. at 318, 156 S.E.2d at 245. These rights acquired by the power company were limited by the retained rights of the landowner, which included "all other rights to said strip of land not inconsistent with the rights and prohibitions herein contained[.]" *Id.* at 319, 156 S.E.2d at 246.

The *Rogers* court determined that the trial court erred by instructing the jury that the easement's value was to be calculated by determining the condemned land's full value, as if taken in fee.

Petitioner does not acquire the right to occupy the surface of the 0.93-acre right-of-way to the *total* exclusion of respondents. It is condemning only an easement; respondents retain the fee in the land. **Subject to the prohibitions specifically enumerated in the petition, they may make any use of the surface of the strip which will not interfere with petitioner's transmission of electricity.** *Carolina Power and Light Co. v. Bowman*, 229 N.C. 682, 51 S.E.2d 191 [(1949)]. Necessarily, that use will be limited; but it cannot be said that the right to use it and to traverse it freely has no value to them.

Id. at 320, 156 S.E.2d at 247 (italicized emphasis in original, bold emphasis added). The Court stated that the trial court instructed the jury as if the easement granted to the power company had been the right to build a road or railroad "in which the bare fee remaining in the landowner, for all practical purposes, has no value to him and the value of the easement is virtually the value of the land it embraces." *Id.* at 321, 156 S.E.2d at 247.

This general rule—that interference is the guiding principle in determining a landowner's use of a power company's easement—expressed in *Bowman*, *Sea Gate*, and *Rogers* has not been materially modified over time. See *Falkson v. Clayton Land Corp.*, 174 N.C. App. 616, 617, 621 S.E.2d 215, 216-17 (2005) (citing *Bowman* as gen-

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eral rule). Thus, I see no reason to view Duke and Callabridge's easement any differently than the Supreme Court saw an almost identical balance of rights nearly ten years before these parties' predecessors entered into their markedly similar agreement. Duke's right to "at any time to clear said strip and keep said strip clear of any and all structures, trees, fire hazards and other objects of any nature," is not materially different than the power company's right in *Rogers* "to keep the right-of-way clear of all structures, trees, fire hazards, and other natural objects of any nature[.]" *Rogers*, 271 N.C. at 318, 156 S.E.2d at 245. And both Callabridge and the landowner in *Rogers* retained the substantial right to "all other rights to said strip of land not inconsistent with the rights and prohibitions herein contained[.]" *Id.* at 319, 156 S.E.2d at 246. Thus, to read Duke's right to keep the strip clear of any structures as the right to exclusively and continually possess the surface would extend to Duke a right greater than Callabridge's predecessors in interest agreed to. In opposition to the balance struck by the *Bowman* court, the Court today sets an unwise precedent that leaves landowners with no remedy against an overzealous exercise of disjunctive easement rights by the dominant tenement. The appropriate balance, when called for in agreements such as the one *sub judice*, is whether the landowner's use of the easement materially impairs the set of rights given to the utility company.

Hanner did not need to apply a general rule to strike the appropriate balance of rights between the parties because, unlike *Rogers* and here, the parties unambiguously agreed within the contract that the landowners retained rights were severely limited. Specifically included in the easement rights conveyed to the power company was indeed the right "to keep said strip of land free and clear of any or all structures, trees and other objects of any nature except those placed in or upon same by the Power Company[.]" *Hanner*, 34 N.C. App. at 737, 239 S.E.2d at 595. Importantly, however, the specific rights retained by the landowner were not all those inconsistent with the power company's use of the easement, but instead "that the grantor(s) may use said strip of land for growing such crops and maintaining such fences as may not interfere with the use of said right of way by the Power Company for the purposes hereinabove [sic] mentioned." *Id.* at 738, 239 S.E.2d at 595. Thus the landowners had to take the nearly indefensible position that their trees were "crops."²

2. The *Hanner* court did not hold that the power company's right to clear was unambiguous, as a matter of law, and controls in every circumstance; rather, the *Hanner* court held that "crops," as a matter of law, was unambiguous.

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The contract specifically gave defendant the right to clear trees from the right-of-way, and plaintiffs' right to grow "crops" was specifically limited by this provision. By the terms of the contract, defendant did not, by agreeing at various times to allow trees to remain, waive its right as stated in the contract.

Id. at 738-39, 239 S.E.2d at 595. The Court found the appropriate intent of the parties by looking no further than the contract's language; the landowner had not reserved all rights not inconsistent with the easement holder's rights, but merely the right to grow crops. Accordingly, *Hanner* is not applicable here.

Application of these principles to the agreement at bar fail to support a judgment in favor of Duke as a matter of law. By viewing the right to clear the land in context of the whole agreement, and our case law, the balance of rights the parties intended is consistent with Callabridge's assessment. Thus, I would reverse the trial court's order of summary judgment in favor of Duke. Moreover, since neither party disputes the fact that the current objects do *not* create a safety hazard, generate an inconvenience, or increase the cost to Duke of exercising its rights under the easement,³ then I would hold the trial court erred by not granting summary judgment in favor of Callabridge.

STATE OF NORTH CAROLINA v. RICHARD LANE BRIGMAN

No. COA05-712

(Filed 20 June 2006)

1. Evidence— hearsay—nontestimonial—residual hearsay exception

The trial court did not abuse its discretion in a multiple first-degree sex offense and multiple taking indecent liberties with a minor case by admitting the children's hearsay statements to their foster parents and to medical personnel, because: (1) defendant concedes that the statements made to the children's foster parents were not testimonial, and therefore, did not violate the Confrontation Clause; (2) the children's statements to their foster

³ Callabridge concedes that if the current objects ever do materially interfere with Duke's rights to transmit electricity, Duke has the authority under the consent judgment to immediately remove them.

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parents were admissible under the residual hearsay exception when the children testified they had told the foster parents about things defendant had done but did not remember what they told the foster parents, the statements were more probative on the points for which they were offered than any other evidence the State could produce through reasonable efforts at the time, the State gave proper notice of its intent to offer the statements, the children's statements possess equivalent circumstantial guarantees of trustworthiness, and it cannot be said the trial court's findings and conclusions were manifestly unsupported by reason or were so arbitrary that they could not have been the result of a reasoned decision; and (3) Child 3's statements to a doctor (that defendant put his hand in the child's bottom, that it hurt, and that defendant touched the two other children in the same way) were not testimonial and defendant's right to confrontation was not violated when it cannot be concluded that a reasonable child under three years of age would know or should know that his statements might later be used at trial.

2. Evidence— expert testimony—sexual abuse—credibility—posttraumatic stress disorder—plain error analysis

Although the trial court erred in a multiple first-degree sex offense and multiple taking indecent liberties with a minor case by admitting certain statements made by two expert witnesses including that the children suffered sexual abuse by defendant, concerning Child 3's credibility, and regarding the children's symptoms of posttraumatic stress disorder, it did not amount to plain error because it cannot be concluded that there was a reasonable possibility that a different result would have been reached by the jury when the evidence against defendant was overwhelming.

3. Constitutional Law— right to unanimous jury verdict

The trial court did not err or commit plain error in a multiple first-degree sex offense and multiple taking indecent liberties with a minor case by failing to require the jury to be unanimous as to the actus reus for each charge, because: (1) the risk of a nonunanimous verdict does not arise even if the jury considered a greater number of incidents than charged in the indictments because, while one juror might have found some incidents of misconduct and another juror might have found different incidents of misconduct, the jury as a whole found that improper sexual conduct occurred; and (2) the jury was instructed on all issues

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including unanimity and separate verdict sheets were submitted to the jury for each charge.

4. Discovery— documents—review of records submitted under seal

The trial court did not err in a multiple first-degree sex offense and multiple taking indecent liberties with a minor case by failing to require the State to provide certain documents to defendant prior to trial, because upon careful review of the records submitted under seal, the Court of Appeals did not find any exculpatory evidence that would entitle defendant to a new trial.

5. Appeal and Error— motion for appropriate relief—recantation of witness's testimony

Defendant's motion for appropriate relief must be remanded based upon the alleged recantation of the testimony of defendant's wife, because the Court of Appeals cannot determine the veracity of the witness's testimony, nor can it discern whether there is a reasonable possibility that a different result would have been reached at trial had the witness's testimony at trial been different or nonexistent.

6. Appeal and Error— amended motion for appropriate relief—dismissal without prejudice

Defendant's amended motion for appropriate relief alleging new grounds including ineffective assistance of counsel is dismissed without prejudice to defendant to file a new motion for appropriate relief in the superior court, because this motion did not amend the previous motion nor was it timely filed.

Appeal by defendant from judgments entered 15 July 2004 by Judge W. Erwin Spainhour in Rowan County Superior Court. Heard in the Court of Appeals 27 March 2006.

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

Miles & Montgomery, by Mark Montgomery, for the defendant.

MARTIN, Chief Judge.

Defendant was convicted by a jury of eighteen counts of first degree sex offense and twenty-seven counts of taking indecent

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liberties with a minor. The convictions were consolidated into five judgments, for which he received two sentences of 339 months to 416 months imprisonment and three sentences of twenty-five to thirty months imprisonment, all to be served consecutively. Defendant appeals.

The State presented evidence at trial tending to show that on 15 April 2002, the Rockwell Police Department received a call from defendant's neighbor regarding three children who were walking down the street towards Highway 152. Hugh W. Bost, Jr., Chief of Police for the town of Rockwell, responded to the call and located the three children.¹ They were all boys of pre-school or kindergarten age. The youngest of the three was not wearing any clothes, and Chief Bost smelled what he believed to be feces on his legs. The older two were "haphazardly clothed and dirty." One of the children told Chief Bost where they lived, and when he took them to the residence, Kimberly Brigman, defendant's wife and the mother of all three children, answered the door. She was not aware the children had left the house. At that time, Chief Bost returned the children to Mrs. Brigman.

Chief Bost reported the incident to the Rowan County Department of Social Services (DSS). Marcus Landy, a DSS investigator/case manager with Child Protective Services, went to defendant's residence later that night to investigate the home. When he arrived, he noted the children were extremely dirty with black feet and dirty palms. They had "feces down their legs where they had used the bathroom on themselves." The youngest child was "soaking wet" with urine. Mr. Landy noticed the entire home smelled like urine, and Kimberly Brigman told him the children used the bathroom in the corners of the house. Mr. Landy also found moldy food in the kitchen and noticed that the refrigerator was dirty. He believed it was in the children's best interest to be taken into DSS custody immediately, and they were placed with foster parents that night.

Foster parents Tammy and Michael McClarty took in the older two boys, Child 1 and Child 2, who were four and five years old respectively. Tammy McClarty testified that over the next few months, both boys, but particularly Child 2, had numerous bowel movements in their pants. On or around 12 June 2002, Mrs. McClarty

1. In order to preserve confidentiality with respect to the identities of the three child victims, we will refer to them throughout this opinion as Child 1, Child 2, and Child 3.

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heard Child 2 in another room screaming, "Lick me, lick me." When she went to see what they were doing, she observed them on the couch and "[Child 2] was laying on his back and [Child 1] was laying on top of him, and [Child 2] had [Child 1] by his shoulders and he was face to face and he was screaming, 'Lick me, lick me.'" She asked the boys what they were doing, and Child 2 said they were playing "puppy." She separated the boys on the couch, and went to tell her husband she could not help with dinner at the moment. When she returned, "[Child 1] was laying on his back, and [Child 2] was laying next to him and had his hands between [Child 1's] legs." She again asked what they were doing, and they said they were playing the "picture game." The boys said the picture game was when defendant and their mother would take pictures of them. The boys demonstrated sexual poses they would do for the pictures and said they were not wearing any clothes when the pictures were taken.

The boys also described a "licking" game to Mrs. McClarty. She testified Child 2 told her that in this game, "they would lick each other's naked butts and naked weenies." He said defendant and their mother were both present when they played, as well as their youngest brother, Child 3, and that defendant "was the winner so he got to lick everyone's naked butts and naked weenies." Child 2 said he was also a winner so he got to "lick his mommy's butt. . . . and [Child 1's] too." Child 1 at first denied licking anyone, but then admitted to licking "Mommy's butt." Child 2 stated that Child 3 also "licked the weenie." When Mrs. McClarty questioned them on what they meant by "weenie," Child 2 "pointed to his crotch area and said, 'this weenie.'" Mrs. McClarty recorded this conversation on a tape recorder, then later that night typed out notes from the recording. She reported the conversation to DSS and gave her notes to the boys' social worker. Two attempts were made to interview the boys in the next few days, but they would not talk to the interviewers. Mrs. McClarty also took the boys to the Northeast Medical Center for medical examinations.

Child 2 was adopted; his adoptive mother testified at trial that when Child 2 first came into her home in July of 2002, he had "severe night traumas" four to six times a night, numerous temper tantrums, and "[h]e continuously soiled his pants." Over time, his behavior, sleep, and bowel control improved greatly. However, when he was in the courtroom for defendant's trial, "he wet his pants." Since that day, according to his adoptive mother, he had "continued to wet and soil his pants," he was "having tantrums that he hadn't had in several months," and he did not want to eat or sleep.

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Child 3 was two years old when he was placed in DSS custody in April of 2002. He went to the home of foster parents, who also took in Child 1 in July of 2002. The foster mother testified that one night as she was preparing to give Child 3 a bath, he took a set of plastic baby keys and “shove[d] one of them up into his rectum.” He also “took his index finger and stuck it up in his bottom.” She testified that Child 3 said “Kim put keys in me. Kim did it. Kim did it.” About a week later, Child 3 again said that Kim put keys and a finger in his bottom. On another occasion, Child 3 also “rub[bed] his private part on [the] couch and excited himself” so that he urinated. The foster mother also testified that Child 1 told her defendant “messed with his weenie all the time. . . . [and] that Richard pulled pinched, rubbed, and licked his weenie.” Child 1 told her defendant “put his weenie in [Child 1’s] mouth [and] this made him choke and sometimes throw up.” Child 1 said “he had to swallow white stuff that looked like milk.” Since the trial began, Child 1 and Child 3 have both had nightmares every night. Child 1 woke up screaming “Richard, Richard, please do not hurt me.” Child 3 said he dreamed about “Kim hurting [Child 1] and Richard hurting [Child 2].” Upon seeing defendant in the courtroom at trial, Child 1 became very angry, and Child 3 told his foster mother he “did not like seeing Richard because Richard was bad.”

The boys’ foster father testified that Child 3 told him “Kim and Richard” bit all three boys on their “weenie[s].” Child 3 also said defendant put his “weenie” in the child’s mouth, as well as in his brothers’ and Kim’s mouths. The foster father also found Child 3 masturbating one day, and the child told him defendant had “[p]layed with me [sic] weenie.” Child 1 and Child 3 both told the foster father defendant made them take their clothes off and watch pornography. They also described an occasion where defendant urinated into a cup and the whole family drank it. They also had to “drink pee from his weenie” and “sometimes it was white.” Child 1 described one of his nightmares to the foster father in which “Kim had my weenie in her mouth.” Child 1 said this had really happened to him, as well as to the other boys and to defendant. When the foster father asked what defendant was doing in that dream, Child 1 said he was “hitting [his butt] inside and outside with a stick.” The foster father asked if this was something that had really happened, and Child 1 said yes. Child 1 had numerous nightmares involving defendant and Kim hurting him.

Kimberly Brigman testified at trial and described the sexual abuse of the three children. She said she first suspected the abuse

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when Child 2 requested a bedtime story defendant had told him “about a little girl and her father, about them kissing and touching their private parts.” When she confronted defendant about the story, he “got ballistic.” Some time later, she got up in the middle of the night and went to the room where Child 1 and Child 2 slept. Defendant was in the room with the boys, who were naked, and defendant was telling them to touch each other and pose in sexually suggestive positions. When defendant saw her, he forced her into the room and told her if she would be quiet, no one would get hurt. She then witnessed defendant make Child 2 touch defendant’s erect penis and defendant ejaculate onto Child 2’s stomach. She testified Child 2 said “Mama, don’t cry. It’s okay. This way he won’t hurt us.” She testified she did not leave defendant because she was afraid of him; she said he had a very violent side and kept a gun in their bedroom.

Kimberly Brigman testified that “[a]fter that night, [the abuse] started getting more in depth as far as [defendant] trying to penetrate the boys, more so with [Child 2].” She stated defendant would penetrate the boys in “their behinds” with fingers, toys, and his penis. Defendant once forced her to hold Child 2 down while defendant penetrated him with a finger. She also witnessed defendant perform oral sex on the boys and have the boys perform oral sex on him. She said she saw defendant abuse Child 2 more than ten times and “[p]robably a little less with [Child 1].” She also saw defendant take pictures of Child 3 in his crib without any clothes on. Unlike Child 1 and Child 2, who are Kimberly Brigman’s children by a former marriage, Child 3 is defendant’s biological son. She found pictures defendant had hidden of defendant “and the boys touching each other.” She saw blood coming out of Child 2’s anal area a few times and out of Child 1’s anal area once. Kimberly Brigman denied that the boys ever licked her or that she had ever licked them.

Dr. Rosalina Conroy, a pediatrician with a specialty in the diagnosis of sexual abuse injuries, performed a medical examination of the three children and testified as to her findings. She testified that when diagnosing sexual abuse, she considers, in addition to physical findings, the behavior of the child and any disclosures the child makes. She said the three boys were “some of the most unruly, difficult children [she had] ever had to examine.” Child 1 and Child 2 were so hyperactive Dr. Conroy could barely examine them or interview them during their examinations. She was, however, able to conduct a thorough examination of Child 3 and ask him if anything had “happened to [his] bottom.” Child 3 disclosed that defendant had “put his

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hand in his bottom and it hurt” and that defendant had similarly touched the other two boys.

Dr. Conroy testified that the physical findings in these children alone were very significant in her diagnosis of sexual abuse. During her examination of Child 3, Dr. Conroy observed evidence of trauma to the anal area and loosening of the muscle. She observed a loss of rugae, or the normal folds of the anal area. Where there should have been a “wavy pattern,” the skin had become smooth “through repeated trauma, through friction.” She also observed a triangular scar pointing into the anal opening, which she testified indicated “repeated anal trauma, penetrating anal trauma, because the . . . apex of the scar was pointing into the anus, and it was thicker than just one episode of trauma, it was thicker, so that told me it was repeated.” She testified that the condition of Child 3’s anal area could have been caused by the penetration of a penis, a hand, or a toy but probably not by a finger “because of the extent of the damage.” Dr. Conroy found similar scars in Child 1 and Child 2 and abnormal rugae in Child 2. She testified that penetration by either a finger, a penis, or a toy could have caused their scars and that the scars were consistent with repeated penetration.

Before trial, Dr. Conroy reviewed the following additional documents: (1) a statement by Kimberly Brigman, (2) notes taken by the foster parents about the children’s statements and behavior, and (3) a psychologist’s report concluding the children were suffering from post-traumatic stress disorder (PTSD). She testified these documents strengthened her opinion that the children had been sexually abused. The statement by Kimberly Brigman corroborated and “explained” the physical findings. PTSD is common in abused children, and a classic symptom of PTSD is “flashbacks that keep coming in and disrupting their thoughts, disrupting their behavior.” The foster parents’ notes indicated the children would spontaneously describe abuse at times like driving out to get ice cream, which suggested the children were having PTSD flashbacks. The children also had sleep disturbances, another symptom of PTSD.

Dr. Kathleen Russo, a pediatrician also specializing in the diagnosis of sexual assault injuries in children, reviewed Dr. Conroy’s findings, psychiatric records, interviews with Kimberly Brigman, and notes from the foster parents, and she testified to her conclusions at trial. Dr. Russo did not examine the boys herself. Like Dr. Conroy, Dr. Russo believed the physical findings indicated repeated penetrating trauma, and the descriptions of abuse by Kimberly Brigman and the

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children's disclosures to their foster parents supported the physical findings of repeated sexual abuse. When asked if she had "an opinion to a reasonable degree of medical certainty as to whether or not these children had been repeatedly sexually penetrated," Dr. Russo stated: "Yes, I would come to the conclusion that based on the history, the statements, the records, and the physical findings, that these children suffered sexual abuse by Mr. Richard Brigman."

Anthony Bolden was an inmate at Albemarle Correctional Facility with defendant in May, June, and July of 2002. He testified that he had a bisexual relationship with defendant while in prison and that defendant told him about certain sexual acts he committed with the children. One such act was called "slick legs," where defendant would "put [his] thing between they [sic] thighs and not penetrate, just hump." Mr. Bolden also testified defendant admitted showing the children pornographic movies and taking pictures of them naked.

Defendant's step-daughter and his daughter by another marriage both testified that defendant used to play pornographic movies for them and touch them between their legs with his hand and mouth. Defendant pled guilty to charges of molesting these two girls, and he was on probation for those offenses at the time of the offenses in the present case. After a report that defendant had contacted a twelve or thirteen year old girl over the Internet about having sex, his probation officer conducted a search of his home. The officer did not find any photographs or pornography in the home or on his computer, but she did find a gun under his bed, for which his probation was revoked.

Defendant testified in his own defense at trial. He denied ever touching or taking sexual pictures of either of the three boys. He denied being a homosexual and having a sexual relationship with Anthony Bolden while in prison. He testified that Child 1 and Child 2's biological father used to take them every other weekend, and that Child 1 and Child 2 lived with their father for three months when defendant and Kimberly first moved in together.

Defendant's mother testified that when defendant and Kimberly were living with her, defendant was never alone with the boys. She also testified that defendant did not date men and that Child 2 had accused his biological father of sexual abuse in 2000. Social worker Bruce Titus testified that Child 2 once said his "daddy" had hurt him and "pulled [his] weenie," but later said neither his daddy nor his mother nor defendant had hurt him. Mr. Titus said Child 2 "changed his story several times." Child 2 also denied having been

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touched “in his private areas” to social worker Marcus Landy in November of 2001.

Defendant makes the following arguments on appeal: (1) the trial court erred in admitting the children’s hearsay statements to their foster parents and to medical personnel; (2) the trial court erred or committed plain error in admitting certain statements made by expert witnesses Dr. Conroy and Dr. Russo; (3) the trial court erred or committed plain error by not requiring the jury to be unanimous as to the *actus reus* for each charge; and (4) the trial court erred in failing to require the State to provide certain documents to the defendant prior to trial.

[1] First we address defendant’s argument that the trial court erred in admitting the out-of-court statements the children made to their foster parents and pediatricians. Defendant argues the statements made to the children’s foster parents were testimonial; however, defendant concedes that this Court conclusively determined in the case against the children’s mother, *State v. Kimberly Brigman*, 171 N.C. App. 305, 310-11, 615 S.E.2d 21, 24, *disc. review denied*, 360 N.C. 67, 621 S.E.2d 881 (2005), that the out-of-court statements made by the children to their foster parents were not testimonial and therefore did not violate the Confrontation Clause of the Sixth Amendment to the United States Constitution under *Crawford v. Washington*, 541 U.S. 36, 158 L. Ed. 2d 177 (2004). This argument is overruled.

Defendant also argues the children’s statements to their foster parents should not have been admitted under the residual hearsay exception. N.C. Gen. Stat. § 8C-1, Rule 804(b)(5) (2005). The admissibility of hearsay statements pursuant to the residual hearsay exceptions lies “within the sound discretion of the trial court.” *State v. Smith*, 315 N.C. 76, 97, 337 S.E.2d 883, 847 (1985). Therefore, “the trial court’s ruling should not be overturned on appeal unless the ruling was manifestly unsupported by reason or was so arbitrary that it could not have been the result of a reasoned decision.” *State v. Hyde*, 352 N.C. 37, 55, 530 S.E.2d 281, 293 (2000) (quotation omitted), *cert. denied*, 531 U.S. 1114, 148 L. Ed. 2d 775 (2001).

At the hearing of the State’s motion to introduce the out-of-court statements, each child testified on *voir dire* that he had told his foster parents about things that defendant had done, but he did not remember what he had told his foster parents. The trial court therefore determined that the three children were unavailable to testify at

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trial “due to the fact that each has no memory of the subject matter of his statement that the State seeks to introduce into evidence.” N.C. Gen. Stat. § 8C-1, Rule 804(b)(5) states that a statement may be admissible at trial where the declarant is unavailable to testify if the statement is:

not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it gives written notice stating his intention to offer the statement and the particulars of it, including the name and address of the declarant, to the adverse party sufficiently in advance of offering the statement to provide the adverse party with a fair opportunity to prepare to meet the statement.

The trial court made findings of fact regarding each of the requirements set forth in the statute above. It found that “[t]he proffered statements are evidence of material facts in these cases. The acts described are evidence of first-degree sex offenses and taking indecent liberties with children.” The court also found the statements “were more probative on the points for which they [were] offered than any other evidence the State could produce through reasonable efforts” at the time. The only eyewitness to these acts other than defendant and the boys, who were found to be unavailable, was Kimberly Brigman. The court found that “[i]t is not at all clear at this point in the trial that Kimberly Brigman, whose convictions for these same crimes are now on appeal, can or will testify.” Because Kimberly Brigman attempted several times to recant her statements made against defendant, we conclude the trial court did not abuse its discretion in making this finding.

Pursuant to part (C) of the statute, the trial court found:

The general purposes of the rules of evidence and the interests of justice will best be served by admission of the statements into evidence. In fact, the court finds that it would be an exceptional injustice to refuse to allow the jury to consider the proffered

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statements that have been made to adults in whose company the boys felt safe and protected.

The trial court was only required to “state [its] conclusion in this regard.” *State v. Triplett*, 316 N.C. 1, 9, 340 S.E.2d 736, 741 (1986). Under Rule 804(b)(5) and *State v. Triplett*, the trial court was also required to “determine that the proponent of the hearsay provided proper notice to the adverse party of his intent to offer it and of its particulars.” *Id.* The trial court made the following finding of fact regarding notice:

The State has given proper notice to the defendant of the State’s intent to offer the statements of [the three alleged victims] into evidence. Copies of the statements made by the children to [their foster parents], and proffered by the State at the hearing of this motion, were served upon the defendant in apt time.

“After the trial judge determines the notice requirement has been met, he must next determine that the statement is not covered by any of the exceptions listed in Rule 804(b)(1)-(4). The trial judge need only enter his conclusion in this regard in the record.” *Id.* (internal citation omitted). The trial court therefore made the following finding: “The proffered statements of [the three children] are not covered by any of the hearsay exceptions listed in N.C. Gen. Stat. § 8C-1, Rule 804(b)(1)-(4) and Rule 803(1)-(23).”

Finally, under *Triplett*, the trial court was required to “include in the record his findings of fact and conclusions of law that the statement possesses equivalent circumstantial guarantee of trustworthiness.” *Id.* (quotation omitted). The trial court made the following findings of fact in this regard: (1) “[t]he discussion of sexual matters was initiated spontaneously by the children themselves;” (2) “the adults to whom the statements were made were credible witnesses, and . . . a reasonable jury could find them to be credible;” (3) “[t]he nature of the statements themselves tends to show that they are trustworthy. . . . These very explicit sexual statements . . . would not ordinarily be stated by boys of this age unless the statements were true;” (4) “[t]he court had an opportunity to see the three boys on the witness stand at the hearing of the motion. It appeared obvious to the court . . . that their presence on the witness stand in front of the defendant was traumatic for them;” (5) “[a]ll three children have personal knowledge of the events alleged in the indictments;” (6) “[t]he children experienced nightmares and had difficulty sleeping. It was only after they became accustomed to a safe environment that they

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made the statements in question;” and (7) “[t]he boys have never retracted any of the statements.” The trial court therefore concluded as a matter of law that the children’s statements possess equivalent circumstantial guarantees of trustworthiness.

We cannot say the trial court’s findings of fact and conclusions of law regarding the admissibility of the children’s out-of-court statements to their foster parents was “manifestly unsupported by reason or was so arbitrary that it could not have been the result of a reasoned decision.” *Hyde*, 352 N.C. at 55, 530 S.E.2d at 293 (quotation omitted). Thus, we conclude the trial court did not abuse its discretion in admitting these statements under the residual hearsay exception. This argument is overruled.

Defendant further argues the children’s statements to medical personnel were (1) testimonial in nature and therefore inadmissible under *Crawford v. Washington*, and (2) not made for medical purposes and therefore do not fit the medical treatment hearsay exception under N.C. Gen. Stat. § 8C-1, Rule 803(4) and *State v. Hinnant*, 351 N.C. 277, 523 S.E.2d 663 (2000), *cert. denied*, 544 U.S. 982, 161 L. Ed. 2d 737 (2005). Although defendant asserts that “[b]oth Dr. Conroy and Dr. Russo testified to statements made to them by the boys,” the only statement made by any of the children to a medical examiner was by Child 3 to Dr. Conroy. Dr. Conroy testified that Child 3 told her “Richard put his hand in his bottom and it hurt, and . . . he touched [Child 1] and [Child 2] the same way.” At trial, defendant objected to this testimony only on the basis of “confrontation.” Because he failed to object under the medical treatment hearsay exception, we will not consider that argument on appeal. *State v. Augustine*, 359 N.C. 709, 721, 616 S.E.2d 515, 525 (2005) (where defendant objected to testimony at trial on the ground of speculation, the Court would not consider his argument on appeal that it was impermissible character evidence).

Our Supreme Court has held that “[f]ollowing *Crawford*, the determinative question with respect to confrontation analysis is whether the challenged hearsay statement is testimonial.” *State v. Lewis*, 360 N.C. 1, 14, 619 S.E.2d 830, 839 (2005). Further, it has stated that an

additional prong of the analysis for determining whether a statement is ‘testimonial’ is, considering the surrounding circumstances, whether a reasonable person in the declarant’s position would know or should have known his or her statements would

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be used at a subsequent trial. This determination is to be measured by an objective, not subjective, standard.

Id. at 21, 619 S.E.2d at 843. At the time of his medical examination by Dr. Conroy, Child 3 was not quite three years old. This Court found in the case against Kimberly Brigman that it was highly unlikely that Child 2, who was almost six when he made statements to his foster parents, understood his statements might be used at a subsequent trial. *Brigman*, 171 N.C. App. at 312-13, 615 S.E.2d at 25-26. We cannot conclude that a reasonable child under three years of age would know or should know that his statements might later be used at a trial. Therefore, we hold Child 3's statement to Dr. Conroy was not testimonial, and defendant's right to confrontation was not violated. This argument is overruled.

[2] Defendant's next argument is that the trial court committed plain error in admitting certain testimony by expert witnesses Dr. Conroy and Dr. Russo. Defendant assigns error to the admission of one statement made by Dr. Conroy and two statements made by Dr. Russo. Defendant did not object to this testimony at trial; therefore, defendant relies on plain error review to raise this issue on appeal. The plain error rule provides that the Court may review alleged errors affecting substantial rights even though defendant failed to object to the admission of the evidence at trial. *State v. Cummings*, 346 N.C. 291, 313, 488 S.E.2d 550, 563 (1997), *cert. denied*, 522 U.S. 1092, 139 L. Ed. 2d 873 (1998). Our Supreme Court has chosen to review such issues when the appellant has alleged plain error in the assignments of error "and when the issue involves either errors in the trial judge's instructions to the jury or rulings on the admissibility of evidence." 346 N.C. at 313-14, 488 S.E.2d at 563. The rule must be applied cautiously, however, and only in exceptional cases where, "after reviewing the entire record, it can be said the claimed error is a fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done." *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citation and emphasis omitted). Thus, the appellate court must study the whole record to determine if the error had such an impact on the guilt determination, therefore constituting plain error. *Id.* at 661, 300 S.E.2d at 378-79.

Defendant contends that Dr. Russo's conclusion "that these children suffered sexual abuse by Mr. Richard Brigman" constituted expert testimony on the guilt of the defendant. We agree. He also correctly argues that Dr. Russo impermissibly testified about the victim's

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credibility when she made the following statement regarding Child 3's disclosure to Dr. Conroy that defendant "put his hand in his bottom and it hurt": "where a child not only says what happened but also can tell you how he felt about it is pretty significant because it just verifies the reliability of that disclosure." While an expert's opinion that the children were sexually abused is "clearly admissible under prior decisions of this Court, [the] opinion that the children were sexually abused *by defendant* was not . . . [because the] opinion that the children were sexually abused *by defendant* did not relate to a diagnosis derived from [the] expert[']s examination of the prosecuting witnesses in the course of treatment" making it improper opinion testimony concerning the victims' credibility. *State v. Figured*, 116 N.C. App. 1, 9, 446 S.E.2d 838, 843 (1994) (emphasis in original), *disc. review denied*, 339 N.C. 617, 454 S.E.2d 261 (1995). Our Supreme Court has previously found error where an expert testified that a sexual assault victim was "believable." *State v. Aguillo*, 318 N.C. 590, 599, 350 S.E.2d 76, 81 (1986). However, in *Aguillo*, "the State's case hinged on the victim's testimony and thus upon her credibility." *Id.*, 350 S.E.2d at 82. In that case, "[t]he evidence of the defendant's guilt was strong but not overwhelming," and there was "a reasonable possibility that a different result would have been reached by the jury" had the expert's testimony not been admitted at trial. *Id.* at 599-600, 350 S.E.2d at 82.

Here, the evidence against the defendant is overwhelming. The children's statements to their foster parents, which we have deemed admissible, described details of the abuse and identified defendant as their abuser. They acted out the sexual "games" they had played with defendant in the homes of their foster parents. Kimberly Brigman also described the abuse and defendant's role in it. There was ample physical evidence of abuse, including scars, loss of rugae, and muscular changes. A fellow inmate testified to sexual acts defendant claimed to have performed with the children. Defendant's daughter and step-daughter testified about the sexual abuse they endured by defendant. We cannot conclude there was a "reasonable possibility that a different result would have been reached by the jury," *id.*, had Dr. Russo's comments about Child 3's reliability not been admitted at trial. This argument is overruled.

Defendant also argues the trial court erred by admitting Dr. Conroy's testimony regarding the children's symptoms of post-traumatic stress disorder. "[E]vidence that a prosecuting witness is suffering from post-traumatic stress syndrome should not be admit-

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ted for the substantive purpose of proving that a rape has in fact occurred . . . [but] it may be admitted for certain corroborative purposes.” *State v. Hall*, 330 N.C. 808, 821, 412 S.E.2d 883, 890 (1992). Because the trial court gave no instruction to the jury that this testimony was to be considered for corroborative purposes, we must assume it was admitted for the substantive purpose of proving that the children had in fact been sexually assaulted. While the admission of the testimony for substantive purposes was error, we cannot conclude it had an impact on the jury’s determination of defendant’s guilt. As we have already determined, the evidence against defendant was overwhelming. We do not believe the jury would have reached a different verdict had Dr. Conroy not made statements regarding the children’s symptoms of post-traumatic stress disorder. This argument is overruled.

[3] We now turn to defendant’s argument that his right to a unanimous jury verdict as to each of the charges against him was violated. Defendant argues that although “there was testimony of countless acts that might qualify as criminal under the indecent liberties and sexual offense statutes [n]one of the verdict sheets set out the specific *actus reus* that the jury had to find in order to convict.” Defendant relies on *State v. Gary Lawrence*, 165 N.C. App. 548, 599 S.E.2d 87 (2004), and *State v. Markeith Lawrence*, 170 N.C. App. 200, 612 S.E.2d 678 (2005), to argue the jury must be unanimous as to each specific criminal act that serves as the basis for each charge.

Since the filing of defendant’s brief and oral argument in this case, the North Carolina Supreme Court has reversed both *Gary Lawrence* and *Markeith Lawrence*. *State v. Gary Lawrence*, 360 N.C. 393, 627 S.E.2d 615 (2006); *State v. Markeith Lawrence*, 360 N.C. 293, 627 S.E.2d 609 (2006). In *Markeith Lawrence*, the Supreme Court held that the indecent liberties statute does not list distinct criminal offenses in the disjunctive; rather, it “simply forbids ‘any immoral, improper, or indecent liberties.’” *Markeith Lawrence*, 360 N.C. at 374, 627 S.E.2d at — (quoting N.C. Gen. Stat. § 14-202.1(a)(1) (2005)). Therefore, under *State v. Hartness*, 326 N.C. 561, 391 S.E.2d 177 (1990), “the risk of a nonunanimous verdict does not arise,” even if the jury “considered a greater number of incidents than . . . charged in the indictments,” because “while one juror might have found some incidents of misconduct and another juror might have found different incidents of misconduct, the jury as a whole found that improper sexual conduct occurred.” *Markeith Lawrence*, 360 N.C. at 374, 627 S.E.2d at — (internal citation omitted). Here, as in *Markeith*

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Lawrence, “the jury was instructed on all issues, including unanimity; [and] separate verdict sheets were submitted to the jury for each charge.” *Markeith Lawrence*, 360 N.C. at 376, 627 S.E.2d at —. Therefore, defendant’s argument regarding jury unanimity is overruled.

[4] The trial court reviewed a number of documents and records *in camera* to determine what portion of that material defendant was entitled to in order to present a defense. The documents not turned over to defendant were sealed for appellate review. Defendant requested that this Court review the sealed documents for any exculpatory evidence which would entitle him to a new trial. Upon careful review of the records submitted under seal, we find no exculpatory evidence that would entitle defendant to a new trial. The trial court did not err in failing to turn over these records to defendant prior to trial. We find no error in the trial.

[5] Finally, defendant has filed a “Motion for Appropriate Relief” and an “Amended Motion for Appropriate Relief” in this Court. The “Motion for Appropriate Relief,” filed on 5 July 2005, seeks a new trial for defendant on the alleged ground that Kimberly Brigman, “the only non-hearsay witness,” has recanted her testimony.

Pursuant to section 15A-1418(b) of our General Statutes, when a motion for appropriate relief is filed in this Court, we “must decide whether the motion may be determined on the basis of the materials before [us], or whether it is necessary to remand the case to the trial division for taking evidence or conducting other proceedings.” N.C. Gen. Stat. § 15A-1418(b) (2005); *State v. Verrier*, 173 N.C. App. 123, 131, 617 S.E.2d 675, 681 (2005) (noting that “it is more within the province of a trial court rather than an appellate court to make factual determinations”). Where there is recanted testimony,

[a] defendant may be allowed a new trial . . . if: 1) the court is reasonably well satisfied that the testimony given by a material witness is false, and 2) there is a reasonable possibility that, had the false testimony not been admitted, a different result would have been reached at the trial.

State v. Britt, 320 N.C. 705, 715, 360 S.E.2d 660, 665 (1987).

Based on the record before us, we cannot determine the veracity of Kimberly Brigman’s testimony. Nor can we discern whether there is reasonable possibility that a different result would have been

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reached at trial had Kimberly Brigman's testimony at trial been different or non-existent. Accordingly, we must remand the motion for Appropriate Relief based upon her alleged recantation to the trial court for an evidentiary hearing. *See, e.g., State v. Thornton*, 158 N.C. App. 645, 654, 582 S.E.2d 308, 313 (2003) ("Where the materials before the appellate court, as in this case, are insufficient to justify a ruling, the motion must be remanded to the trial court for the taking of evidence and a determination of the motion.").

[6] Defendant's second motion, filed on 4 April 2006, subsequent to oral argument, was entitled an "Amended Motion for Appropriate Relief." Rather than amending the original Motion for Appropriate Relief, however, the "amended" motion alleges new grounds for relief: ineffective assistance of counsel, and therefore constitutes a new motion for appropriate relief. Pursuant to Rule 37 (a) of our Rules of Appellate Procedure, applications for relief "may be filed and served at any time before the case is called for oral argument," N.C.R. App. P. 37(a), and compliance with the Rules of appellate procedure is mandatory. *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 401, 610 S.E.2d 360, 360 (2005) (stating that the "North Carolina Rules of Appellate Procedure are mandatory and 'failure to follow [them] will subject an appeal to dismissal' "). Since this motion did not amend the previous motion, nor was it timely filed, "we dismiss that portion of defendant's motion for appropriate relief concerning [ineffective assistance of counsel], without prejudice to defendant to file a new motion for appropriate relief in the superior court." *Verrier*, 173 N.C. App. at 132, 617 S.E.2d at 681.

No error in the trial, Motion for Appropriate Relief remanded, Amended motion for Appropriate Relief dismissed without prejudice.

Judges HUDSON and BRYANT concur.

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A CHILD'S HOPE, LLC, PETITIONER v. JOHN DOE, PERNELL INGRAM AND ANY
UNKNOWN PARENT OR POSSIBLE PARENT, RESPONDENT

No. COA05-679

(Filed 20 June 2006)

**Termination of Parental Rights— illegitimate child—failure to
show assumed burdens of parenthood**

The trial court erred by denying petitioner licensed private adoption agency's petition to terminate respondent father's parental rights in light of evidence showing respondent's failure to meet the requirements of N.C.G.S. § 7B-1111(a)(5), because: (1) the similarity of the requirements between the statute permitting the termination of a putative father's rights and the statute requiring the consent of a father of a child born out of wedlock to its adoption reflect the intent of the legislature not to make an illegitimate child's future welfare dependent on whether the putative father knows of the child's existence at the time the petition is filed; and (2) despite the fact that respondent may have acted consistently with acknowledging paternity, the trial court failed to make findings of fact to indicate respondent met the statutory requirements demonstrating that he assumed some of the burdens of parenthood such as attempting to establish paternity, legitimizing the child, or providing support for the biological mother or infant.

Judge JACKSON dissenting.

Appeal by petitioner from order entered 3 December 2004 by Judge Michael R. Morgan in Wake County District Court. Heard in the Court of Appeals 8 May 2006.

Herring McBennett Mills & Finkelstein, PLLC, by Bobby D. Mills and Anna E. Worley, for petitioner-appellant.

No brief filed for respondent-appellee.

MARTIN, Chief Judge.

Petitioner appeals from the trial court's order denying its petition to terminate respondent's parental rights to the minor child who is the subject of this action. For the reasons stated below we reverse the order of the trial court.

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On 19 August 2002, petitioner, a duly licensed private adoption agency, filed a petition to terminate parental rights pursuant to N.C.G.S. § 7B-1103. Attached to the petition was the affidavit of the biological mother, who averred that on 17 July 2002, she surrendered custody of the minor child to petitioner for an adoptive placement. She stated that she did not know the identity of the minor child's father and that she could not determine his identity or whereabouts. She explained that she was at a party in Chapel Hill, North Carolina on the first weekend of October 2001, where she drank heavily and "may have been drugged." According to her affidavit, when she regained consciousness she had a friend drive her home and the morning after the party she realized that she had been the victim of a rape. She did not file a police report, however, because she went to the hospital to be "checked out" after showering and there was no physical evidence of the rape. She further attested that she did not know the people who gave the party, she attended with someone she had just met, and she used the name "Tiffany" rather than her own. Based upon this affidavit, petitioner published notification in the Chapel Hill newspaper starting on 8 September 2002, notifying any unknown parent of the termination action and of the birth of the minor child.

Respondent is the biological father of the minor child. He testified that he began a romantic relationship with the biological mother, whom he had known for years, in August of 2001, and that when she informed him of her pregnancy he moved back home from college and began working odd jobs and seeking full time employment. He explained that he and the biological mother had discussed baby names and they planned to marry. When respondent informed the biological mother that he was not ready to get married, their relationship deteriorated and the couple stopped seeing one another by February of 2002. Respondent stated that he made his desire to care for the child clear to the biological mother. When she approached him about relinquishing his rights to the child, respondent testified that he informed her that if she did not want the baby he would care for it. The biological mother's response reportedly was that he "would be the last person to get this child." Around 3 June 2002, the biological mother informed respondent that "she had no more baby." He was unclear as to whether the biological mother meant that she had a miscarriage or an abortion, but his mother inquired and was assured that she had a miscarriage.

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On 8 January 2003, the petition to terminate unknown fathers' parental rights to the minor child was amended to include respondent. In April 2003, a paternity test showed that respondent was the biological father of the minor child. Respondent moved to dismiss on 29 July 2003 and the case was heard in November 2003. After the hearing, the trial court entered an order with the following pertinent findings of fact:

14. The court further finds that Respondent father was not aware that the minor child was in fact born and survived said birth until January 8, 2003 when he was served a summons along with a petition to appear for a hearing on a Petition to terminate his parental rights and that said unawareness was the result of misrepresentations on the part of the biological mother regarding the whereabouts of the biological father and misrepresentations made to the biological father as to an alleged miscarriage of this child on June 3, 2002;

15. The court further finds that when notified of the pregnancy by the biological mother in October of 2001, the Respondent father withdrew from school and moved back home to Sampson County, North Carolina to care for the minor child;

16. The court further finds that [the biological mother] never told the Respondent that he might not be the father due to an alleged rape that occurred while at a party in October 2001, nor did she inform the Respondent other men may have been the father as through consensual sex;

. . . .

19. The court further finds that the Respondent father continued to prepare to parent the minor child by maintaining consistent contact by phone and in person with the biological mother regarding the progress of the pregnancy, leaving school to return home to care for the child, gaining and maintaining employment, attending a prenatal appointment, caring for [the biological mother]'s other two children so that she could attend other prenatal appointments, engaging in conversations regarding the naming of the child, and purchasing a larger car to transport the child while residing in the home of his mother, stepfather and sister located in Sampson County;

20. The court further finds that the Respondent during this time had, and, [sic] substantial family support in raising the minor

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child and providing all necessities with respect to the care of the minor child;

21. The court further finds that said family support and willingness to provide care on the part of the Respondent was corroborated by the testimony of the Respondent's mother . . . and the Respondent's aunt . . . and Melissa Williams of the Johnston County Department of Social Services;

22. That [respondent] informed the biological mother that if she was not willing to provide care for the minor child after it was born, that he would be willing to provide primary care for it. [The biological mother]'s response to the father was that the Respondent would be the last person to care for the child;

23. The court further finds that during the duration of the pregnancy, [the biological mother] would assert that she was predisposed to a miscarriage due to the stress as proven during prior pregnancies;

24. That the court further finds that on or about June 3, 2002, the biological mother informed the Respondent that she miscarried the child and that there was "no child";

25. That the court further finds that the Respondent, upon getting this information as to a miscarriage on June 3, 2002, attempted to verify the truthfulness of the allegations of a miscarriage of the minor child;

. . . .

30. That the court further finds that the respondent father located, via the Internet, a newspaper article printed in the June 4, 2002 News & Observer, which stated that an unidentified baby was abandoned at the Johnston Memorial Hospital during the same weekend that [the biological mother], claimed to have had a miscarriage;

31. That based on the information found in the June 4, 2002 article the Respondent was led to believe that the child referenced in the article was in fact his child born to [the biological mother], that there was no miscarriage and that the child was alive rather than deceased;

32. That the court finds that the Respondent's aunt . . . contacted Johnston Memorial Hospital to determine if [the biological

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mother] gave birth to the child or had a miscarriage, but the effort was unsuccessful due to confidentiality concerns on the part of the hospital;

33. That the court finds that the Respondent went to [the biological mother]'s doctor to inquire as to whether [the biological mother] gave birth or had a miscarriage but was unsuccessful due to confidentiality concerns on the part of the doctor;

34. That the court finds that the Respondent went to Johnston County Department of Social Services to inquire about the child referenced in the June 4, 2002 article and to obtain the agency's help in locating a child that may have been born to [the biological mother];

35. That the court finds that Respondent expressed to the Johnston County Department of Social Services a desire to parent the minor child and locate it so that he could provide care;

36. That the court finds that the Respondent agreed to take a paternity test on the child referenced in the June 4, 2002 article, but that the results of the test were that the Respondent was determined not to be the father of that child;

37. That the court finds that the Johnston County [sic] of Social Services at the time of the initial contact with the Respondent knew that he could not be the father of the child in the June 4, 2002, article because of the racial identity of that child but could not immediately inform him of such due to confidentiality concerns;

38. That the court finds that based on the Respondent's report of a missing child possibly born to [the biological mother], the Johnston County Department of Social Services initiated an investigation into a possible investigation [sic] in violation of the law;

39. That the court finds that Ms. Melissa Williams of the Johnston County Department of Social Services made contact with [the biological mother] during which time [the biological mother] denied having sexual intercourse with the Respondent during the time of conception, denied that the Respondent had knowledge of her pregnancy, asserted that the child had already been adopted, asserted further that the child could only have been conceived

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during the rape, and denied that she was having consensual sex with others during the time of conception, stating moreover that no one in her family had knowledge of the pregnancy;

40. That the court finds that during the entirety of the pregnancy [the biological mother] concealed her pregnancy from her entire family due to embarrassment that would be caused from having a third child by a third different father;

....

42. That the court further finds that, [the biological mother], in a meeting during the time of the investigation by Ms. Williams, met the Respondent in Johnston County at a local gym and inquired whether he contacted the social services agency about the child and she again asserted that the child was miscarried;

43. That Ms. Williams made contact with the adoption agency in California and the Petitioner during which time Ms. Williams informed them that she had located the father of the child born to [the biological mother].

44. That the adoption agency in California asked Ms. Williams about the racial identity of the Respondent and when told that he was African American the agency informed Ms. Williams that [the biological mother] had told the agency that the father of the child's father [sic] was Hispanic rather than African American;

45. That the court finds that Ms. Williams, due to confidentiality requirements was unable to tell the Respondent that she had located his child, that his child was not miscarried, the location of the child, or anything relating to the adoption of the child or the pending proceeding to terminate the father's parental rights;

46. That the court finds that the Respondent became a party to the action only after Ms. Williams, by way of subpoena from the Petitioner, presented testimony about the results of the investigation and the identity of the Respondent, and that said testimony was presented to the court in December 2003;

....

48. That the court finds that the Respondent took a paternity test in April 2003 establishing that he is the biological father of the minor child;

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49. That the court finds that the Respondent has filed a custody action in Johnston County in September 2003 to gain care, custody and control of the minor child;

50. That the court finds that the Respondent filed an action to legitimate the minor child after he learned that the child was in fact born and not miscarried;

The trial court concluded that petitioner “failed to prove by clear, cogent, and convincing evidence that grounds to terminate the parental rights of the respondent father exist pursuant to N.C.G.S. § 7B-1111” and ordered “[t]hat any and all rights of the parental relationship of the biological father and the minor child . . . be maintained, including the obligations of the parent to the child and of the child to the parent arising from [sic] the parental relationship.” Petitioner appeals.

The dispositive issue in this appeal is whether the trial court erred by denying the termination petition in light of uncontroverted evidence showing respondent’s failure to meet the requirements of N.C.G.S. § 7B-1111(a)(5).

There are two stages to a termination of parental rights proceeding: adjudication, governed by N.C.G.S. § 7B-1109, and disposition, governed by N.C.G.S. § 7B-1110. *In re Brim*, 139 N.C. App. 733, 741, 535 S.E.2d 367, 371 (2000). During the adjudication stage, petitioner has the burden of proof by clear, cogent, and convincing evidence that one or more of the statutory grounds set forth in section 7B-1111 exists. N.C. Gen. Stat. § 7B-1109(e)-(f) (2005). “A finding of any one of the grounds enumerated [in section 7B-1111], if supported by competent evidence, is sufficient to support a termination.” *In re J.L.K.*, 165 N.C. App. 311, 317, 598 S.E.2d 387, 391, *disc. review denied*, 359 N.C. 68, 604 S.E.2d 314 (2004). After making a determination that one of the grounds for termination exists, the trial court proceeds to disposition and considers the best interests of the child. *Id.* The standard of appellate review is whether the trial court’s findings of fact are supported by clear, cogent, and convincing evidence and whether the findings of fact support the conclusions of law. *In re 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 petitioner filed a petition to terminate the putative father’s parental rights pursuant to N.C.G.S. § 7B-1111(a)(5). The statute authorizes the court to terminate parental rights upon a finding that:

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The father of a juvenile born out of wedlock has not, *prior to the filing of a petition or motion to terminate parental rights*:

a. Established paternity judicially or by affidavit which has been filed in a central registry maintained by the Department of Health and Human Services; provided, the court shall inquire of the Department of Health and Human Services as to whether such an affidavit has been so filed and shall incorporate into the case record the Department's certified reply; or

b. Legitimated the juvenile pursuant to provisions of G.S. 49-10 or filed a petition for this specific purpose; or

c. Legitimated the juvenile by marriage to the mother of the juvenile; or

d. Provided substantial financial support or consistent care with respect to the juvenile and mother.

N.C. Gen. Stat. § 7B-1111(a)(5) (2005) (emphasis added).

Our Court has previously considered and rejected the argument that a putative father "was unable to take the steps set out in N.C. Gen. Stat. § 7B-1111(a)(5) because he did not know of" the existence of the child. *In re T.L.B.*, 167 N.C. App. 298, 302-03, 605 S.E.2d 249, 252 (2004); *see also In re Adoption of Clark*, 95 N.C. App. 1, 8, 381 S.E.2d 835, 839 (1989) (noting that the predecessor statute to section 7B-1111(a)(5), and the predecessor to N.C.G.S. § 48-3-601(2)(b), contain the same requirements to defeat a petition for termination or to render a putative father's consent unnecessary), *rev'd on other grounds*, 327 N.C. 61, 393 S.E.2d 791 (1990). The similarity of the requirements between the statute permitting the termination of a putative father's rights and the statute requiring the consent of a father of a child born out of wedlock to its adoption reflect the intention of the legislature not to make an "illegitimate child's future welfare dependent on whether or not the putative father knows of the child's existence at the time the petition is filed." *Clark*, 95 N.C. App. at 8, 381 S.E.2d at 839.

Moreover, our Supreme Court has recently re-affirmed the bright line rules regarding putative father's rights established by *In re Adoption of Byrd*, 354 N.C. 188, 552 S.E.2d 142 (2001). *In re Adoption of Anderson*, 360 N.C. 271, 276-78, 624 S.E.2d 626, 629-30 (2006) ("[t]he consent of an unwed putative father . . . is not obligatory

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unless he has assumed some of the burdens of parenthood"). In *Byrd*, our Supreme Court noted that the putative father

did virtually all that could reasonably be expected of any man, . . . [n]evertheless, the statute is clear in its requirements, and respondent must have satisfied the three prerequisites stated, prior to the filing of the adoption petition, in order for his consent to be required. . . . Under the mandate of the statute, a putative father's failure to satisfy any of these requirements before the filing of the adoption petition would render his consent to the adoption unnecessary.

354 N.C. at 194, 552 S.E.2d at 146.

In *Byrd*, the petition was filed the day after the child was born. After stating that a mother should not be "in total control of the adoption to the exclusion of any inherent rights of the biological father", the Court held that despite the putative father's acknowledgment of his paternity, "he did not consistently provide the kind of tangible support required under the statute" prior to the filing of the petition. *Id.* at 196-97, 552 S.E.2d at 148. *Andersen* reiterates our Supreme Court's intention that "biological mothers [should not have] the power to thwart the rights of putative fathers," but holds that "[s]o long as the father makes reasonable and consistent payments for the support of mother or child, the mother's refusal to accept assistance cannot defeat his paternal interest." 360 N.C. at 279, 624 S.E.2d at 630 (emphasis in original).

These cases and the statute necessarily establish bright line requirements for putative fathers to demonstrate that they have assumed some of the burdens of parenthood, thus enabling the trial court to make clear factual determinations about their rights. This reflects the need to balance the tensions between paternal rights and the rights of the child. *See Byrd*, 354 N.C. at 196, 552 S.E.2d at 147 ("We recognize the legislature's apparent desire for fatherhood to be acknowledged definitively regardless of biological link. We also recognize the importance of fixing parental responsibility as early as possible for the benefit of the child.").

While we are sympathetic to the dissent's portrayal of the unique facts of this case, the trial court failed to make findings of fact to indicate respondent met the statutory requirements demonstrating that he assumed some of the burdens of parenthood. Based upon respondent's testimony recounting attempts to maintain a relationship with the biological mother and his expressed interest in caring for the

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child, the trial court made numerous findings of fact regarding the relationship between the respondent and the biological mother, and her misrepresentations about both the events surrounding the minor child's conception and her "miscarriage." However, despite its lengthy fact-finding, the trial court made no findings of fact as to whether respondent attempted to provide substantial support for the biological mother. The trial court's finding of fact number 19 illustrates that respondent acknowledged paternity, but it does not demonstrate that he provided "substantial financial support or consistent care with respect to the juvenile and mother." Nor are the findings that respondent has substantial family support the equivalent of finding that respondent provided the biological mother with substantial support. *Byrd* at 197, 552 S.E.2d at 148 ("recogniz[ing] the practical importance of family assistance," but holding it insufficient for purposes of the statute).

There is no doubt that the biological mother thwarted respondent's parental rights by lying about the status of the pregnancy; however, when respondent became suspicious, the statute requires that he undertake the steps set forth in section 7B-1111(a)(5) to protect his legal rights. Respondent offered no evidence that he attempted to establish paternity, legitimize the child or provide support for the biological mother or the infant. In addition, the record contains affidavits and photocopies of searches from Courtsearch.com, indicating no records indexed in the names of S.G.R., the biological mother, or respondent, which would exist had a legitimation procedure been filed. It also contains a letter from the Department of Health and Human Services certifying that no affidavit of paternity had been filed in its Central Registry.

Despite the fact that respondent may have acted consistently with acknowledging his paternity, the statute is clear in its requirements, as are *Andersen* and *Byrd*, and the trial court made no findings that respondent, prior to the filing of the termination petition, a) established paternity judicially, b) legitimated the juvenile either through judicial process or c) marriage to the mother, or d) provided the biological mother with substantial financial support or consistent care. The statute is explicit in its requirements and there was no evidence that respondent met those requirements. *See Byrd*, 354 N.C. at 198, 552 S.E.2d at 149 (noting that "[a]ll requirements of the statute must be met" for a putative father's consent to adoption to be required). In fact, there was uncontradicted evidence that the respondent took none of the actions enumerated in section

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7B-1111(a)(5). Thus, the trial court's findings do not support its conclusion of law, that petitioner "failed to prove by clear, cogent, and convincing evidence that grounds to terminate the parental rights of the respondent father exist pursuant to N.C.G.S. § 7B-1111," and we must therefore reverse the order of the trial court denying the petition and remand this case for entry of an order consistent with this opinion. Our decision renders unnecessary any discussion of petitioner's remaining assignments of error.

Reversed.

Judge LEVINSON concurs.

Judge JACKSON dissents in a separate opinion.

JACKSON, Judge dissenting.

For the reasons stated below, I respectfully dissent from the majority's conclusion that clear, cogent, and convincing evidence exists to support the termination of respondent's parental rights, and thus the trial court's denial of the petition must be reversed.

As noted by the majority, North Carolina General Statutes, section 7B-1111(a)(5) provides that a putative father's parental rights may be terminated when he has failed to take specific actions prior to the filing of the petition to terminate his parental rights. Prior to the filing of the petition, the putative father must have done one of the following: 1) establish paternity judicially; 2) legitimate the juvenile either through judicial process or by marriage to the mother, or 3) provide the biological mother with substantial financial support or consistent care. The petitioner seeking to terminate the putative father's rights must satisfy the heightened standard of clear, cogent, and convincing evidence to show that facts exist to support a finding that the father has failed to do one of the required actions prior to the filing of the petition.

In the instant case, respondent was purposefully deceived by the biological mother into believing that she had miscarried his child, and that there was, in fact, no baby. Only when he was physically served with the petition to terminate his parental rights to the child did he have any reason to believe that the biological mother actually had given birth to a child. At this point in time, he still did not know that the child was, in fact, his. Thus, respondent could not have legiti-

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mated the child or sought to establish paternity of the child prior to the filing of the petition, as the petition was the first actual notice that he had of the existence of the child as noted extensively in the majority's recitation of the facts, *supra*.

The majority relies on the holdings of *In re Adoption of Byrd*, 354 N.C. 188, 552 S.E.2d 142 (2001) and *In re Adoption of Anderson*, 360 N.C. 271, 624 S.E.2d 626 (2006) in its opinion. Although I recognize that this line of cases has established bright line rules regarding the rights of a putative father, I believe that the instant case is distinguishable from both *Byrd* and *Anderson* due to its unique facts. In both *Byrd* and *Anderson*, the putative fathers made offers of support, which subsequently were turned down by the biological mothers. In the instant case, it is undisputed that respondent made drastic changes in his life upon learning of the pregnancy. Respondent's actions from the time he learned of the pregnancy cannot be seen as anything but an acknowledgment of his paternity. When respondent returned home in December following the news of the pregnancy, he worked with his uncle while seeking regular, steady employment. He was not in a position to provide financially for the biological mother, therefore he provided consistent care for her in the only way in which he knew how. He visited her regularly and cared for her children. He made plans for the child's future, which included purchasing a four-door vehicle which would be suitable for transporting a child.

Respondent's relationship with the biological mother continued until the time when the couple decided not to get married, at which point he remained in contact with the mother. He testified that he cared for the biological mother's children on multiple occasions so that she could attend prenatal doctor's visits. When the mother specifically asked respondent to relinquish his rights to the child, he adamantly refused, stating that he would care for the child. Only when the biological mother told respondent that she had miscarried did he stop contacting her. Respondent had no reason to doubt the mother's statements, as her statements remained consistent to him and his family throughout the remainder of the year. Moreover, he took fairly dramatic steps to ensure the veracity of those statements, such as contacting the Johnston County Department of Social Services after learning of the abandonment of a child the same weekend the biological mother informed him she had miscarried, and thereafter agreeing to take a paternity test to conclude whether or not that child was his.

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In both *Byrd* and *Anderson*, our Supreme Court held that a biological mother should not be permitted to control the adoption process to the complete exclusion of the biological father. In *Byrd* the Court held that “fundamental fairness dictates that a man should not be held to a standard that produces unreasonable or illogical results. . . . [T]he General Assembly did not intend to place the mother in total control of the adoption to the exclusion of any inherent rights of the biological father.” *Byrd*, 354 N.C. at 196, 552 S.E.2d at 147-48. Similarly, in *Anderson* the Court held that “the mother’s refusal to accept assistance cannot defeat [a putative father’s] paternal interest.” *Anderson*, 360 N.C. at 279, 624 S.E.2d at 630. Specifically, its resolution in that case was not intended to “grant biological mothers the power to thwart the rights of putative fathers.” *Id.* Thus, to permit a mother purposefully to deceive the biological father regarding the existence of his child, only to then proceed with an adoption of the child, thereby terminating his parental rights based on her deception and lies, seems to be the precise illogical and unreasonable result that our General Assembly intended to avoid, and would, indeed, afford the biological mother prone to such deception the opportunity to “thwart” a putative father as specifically addressed in *Anderson*.

I disagree with the majority’s conclusion that respondent failed to comply with the requirements of North Carolina General Statutes, section 7B-1111(a)(5)(d), however. As provided by the statute, the putative father may achieve compliance by providing the mother with substantial financial support or consistent care. N.C. Gen. Stat. § 7B-1111(a)(5)(d). As noted by the trial court in its finding of fact, respondent maintained

consistent contact by phone and in person with the biological mother regarding the progress of the pregnancy, leaving school to return home to care for the child, gaining and maintaining employment, attending a prenatal appointment, caring for [her] other two children so that she could attend other prenatal appointments, engaging in conversations regarding the naming of the child, and purchasing a larger car to transport the child[.]

Moreover, he informed the biological mother during her pregnancy that he would be willing to provide primary care for the child if she was unwilling to do so. Her response to this proposal was that he would be the last person to care for the child. I believe that these activities are sufficient to satisfy the statutory requirement that a

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putative father provide either financial support or consistent care to the biological mother. The trial court's findings also clearly show that even after the putative father had been informed of the miscarriage of his child, he continued to search for that child, hampered by the biological mother's concerted efforts to prevent him from learning of the child's existence and by our state's confidentiality laws. Only after the biological mother engaged in a determined campaign of deception, did respondent cease his efforts to locate his child and provide the mother with care. To argue, as the majority does, that respondent should have filed an affidavit to legitimate an illusory child seems beyond the bounds of what we reasonably may expect of any man.

I note, too, that our interpretation of North Carolina General Statutes, section 7B-1111(a)(5)(d) appears to be a matter of first impression as to the interpretation of the phrase "consistent care." The Court in *Byrd* and *Anderson* upheld the termination of the putative fathers' parental rights through our adoption statutes found in Chapter 48 of the North Carolina General Statutes. In both *Byrd* and *Anderson*, the Court held that due to the putative fathers' failure to provide financial support to the biological mothers, the fathers' consent to the adoptions was not required pursuant to North Carolina General Statutes, section 48-3-601. In the instant case, petitioner sought to terminate respondent's parental rights under the provisions of the Juvenile Code found in Chapter 7B of North Carolina General Statutes, not our state's adoption statutes.

Respondent provided regular and consistent care to the mother throughout her pregnancy, and was deceived intentionally about the birth of the child. In the instant case I believe petitioner has failed to satisfy the standard of clear, cogent, and convincing evidence of respondent's failure to provide consistent care to the mother during her pregnancy. Respondent could not have established paternity or legitimated the child prior to the filing of the petition, as he was lead falsely to believe the child had died. I believe the instant case is distinguishable from the line of cases following *Byrd* and *Anderson*, as respondent was purposefully deceived and was not made aware of the existence of his child until the time he was served with the petition. Therefore, I would affirm the trial court's denial of the petition to terminate respondent's parental rights.

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No. COA05-765

(Filed 20 June 2006)

1. Appeal and Error— presentation of issues—brief—issue not adequately argued—abandoned

An argument was deemed abandoned where it was stated in the heading but not adequately argued.

2. Child Abuse and Neglect— remand—findings—supported by evidence

There was no merit in a child neglect case to an objection to certain findings on remand that were not in the original order. The challenged findings were supported by clear and convincing evidence of domestic violence, illegal drug activity, illegal firearms possession, and repeated and violent angry outbursts in the presence of the children.

3. Appeal and Error— law of the case—preservation of issue by objection at trial

The Court of Appeals would not review the admission of hearsay testimony from a social worker in a child neglect case where the issue had already been ruled upon in a prior appeal. The failure to assign as error the question of whether there was ineffective assistance of counsel in not objecting to this evidence at trial meant that the question was not properly before the Court of Appeals.

4. Jurisdiction— setting hearing after remand—not the exercise of jurisdiction

There is no authority that setting a matter for hearing constitutes the exercise of jurisdiction. Although two courts cannot have jurisdiction over the same order at the same time, the action in issue in this case was the setting of the case for hearing after a Court of Appeals remand but before the certification to the trial court.

5. Child Abuse and Neglect— delay in issuing order—not prejudicial

The assertion that the trial court's delay in issuing its order in a child neglect and abuse case kept the mother away from the children without just cause and was very hard for the mother did

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not establish prejudice. The mother could have requested a review hearing and sought custody if she had complied with conditions such as remaining drug free. Moreover, the interests of the child are paramount.

Judge TYSON dissenting.

Respondent appeals from order entered 15 October 2004 by Judge Galen Braddy in the District Court in Pitt County. Heard in the Court of Appeals 12 January 2006.

Anthony H. Morris, for petitioner-appellee.

Wanda Naylor, for Guardian ad litem.

Richard E. Jester, for respondent-appellant.

HUDSON, Judge.

In July 2001, the Pitt County Department of Social Services (“DSS”) filed a petition alleging that respondent mother’s children, T.S., III, and S.M., were neglected and dependent. DSS took the children into protective custody. On 22 January 2002, the trial court adjudicated the children neglected and dependent. Respondent appealed and on 20 April 2004, this Court remanded the case to the trial court “with instructions to make ultimate findings of fact based on the evidence and to enter clear and specific conclusions of law based on the findings of fact.” *In re T.S., III, & S.M.*, 163 N.C. App. 783, 595 S.E.2d 239 (2004) (unpublished). The trial court heard the matter on 13 May 2004. DSS submitted a proposed order, but respondent objected to the order and the court held the matter open for the parties to submit proposed findings or objections on or before 14 June 2004. None of the parties submitted any additional proposed findings and the trial court entered its order on 18 October 2004, concluding that the children were neglected and ordering continued legal custody with DSS. Respondent appeals. We affirm the trial court.

The record shows that in March 2001, DSS began investigating respondent’s home because of reports of domestic violence. Respondent’s partner, T.S., T.S. III’s father, struck respondent and she retaliated by cutting his arm with a knife. He then locked respondent in a closet. The children were present during the altercation and S.M. hid under a table. On a subsequent visit, a DSS worker found the home in disarray as a result of domestic violence the previous night, which had also occurred in the presence of the children.

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In June 2001, police stopped T.S.'s car, acting on a tip that he was selling drugs. Respondent and the children were also in the car. The police did not find drugs in the car, but later found twenty doses of cocaine in T.S.'s rectum and a handgun in the home. When the police stopped the car, the children were not in car seats as required by law. Respondent became combative to the point of being arrested for disorderly conduct. In July 2001, DSS workers visited the home again and respondent denied the workers access to the children, told them to leave, and stated that she would not sign a case plan to deal with the problems in the home.

The record also indicates that respondent used cocaine while pregnant with S.M., that she smoked marijuana in July 2001, and that she refused to take drug screens requested by DSS. T.S. has drug-related convictions in New York and North Carolina and is known as a drug dealer among law enforcement officers. The children's grandparents corroborated reports of domestic violence and drug abuse occurring in the home.

[1] Respondent first asserts that the trial court erred in not dismissing the petition because the petitioners did not present sufficient evidence and that the trial court's findings of fact are not supported by evidence and these findings do not support the conclusions of law. We note that although respondent states in the heading for her first question presented that the court erred in not dismissing the petition, she fails to adequately argue this point in her brief and we conclude that she abandoned this argument. N.C. R. App. P. 28(b)(6) (2004). Thus, we turn to respondent's contention that the trial court's findings of fact are not supported by evidence and that the findings do not support the conclusions of law.

[2] When reviewing an adjudication of neglect, we must determine whether the trial court's findings of fact are supported by clear and convincing evidence and, in turn, whether these findings of fact support the trial court's conclusions of law. *In re Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 365 (2000). N.C. Gen. Stat. § 7B-101 defines a "neglected juvenile," in pertinent part, as

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

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N.C. Gen. Stat. § 7B-101(15) (2001). It is well-established that the trial court need not wait for actual harm to occur to the child if there is a substantial risk of harm to the child in the home. *See In re Helms*, 127 N.C. App. 505, 512, 491 S.E.2d 672, 676 (1997).

Respondent objects to several findings of fact on the grounds that they were not contained in the original order entered 22 January 2002. This Court remanded the matter to the trial court “with instructions to make ultimate findings of fact based on the evidence and to enter clear and specific conclusions of law based on the findings of fact.” *T.S., III, & S.M.*, 163 N.C. App. 783, 595 S.E.2d 239. Our careful review of the record reveals that on remand the trial court made such findings, supported by clear and convincing evidence of record, and we conclude that respondent’s objection to these findings lacks merit. Respondent’s arguments regarding the remaining findings of fact do not challenge the findings on the basis that they are not supported by evidence. Instead, respondent attempts to explain her behavior and to argue that certain findings are irrelevant or do not support a conclusion that the children were neglected. Again, our careful review of the record reveals that all of the challenged findings of fact are supported by clear and convincing evidence.

Respondent argues that the findings do not support the conclusion that the children were neglected because they do not show that the children were at a substantial risk of impairment as a result of improper care or supervision. We disagree. The court made findings that the children were subjected to acts of domestic violence, that respondent abused illegal substances, that during a police stop the children were not in carseats and respondent’s angry outburst in the presence of the children led to her arrest, that respondent threatened a social worker in front of the children, that a firearm was found in the home of respondent and T.S., both of whom were convicted felons, and that respondent refused to cooperate with DSS’s efforts to improve the problems in the home. This court remanded to the trial court, in part, because the original order “made no reference to the statutory basis for its conclusion, nor did it cite any one incident or a series of incidents as a basis for its determination of neglect.” On remand, the court made the following relevant conclusions of law:

1. That the juveniles are neglected pursuant to North Carolina General Statute 7B-101(15) in that they were not provided proper care and supervision by their parents; and they lived in an environment injurious to the juveniles’ welfare by subjecting the chil-

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dren to acts of domestic violence and continuing to cohabitate in an abusive environment, by committing acts of violence toward police officials in the presence of the minor children; by abusing illegal substances, by refusing to submit to drug screens; by allowing the children ages 4 and 1 to ride unrestrained in a motor vehicle, by using threatening behavior toward social workers and police officers in front of the children and by having a firearm in their home in the presence of minor children while both respondents were convicted felons which was severe and dangerous conduct potentially causing physical, mental and emotional injury to the minor children.

2. Several instances of serious domestic violence; illegal drug activity; illegal possession of a firearm; and repeated violent and angry outbursts in the presence of the children contributed to this injurious environment.

3. The juveniles were at a substantial risk of physical and emotional harm in the presence of the domestic violence between the respondent parents and the angry outbursts of the respondent mother.

4. That the juveniles did not receive proper care and supervision by their parents.

We conclude that the trial court's findings support these conclusions of law and, likewise, that the order satisfies this Court's directive on remand.

[3] Respondent next contends that the court erred in using hearsay evidence to make its findings. Respondent contends that the trial court incorrectly considered hearsay testimony of a social worker about S.M.'s statements to her. However, respondent concedes that this Court has already addressed this matter, concluding that respondent waived this argument because trial counsel failed to object. *In re T.S., III., & S.M.*, 163 N.C. App. 783, 595 S.E.2d 239 (2004). We will not review a matter already reviewed and ruled upon by this Court. *See Weston v. Carolina Medicorp, Inc.*, 113 N.C. App. 415, 417, 438 S.E.2d 751, 753 (1994) (“[O]nce an appellate court has ruled on a question, that decision becomes the law of the case and governs the question both in subsequent proceedings in a trial court and on subsequent appeal”). Respondent also argues that if the hearsay argument was waived by trial counsel's failure to object at trial, that this constituted ineffective assistance

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of counsel. Respondent did not assign as error ineffective assistance of counsel, so this argument is not properly before us. N.C. R. App. P. 10 (c)(1) (2004).

[4] Respondent also contends that the trial court erred in exercising jurisdiction over the case before such jurisdiction had been returned to the trial court from the Court of Appeals. Respondent correctly asserts that two courts cannot have jurisdiction over the same order at the same time. N.C. Gen. Stat. § 1-294 (2003). N.C. Gen. Stat. § 1-294 “stays all further proceedings” pending appeal. On 20 April 2004, this Court filed *In re T.S., III, & S.M.*, 163 N.C. App. 783, 595 S.E.2d 239. However, the judgment remanding the case was not certified to the district court until 10 May 2004. On 29 April 2004, after the Court of Appeals filed its opinion but before the judgment was certified, the district court set the case for hearing and sent notice of hearing to respondent. The district court held the hearing on 13 May 2004. Defendant cites no authority holding that noticing a matter constitutes the exercise of jurisdiction. *See* N.C. R. App. P. 28(b)(6) (2005). We conclude that this argument lacks merit.

[5] In her final argument, respondent contends that the trial court erred in failing to enter its written order in a timely manner and as required by law. The court held a hearing on 13 May 2004 and the order was not entered until 15 October 2004. N.C. Gen. Stat. § 7B-905(a) states, in pertinent part: “The dispositional order shall be in writing, signed, and entered no later than 30 days from the completion of the hearing, and shall contain appropriate findings of fact and conclusions of law.” *Id.* This Court has addressed violations of statutory time limits in juvenile cases on a case-by-case basis. Recently, in *In re S.N.H.*, the Court summarized our recent cases on this issue as follows:

[T]his 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, 134, 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. 132 at 134, 614 S.E.2d at 369

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(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) 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 135, 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).

S.N.H., 177 N.C. App. 82, 86, 627 S.E.2d 510, 513 (2006) (holding that two-and-a-half month delay was not prejudicial). Here, respondent contends that she was prejudiced by the trial court's delay in entering its order, arguing that she "been kept away from [the children] without just cause," and that "the court's delay was very hard for [respondent]." We conclude that these assertions, without more, do not establish that the delay prejudiced respondent. Indeed, we conclude that the delay did not preclude the reunification of the children and respondent.

N.C. Gen. Stat. § 7B-906(a) (2003) provides for review hearings within 90 days of the *dispositional hearing* (not the order) and within 6 months thereafter. *Id.* A parent may request a review hearing and "[t]he court may not waive or refuse to conduct a review hearing if a party files a motion seeking the review." N.C. Gen. Stat. § 7B-906(b)(5) (2003). N.C. Gen. Stat. § 7B-1003(b)(2) (2003) allows the district court to conduct these hearings pending appeal and to place the child as the court finds in the best interests of the juvenile. *Id.* Thus, we conclude that neither the pendency of the order, nor the appeal deprived respondent of reunification with the children. If respondent had complied with the order—including remaining drug free, maintaining stable housing, not driving the children without a proper driver's license, attending domestic violence programs, completing parenting classes, and addressing anger management

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issues—she could have requested a review hearing and sought custody of her children.

We also note that it is well-established that in abuse, neglect, and dependency proceedings under Chapter 7B, “if the interest of the parent conflicts with the welfare of the child, the latter should prevail. Thus, in this context, the child’s best interests are paramount, not the rights of the parent.” *In re T.K.*, 171 N.C. App. 35, 38-39, 613 S.E.2d 739, 741, *aff’d*, 360 N.C. 163; 622 S.E.2d 494 (2005) (internal citations and quotation marks omitted). *See also In re S.B.M.*, 173 N.C. App. 634, — 619 S.E.2d 583 (2005); *In re Pittman*, 149 N.C. App. 756, 761, 561 S.E.2d 560, 564, *disc. review denied*, 356 N.C. 163, 568 S.E.2d 608 (2002), *cert. denied*, 538 U.S. 982, 123 S. Ct. 1799, 155 L. Ed. 2d 673 (2003). Furthermore,

the General Assembly’s intent was to provide parties with a speedy resolution of cases where juvenile custody is at issue. Therefore, holding that the adjudication and disposition orders should be reversed simply because they were untimely filed would only aid in further delaying a determination regarding [the children’s] custody because juvenile petitions would have to be re-filed and new hearings conducted.

In re E.N.S., 164 N.C. App. 146, 153, 595 S.E.2d 167, 172 (2004).

Affirmed.

Judge GEER concurs.

Judge TYSON dissents in a separate opinion.

TYSON, Judge, dissenting.

The majority’s opinion erroneously affirms the trial court’s order, which adjudicates respondent’s minor children to be neglected and holds she failed to establish the trial court’s excessive delay in reducing to writing and entering its order prejudiced her. I respectfully dissent.

I. Late Entry of Order

N.C. Gen. Stat. § 7B-905(a) (2005) mandates, “The dispositional order *shall be in writing, signed, and entered* no later than 30 days from the completion of the hearing, *and shall* contain appropriate findings of fact and conclusions of law.” (Emphasis supplied).

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Although we stated, “[a] trial court’s violation of statutory time limits in a juvenile case is not reversible error per se . . . [T]he complaining party [who] appropriately articulate[s] the prejudice arising from the delay . . . [does] justify reversal.” *In re S.N.H.*, 177 N.C. App. 82, 86, 627 S.E.2d 510, 513 (2006). While “[t]he passage of time alone is not enough to show prejudice, . . . [we] recently [held] the ‘longer the delay in entry of the order beyond the thirty-day deadline, the more likely prejudice will be readily apparent.’” *Id.* at 86, 627 S.E.2d at 513-14 (quoting *In re C.J.B.*, 171 N.C. App. 132, 135, 614 S.E.2d 368, 370 (2005)).

This Court has repeatedly reversed orders terminating the respondent’s parental rights due to prejudice to the respondent, the children, and the parties resulting from the trial court’s late entry of its order. *In re D.S.*, 177 N.C. App. 136, 139-40, 628 S.E.2d 31, 33 (2006). This Court stated in *In re D.S.*:

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 [30 day] 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.

177 N.C. App. at 139-40, 628 S.E.2d at 33 (internal quotations and citations omitted).

This Court held a delay in the entry of an order of six months was “[highly] prejudicial to respondent-mother, the minors, and the foster parent.” *In re L.E.B., K.T.B.*, 169 N.C. App. 375, 380, 610 S.E.2d 424, 427, *disc. rev. denied*, 359 N.C. 632, 616 S.E.2d 538 (2005). Prejudice to the respondent, her children, and all parties involved is clear when:

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.

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Id. at 379, 610 S.E.2d at 426-27 (internal quotations and citation omitted).

The majority's opinion quotes *In re E.N.S.*, 164 N.C. App. 146, 153, 595 S.E.2d 167, 172, *disc. rev. denied*, 359 N.C. 189, 606 S.E.2d 903 (2004), which was decided prior to *In re L.E.B.* and its progeny and states, "holding that the adjudication and disposition orders should be reversed simply because they were untimely filed would only aid in further delaying a determination regarding [the children's] custody." This Court more recently stated, "prejudice, if clearly shown by a party" is not "something to ignore solely because the remedy of reversal further exacerbates the delay." *In re A.L.G.*, 173 N.C. App. 551, 556-57, 619 S.E.2d 561, 564 (2005), *aff'd*, 360 N.C. 475, 628 S.E.2d 760 (2006).

Here, after remand from the first appeal on 10 May 2004, the trial court held an informational hearing on 13 May 2004 and ordered its order be entered on 14 June 2004. The court failed to reduce to writing and enter its order until over five months later on 15 October 2004. Respondent specifically argues the prejudice that resulted from the incessant delays and late entry of the order:

Between May and October 2004, [respondent] spent yet [an] additional [five] months without contact with her children . . . [respondent] has been severely prejudiced by this delay. The entire case history, and DSS's completely incompetent response to a person with oppositional defiant disorder has created a situation in which a mother who never harmed her children, nor allowed anyone to harm her children, has been kept away from them without just cause . . . The mother has been cut off from her children . . . and the Court's delay was very hard for [respondent].

The majority's opinion concludes, "these assertions, without more, do not establish that the delay prejudiced respondent." Upon similar allegations, this Court has repeatedly found prejudice to exist in many cases, with facts analogous to those here. *See In re D.S.*, 177 N.C. App. at 139-40, 628 S.E.2d at 33 (The trial court's entry seven months after the termination was a clear and egregious violation of N.C. Gen. Stat. §§ 7B-1109(e) and 1110(a), and the delay prejudiced all parties.); *see also In re A.N.J.*, 175 N.C. App. 793, 625 S.E.2d 203 (2006) (The trial court's judgment was reversed when the respondent was prevented from filing an appeal for over seven months because the trial court failed to enter its order within the statutorily prescribed time limit.); *In re O.S.W.*, 175 N.C. App. 414, 623 S.E.2d 349

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(2006) (The trial court's order was vacated because the court failed to enter its order for six months, and the father was prejudiced because he was unable to file an appeal.); *In re T.W.*, 173 N.C. App. 153, 617 S.E.2d 702 (2005) (The trial court entered its order just short of one year from the date of the hearing. The Court of Appeals reversed the trial court's order.); *In re L.L.*, 172 N.C. App. 689, 616 S.E.2d 392 (2005) (The Court of Appeals held the eight month delay prejudiced the parents.); *In re C.J.B.*, 171 N.C. App. 132, 614 S.E.2d 368 (2005) (The Court of Appeals reversed the trial court's order because the trial court failed to enter its order *until five months* after the hearing.); *In re T.L.T.*, 170 N.C. App. 430, 612 S.E.2d 436 (2005) (The Court of Appeals reversed the trial court's judgment because the trial court failed to enter its order until seven months after the hearing.).

In distinguishing earlier precedents upon which the majority's opinion relies, this Court stated in *In re L.E.B.*:

Although respondent-mother acknowledges the precedents on timeliness, she argues that more than six months is an excessive delay to enter the order and prejudiced her by adversely affecting: (1) both the family relationship between herself and the minors *and* the foster parent and the minors; (2) delaying subsequent procedural requirements; and (3) the finality of the matter.

169 N.C. App. at 379, 610 S.E.2d at 426.

In *In re A.L.G.*, this Court stated:

As in *In re B.M.*, the respondent in *In re C.L.C.* fell short of meeting her burden of showing prejudice. "The only prejudice that the mother identifies is that 'DSS ceased reunification but waited many months to initiate termination proceedings.' She does not explain in what manner the delay prejudiced her" 171 N.C. App. 438, 445, 615 S.E.2d 704, 708 (2005). These cases highlight the need to argue prejudice. Both interpret delays by DSS associated with filing a petition for termination, an eleven-month delay and a three-month delay respectively, *but since prejudice was not articulated by any party it could not serve as a basis for reversal.*

173 N.C. App. at 556-57, 619 S.E.2d at 565 (emphasis supplied).

Here, respondent specifically "articulated" the "prejudice" she, her children, and all parties suffered. *Id.* A five month further delay here is particularly egregious and prejudicial due to the prior appeal

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and decision by this Court in respondent's favor. *See In re T.S.*, 163 N.C. App. 783, 595 S.E.2d 239 (2004) (Unpublished) ("After determining what appears to be the trial court's conclusions of law, we find that the trial court summarily declared the children to be neglected, but made no reference to the statutory basis for its conclusion, nor did it cite any one incident or a series of incidents as a basis for its determination of neglect. N.C. Gen. Stat. § 7B-101(15) provides several grounds for determining neglect; however, the trial court made no reference to the statutory grounds. Therefore, this Court remands the case to the trial court with instructions to make ultimate findings of fact based on the evidence and to enter clear and specific conclusions of law based on the findings of fact." (internal quotations and citation omitted)). Upon remand, no new evidence was taken or allowed, and the trial court scheduled proposed revised drafts of orders to be submitted no later than 14 June 2004.

II. Conclusion

For a parent, everyday a young child is absent seems like a week, a week's absence seems like a month, a month passes as slowly as a year. Over five months to a parent without his or her young child is an eternity. The prejudicial delays, as argued by respondent mother is exacerbated by the patent disregard of this Court's mandate and the trial court's own schedule for the parties to present proposed revised orders by 14 June 2004. Now, more than five months later, no new evidence was allowed or taken by the trial court. It is inexcusable, and no excuse is offered in the trial court's order or by petitioner DSS to explain why the required submission date of 14 June 2004 languished and was not accomplished until 15 October 2004.

The People of North Carolina, through their elected representatives in the General Assembly, mandated specific deadlines for DSS to act when children are removed from their parents' custody. Compliance with these statutory mandates is necessary to enforce the overall objectives of the Juvenile Code, "[t]o provide standards for the removal, when necessary, of juveniles from their homes *and for the return of juveniles to their homes consistent with preventing the unnecessary or inappropriate separation of juveniles from their parents.*" N.C. Gen. Stat. § 7B-100(4) (2005) (emphasis supplied). These statutory mandates are not suggestions. The recent amendments shortening the required response times were specifically enacted to preserve Federal funding for those important programs. Noncompliance with the deadlines can jeopardize that funding in the future.

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Prejudice to respondent mother and her young children is argued, and prejudice is shown. *In re A.L.G.*, 173 N.C. App. at 556-57, 619 S.E.2d at 565. Procrastination to reunite and to resolve the issues that led to the removal of the children from their mother, prevented respondent mother from entering her notice of appeal until the judgment was entered. This delay is highly prejudicial, and it bears consequences to the responsible party.

It is also appropriate to note that Canon 3 of the North Carolina Judicial Conduct mandates, “A judge should perform the duties of the judge’s office impartially and *diligently* . . . A(5) A judge should dispose *promptly* of the business of the Court.” North Carolina Code of Judicial Conduct, Canon 3A(5) (2006) (emphasis supplied). This long-term delay was neither prompt nor diligent.

The trial court erred when it failed to reduce its order to writing adjudicating the minor children neglected and entering the order within the statutorily mandated time period. “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.’” *In re L.E.B., K.T.B.*, 169 N.C. App. at 378, 610 S.E.2d at 426.

Respondent specifically argued and articulated the prejudice she and her children suffered as a result of the egregious late entry of the court’s order. *In re A.L.G.*, 173 N.C. App. at 556-57, 619 S.E.2d at 565. It is incredulous and inexcusable for six more months to elapse after this Court’s opinion in the earlier appeal, to simply revise and enter an order, where no additional evidence was allowed or taken. I vote to reverse the trial court’s order and respectfully dissent.

STATE OF NORTH CAROLINA v. LOURETHA MAE KING

No. COA05-1379

(Filed 20 June 2006)

1. Forgery— sufficiency of indictments

The trial court did not err by concluding the thirteen forgery indictments were not fatally defective, because: (1) the indictments set forth all of the elements of the offense; (2) the indict-

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ments do not have to state the manner in which defendant forged the withdrawal form; (3) the indictments informed defendant of the date and time of each offense, the amount of money involved, and where the offense occurred; and (4) the indictments gave defendant notice of the charge against her and enabled the court to know what judgment to pronounce in case of conviction.

2. Evidence— prior crimes or bad acts—common plan or scheme—absence of mistake

The trial court did not abuse its discretion in a multiple obtaining property by false pretenses, multiple forgery, and multiple uttering case by admitting evidence found in a vehicle purchased by defendant which included a power of attorney defendant obtained naming her as attorney in fact and a third person as the principal and personal papers and identification cards belonging to two other persons, and evidence of defendant's purchase of a vehicle with the power of attorney naming the victim as the principal, because: (1) the State offered the evidence to show common plan or scheme and absence of mistake; (2) the evidence was particularly relevant since the victim had died prior to trial and was unavailable to testify; (3) the evidence tended to rebut defendant's contention that the victim initialed the power of attorney used to withdraw funds from the victim's bank account, and showed defendant engaged in a plan or scheme to obtain and use illegitimate powers of attorney to illegally withdraw funds from individuals' bank accounts including that of the victim; (4) and the incidents were 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.

3. Forgery— motion to dismiss—sufficiency of evidence

The trial court erred by denying defendant's motion to dismiss on all but the first three forgery charges named in the indictment and the accompanying uttering charges, and defendant's ten convictions for forgery and ten convictions for uttering in docket numbers 04 CRS 55303, 04 CRS 55304, 04 CRS 55306, and 04 CRS 55307 are reversed, because: (1) signing as the agent of another without authority does not constitute forgery; and (2) all but the first three withdrawal slips from 04 CRS 55302 that defendant presented to the bank bore defendant's own signature and did not include the victim's name or purported signature.

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4. Appeal and Error— mootness—prior record level

Although defendant contends the trial court erred in a multiple obtaining property by false pretenses, multiple forgery, and multiple uttering case by calculating defendant's prior record level, this argument is dismissed as moot because the case has already been remanded for resentencing, and the trial court is required to calculate defendant's prior record level upon resentencing.

Appeal by defendant from judgments entered 20 April 2005 by Judge Paul L. Jones in Wayne County Superior Court. Heard in the Court of Appeals 11 May 2006.

Attorney General Roy Cooper, by Assistant Attorney General David P. Brenskelle, for the State.

Geoffrey W. Hosford, for defendant-appellant.

TYSON, Judge.

Louretha Mae King (“defendant”) appeals from judgments entered after a jury found her to be guilty of thirteen counts of obtaining property by false pretenses, thirteen counts of forgery, and thirteen counts of uttering. We find no error in part, reverse in part, and remand for resentencing.

I. Background

In early 2004, Catherine Parker (“Parker”) advertised in the newspaper for a care giver for her elderly sister, Agnes Canady (“Canady”). Defendant responded to the advertisement. Parker hired defendant to care of Canady every other Sunday from 2:00 p.m. until 9:00 p.m. Defendant worked as Canady's care giver for three or four Sundays before being terminated for failing to keep an appointment to care for Canady. Parker paid defendant for her services with three personal checks. The checks were drawn upon Canady's Wachovia Bank personal checking account. Parker signed the checks pursuant to a power of attorney, which Canady had issued to Parker in 1986. The checks bore Canady's name, address, telephone number, and checking account number. The last of the three checks was issued to defendant on 8 March 2004.

On 18 March 2004, defendant visited the law office of attorney Mario White (“White”) in Clinton requesting him to prepare a power of attorney for her “grandmother” or “aunt.” White prepared a power

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of attorney naming Canady as the principal and defendant as attorney in fact. Defendant supplied the information necessary for White to prepare the power of attorney, including Canady's social security number. Defendant supplied her own address as the address for Canady. The power of attorney was not signed or notarized at White's office since Canady was not present to sign or initial the document. Defendant left White's office with the power of attorney that day.

Later that day, defendant visited Donnie McIntyre ("McIntyre"), the owner of McIntyre Funeral Home in Goldsboro, seeking to have Canady's power of attorney notarized. McIntyre knew defendant from church and "took for granted" that the power of attorney presented by defendant was legitimate. Defendant represented to McIntyre that Canady was defendant's grandmother and that she was caring for her. Defendant further represented to McIntyre that "she had some things that needed to be taken care of right then." At the time defendant presented the power of attorney to McIntyre for his notarization, it bore the initials "APC" next to portions of the document indicating defendant had the authority to engage in certain transactions on behalf of Canady. Defendant signed the document in McIntyre's presence and McIntyre notarized it.

The following day, 19 March 2004, defendant presented the power of attorney to Tesia Lemelle ("Lemelle"), the financial services manager of a Wachovia Bank branch located in Mt. Olive. Defendant told Lemelle that her aunt was in the hospital and that she was in "a rush." Lemelle processed the power of attorney. Defendant's name was added to Canady's account within the bank's computer system as a person authorized to conduct transactions on behalf of Canady. Defendant withdrew \$3,500.00 from Canady's checking account using a generic withdrawal slip, which had been completed prior to her approach to the bank teller's window.

On 2 April 2004, defendant twice withdrew \$500.00 from Canady's account. Thereafter, defendant made numerous other withdrawals from Canady's checking and money market accounts using generic withdrawal slips. On 5 April 2004, defendant twice withdrew \$500.00. On 9 April 2004, defendant withdrew \$500.00. Defendant withdrew \$250.00 on 14 April 2004 and again on 15 April 2004. Defendant withdrew \$500.00 on 16 April 2004. On 25 May 2004, defendant withdrew \$4,500.00 from Canady's account and \$1,000.00 more on 28 May 2004. On 2 June 2004, defendant withdrew another \$1,000.00. Defendant withdrew \$800.00 twice on 3 June 2004. On 8 June 2004, defendant withdrew \$4,700.00.

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Parker reviewed Canady's bank statement and discovered that money was being taken from her sister's checking and money market accounts. The statement was addressed to Canady with defendant's name beneath it followed by "POA." Parker discovered that defendant had been withdrawing money from Canady's account using generic withdrawal slips. Parker contacted Wachovia to inform them that money had been improperly withdrawn from her sister's accounts. Parker received two boxes of checks at her address from Wachovia that she had not ordered. The name designation on the checks was "Agnes P. Canady, Louretha King, POA."

After being contacted by Parker, Wachovia's loss management department commenced an investigation. The case was assigned to Reggie Whitley ("Whitley") on 16 April 2004. Whitley began the investigation on 19 April 2004 and discovered: (1) the power of attorney was invalid because it had never been signed by Canady; and (2) defendant's signature was located where Canady should have signed. On 27 April 2004, Whitley advised defendant the transactions she had made were not legitimate and to return the money she had withdrawn from Canady's account.

Defendant told Whitley that she had been working for Canady for many years, and that she was paying some of Canady's bills and "handling some of her own expenses too." Defendant further told Whitley that Canady was helping defendant establish a group home for drug addicts and recovering alcoholics. Defendant acknowledged that she owed the money and told Whitley she would bring \$2,500.00 to Wachovia the following Friday. Defendant never repaid any funds. Instead, defendant continued to withdraw funds from Canady's account until June 2004.

On 2 June 2004, defendant attempted to withdraw funds from Canady's account at the Goldsboro Wachovia branch. The bank teller recognized defendant and asked her to come inside the bank. Bank personnel called the police who removed defendant from the premises. Defendant returned to the same branch later that day and attempted to withdraw money from one of Canady's accounts. Bank personnel instructed defendant to leave the bank and that she would not be allowed to withdraw any more money from Canady's accounts.

The following day, defendant withdrew \$800.00 from Canady's account at Wachovia's Berkeley Branch in Goldsboro and \$800.00 from Canady's account at Wachovia's Mt. Olive branch. Defendant's

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final withdrawal from Canady's accounts took place on 8 June 2004 when she withdrew \$4,700.00, leaving only \$36.00 remaining in Canady's accounts.

Defendant was indicted on thirty-nine counts: thirteen counts of obtaining property by false pretenses in violation of N.C. Gen. Stat. § 14-100, thirteen counts of forgery in violation of N.C. Gen. Stat. § 14-119, and thirteen counts of uttering in violation of N.C. Gen. Stat. § 14-120. Defendant was tried in Wayne County Superior Court beginning 18 April 2005.

At trial, following a *voir dire* hearing, the trial court allowed testimony regarding a subsequent power of attorney that White had prepared for defendant. This power of attorney, prepared on 11 May 2004, names Robert L. Goodson ("Goodson") as the principal and defendant as the attorney in fact. The 11 May 2004 power of attorney was notarized by an employee of McIntyre Funeral Home. Goodson testified that defendant was a friend of his roommate, and that he had never given defendant a power of attorney or authorized her to act on his behalf. Using this power of attorney, defendant engaged in a failed attempt to withdraw funds from Goodson's Wachovia bank account.

Following another *voir dire* hearing, the trial court allowed testimony that on 23 March 2004, defendant visited a used car dealership and presented the power of attorney bearing Canady's name as principal and defendant as attorney in fact to purchase a Ford Explorer. Defendant represented she was Canady's guardian and that she was purchasing the Ford Explorer to transport Canady and pick up her medications. The Ford Explorer was financed in Canady's name for \$11,909.85.

The trial court allowed testimony that the Ford Explorer was searched following defendant's arrest and was found to contain Goodson's social security number, his driver's license, his birth certificate, and the false power of attorney which defendant had obtained naming Goodson as principal and defendant as attorney in fact. The vehicle also contained Parker's social security number, date of birth, checking account numbers, bank account balance amounts, and personal bank identification number.

The jury found defendant to be guilty on all thirty-nine counts named in the indictment. Defendant was sentenced within the presumptive range with a Prior Record Level IV to thirteen consecutive prison terms of ten to twelve months. Defendant appeals.

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II. Issues

Defendant argues: (1) the forgery indictments were fatally defective; (2) the trial court abused its discretion in admitting evidence in violation of the North Carolina Rules of Evidence, Rule 404(b); (3) the trial court erred in failing to dismiss the forgery charges; and (4) the trial court erred in calculating her Prior Record Level.

III. Forgery Indictments

[1] Defendant argues the bills of indictment for forgery were fatally defective and judgment should be arrested. She asserts the bills of indictment failed to sufficiently state the elements of forgery. We disagree.

It is well established that an indictment must charge all of the essential elements of the alleged criminal offense. *State v. Thomas*, 153 N.C. App. 326, 335, 570 S.E.2d 142, 147, *disc. rev. denied*, 356 N.C. 624, 575 S.E.2d 759 (2002) (citation omitted). The crime of forgery requires allegations of three elements: “(1) There must be a false making or alteration of some instrument in writing; (2) there must be a fraudulent intent; and (3) the instrument must be apparently capable of effecting a fraud.” *State v. Phillips*, 256 N.C. 445, 447, 124 S.E.2d 146, 147 (1962). Here, the thirteen forgery indictments, of which “Count 2” is representative, provide as follows:

AND THE JURORS FOR THE STATE UPON THEIR OATH DO FURTHER PRESENT that on or about the 19th day of March, 2004, in Wayne County Louretha Mae King unlawfully, willfully, feloniously and with the intent to injure and defraud, did forge, falsely make, and counterfeit a Wachovia withdrawal form, which was apparently capable of effecting a fraud, and which is as appears on the copy attached hereto as Exhibit “A” and which is hereby incorporated by reference in this indictment as if the same were fully set forth.

Defendant asserts the indictments are defective because they must “allege how [defendant] committed a false making.” The language of the indictment clearly sets forth all of the elements of the offense. *Id.* The indictments are not fatally defective for failing to state the manner in which defendant forged the withdrawal form.

Further, the exhibits attached to the forgery indictments are copies of the withdrawal slips defendant used to remove funds from

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Canady's bank accounts. The exhibits show the date and time of day, amount of money withdrawn, account number, and particular bank branch from which the funds were withdrawn. The forgery indictments alleged all of the necessary elements of the offense and informed defendant of the date and the time of each offense, the amount of money involved, and where the offense occurred. The forgery indictments fulfilled the purposes of an indictment, which are: "(1) to give the defendant notice of the charge against [her] to the end that [she] may prepare [her] defense and to be in a position to plead former acquittal or former conviction in the event [she] is again brought to trial for the same offense; [and] (2) to enable the court to know what judgment to pronounce in case of conviction." *State v. Burton*, 243 N.C. 277, 278, 90 S.E.2d 390, 391 (1955). This assignment of error is overruled.

IV. Character Evidence

[2] Defendant argues the trial court abused its discretion in admitting evidence, in violation of the North Carolina Rules of Evidence, Rule 404(b), of: (1) the power of attorney she obtained naming her as attorney in fact and Goodson as the principal; (2) personal papers and identification cards belonging to Parker and Goodson found in her vehicle after her arrest; and (3) her purchase of the Ford Explorer with the power of attorney naming Canady as the principal. Defendant argues this evidence is irrelevant and was offered solely to show her propensity to commit the offenses charged. We disagree.

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.

In *State v. Coffey*, our Supreme Court stated that Rule 404(b) 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.

326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990).

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Thus, even though evidence may tend to show other crimes, wrongs, or acts by the 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.”

Id. at 279, 389 S.E.2d at 54. Relevant evidence is “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” N.C. Gen. Stat. § 8C-1, Rule 401 (2005).

The State offered this evidence to show “common plan or scheme” and “absence of mistake.” This evidence was particularly relevant since Canady had died prior to trial and was unavailable to testify. Defendant contended Canady had initialed the power of attorney which she utilized to withdraw funds from Canady’s bank accounts. This evidence tended to rebut defendant’s contention and showed she engaged in a plan or scheme to obtain and use illegitimate powers of attorney to illegally withdraw funds from individuals’ bank accounts, and that Canady was one of the victims of this scheme.

“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, *cert. denied*, 354 N.C. 222, 554 S.E.2d 647 (2001) (citation omitted). 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.” *State v. Boyd*, 321 N.C. 574, 577, 364 S.E.2d 118, 119 (1988). This evidence was relevant and admissible pursuant to Rule 404(b). Under an abuse of discretion review, defendant has failed to show the admission of this evidence was “manifestly unsupported by reason or [was] 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). This assignment of error is overruled.

V. Motion to Dismiss

[3] Defendant argues the trial court erred by denying her motion to dismiss the forgery charges at the close of the State’s evidence. We agree in part.

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)

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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)), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2001). 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)).

As previously noted, the essential elements of the offense of forgery are: (1) "a false making or alteration of some instrument in writing;" (2) "fraudulent intent;" and (3) "the instrument must be apparently capable of effecting a fraud." *Phillips*, 256 N.C. at 447, 124 S.E.2d at 147. Defendant contends the State failed to present sufficient evidence of the first element of forgery. The first three withdrawal slips defendant presented to the bank, dated 19 March and 2 April 2004, bore the forged signature of Canady along with defendant's signature.

To show that the defendant signed the name of some other person to an instrument, and that he passed such instrument as genuine, is not sufficient to establish the commission of a crime. It must still be shown that it was a false instrument, and this is not established until it is shown that a person who signed another's name did so without authority.

Id. at 448, 124 S.E.2d at 148 (quotation omitted). The State presented sufficient evidence from which a jury could conclude that defendant forged Canady's name and uttered withdrawal slips without Canady's authority. The trial court did not err in denying defendant's motion to dismiss with respect to these three transactions in docket number 04 CRS 55302.

As for the remaining withdrawal slips defendant presented to the bank, each contains a representation stating defendant was the account holder. Each of these withdrawal slips contains the language, "I wish to withdraw from my account," along with one of Canady's account numbers and defendant's signature alone. Our Supreme Court's holding in *State v. Lamb*, 198 N.C. 423, 152 S.E. 154 (1930) controls this issue.

In *Lamb*, the Court held, "Forgery is the attempted imitation of another's personal act. Hence *signing as the agent of another without authority does not constitute forgery.*" 198 N.C. at 425, 152 S.E. at 155 (citations omitted) (emphasis supplied).

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If a man draw . . . a bill of exchange in the name of another, without his authority it is forgery. *But if he sign it with his own name, per procuracion . . . it is no forgery.* The reason is that forgery cannot be predicated of a writing not intended to be a semblance of something which it does not purport to be and which is in itself not false.

Id. at 426, 152 S.E. at 156 (quotation omitted) (emphasis supplied). In *Lamb*, our Supreme Court reversed the defendant's forgery conviction because the State failed to prove the defendant's writing falsely purported to be the writing of another. 198 N.C. at 426-27, 152 S.E. at 156.

The United States Supreme Court cited *Lamb* in *Gilbert v. United States*, 370 U.S. 650, 8 L. Ed. 2d 750 (1962) and considered the issue of agency endorsement. The defendant in *Gilbert* was convicted of forgery under 18 U.S.C. § 495. The defendant, an accountant, forged the endorsements of others on government tax-refund checks and endorsed his own name on the checks as "trustee." *Id.* at 653, 8 L. Ed. 2d at 753. In considering the question of whether "forgery" under 18 U.S.C. § 495 included agency endorsement, the Court inquired into the common law meaning of forgery. *Id.* at 655, 8 L. Ed. 2d at 754 ("For in the absence of anything to the contrary it is fair to assume that Congress used that word in the statute in its common-law sense.").

Mr. Justice Harlan, speaking for an unanimous Court, held:

In 1847 it was decided in the English case of *Regina v. White*, 2 Car & K 404, 175 Eng Rep 167 (Nisi Prius, Book 6), that "indorsing a bill of exchange under a false assumption of authority to indorse it per procuracion, is not forgery, there being no false making." . . . [T]he *Regina v. White* view of forgery at common law was early accepted in a federal case as representing the English common law. *In re Extradition of Tully*, 20 F 812. The same view of forgery has since been followed in most of the state and federal courts in this country. *See, e.g., . . . State v. Lamb*, 198 N.C. 423, 425-426, 152 S.E. 154, 155-156 . . .

Id. at 655-56, 8 L. Ed. 2d at 754-55. The Court held " 'forge' in § 495 should not be taken to include an agency endorsement." *Id.* at 657, 8 L. Ed. 2d at 755. Because our forgery statute does not include a definition of "forgery," we review the common law for the meaning of the word.

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Here, all but the first three withdrawal slips defendant presented to the bank bore her own signature, and did not include Canady's name or purported signature. Under the common law, our Supreme Court's precedent in *Lamb*, and the United States Supreme Court's precedent in *Gilbert*, defendant cannot be guilty of forgery for the transactions in which she signed her own name on the withdrawal slip. The trial court erred by denying defendant's motion to dismiss on all but the first three forgery charges named in the indictment and the accompanying uttering charges. *State v. Greenlee*, 272 N.C. 651, 657, 159 S.E.2d 22, 26 (1968) ("Uttering a forged instrument consists in offering to another the forged instrument with the knowledge of the falsity of the writing and with intent to defraud.") Defendant's ten convictions for forgery and ten convictions for uttering in docket numbers 04 CRS 55303, 04 CRS 55304, 04 CRS 55306, and 04 CRS 55307 are reversed.

VI. Prior Record Level Points

[4] Defendant argues the trial court erred by calculating her prior record level points because it counted two separate felony convictions that occurred during the same superior court session. Because we have remanded this case to the trial court for resentencing, this issue is moot. The trial court is required to calculate defendant's prior record level upon resentencing her. N.C. Gen. Stat. § 15A-1340.13 (2005) ("Before imposing a sentence, the court shall determine the prior record level for the offender pursuant to G.S. 15A-1340.14."). This assignment of error is dismissed.

VII. Conclusion

Defendant has failed to show that the forgery indictments were fatally defective or that the trial court abused its discretion in admitting evidence to show her propensity to commit crimes in violation Rule 404(b). The trial court did not err in failing to dismiss the first three forgery and uttering charges listed on defendant's indictment. Sufficient evidence was presented that defendant forged Canady's name on the first three withdrawal slips she presented to the bank. We find no error in defendant's three convictions for forgery and three convictions for uttering in docket number 04 CRS 55302.

The trial court erred in failing to dismiss the remaining forgery and uttering convictions pursuant to our Supreme Court's decision in *Lamb*, 198 N.C. at 426-27, 152 S.E. at 156. Defendant signed her own name, not Canady's, to the withdrawal slips she used in procuring the

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funds from the bank. Canady's name or purported signature does not appear on the withdrawal slips. The trial court erred by denying defendant's motion to dismiss all but the first three forgery and uttering charges listed in the indictment. This case is remanded for resentencing.

In all other respects, we hold defendant received a fair trial free from errors she preserved, assigned, and argued. We find no error in defendant's thirteen obtaining property by false pretenses convictions. We reverse defendant's ten forgery convictions and ten uttering convictions in docket numbers 04 CRS 55303, 04 CRS 55304, 04 CRS 55306, and 04 CRS 55307 and remand for resentencing. The trial court is required to calculate defendant's prior record level upon resentencing her.

No error in part, Reversed in part, and Remanded for Resentencing.

Judges McCULLOUGH and HUDSON concur.

STATE OF NORTH CAROLINA v. JERRY DALE SMITH, DEFENDANT

No. COA05-1240

(Filed 20 June 2006)

1. Criminal Law— felony fleeing to elude arrest—motion to dismiss—sufficiency of evidence—aggravating factors

The trial court did not err by denying defendant's motion to dismiss the charge of felony fleeing to elude arrest under N.C.G.S. § 20-141.5(b), because: (1) an officer testified that defendant sped at least in excess of sixty miles per hour in speed-zone areas of thirty-five and forty-five miles per hour, thus providing sufficient evidence that defendant drove more than fifteen miles per hour over the speed limit as required for a charge under N.C.G.S. § 20-141.5(b); and (2) an officer provided sufficient testimony to show that defendant's actions satisfied the definition of reckless driving including that it was a rainy day, defendant was involved in a high-speed chase and came close to hitting an oil tanker at speeds in excess of sixty miles per hour, and defendant crossed double yellow lines.

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2. Confessions and Incriminating Statements— motion to suppress—interrogation—custody

The trial court did not err in a felony fleeing to elude arrest case by denying defendant's motion to suppress his confession, because: (1) defendant failed to preserve the issue for appellate review by impermissibly presenting a different theory on appeal than argued at trial; (2) even if the issue were properly preserved, undisputed evidence in the record established that defendant initiated the confession and his confession was not made in response to any questioning by an officer; and (3) although defendant was in custody when he confessed, Miranda protection is only triggered by a measure of compulsion above and beyond that inherent in custody itself.

3. Criminal Law— motion for continuance—failure to provide affidavit

The trial court did not abuse its discretion in a felony fleeing to elude arrest case by denying defendant's motion for a continuance, because: (1) defendant failed to provide with his motion an affidavit citing any reasons for a continuance beyond defense counsel's general statement that he needed time to process the information; (2) defendant failed to show how the additional time would have helped him to better prepare had the continuance been granted; (3) attempts to suggest reasons supporting the motion in a brief on appeal are insufficient to overcome the failure to provide these reasons to the trial court in an affidavit or otherwise; and (4) defendant failed to demonstrate that he was materially prejudiced as a result of the denial of his motion to continue, and the overwhelming evidence of his guilt negates any inference that he suffered material prejudice.

Appeal by Defendant from judgment entered 26 April 2005 by Judge James U. Downs in Superior Court, Buncombe County. Heard in the Court of Appeals 16 May 2006.

Attorney General Roy Cooper, by Assistant Attorney General Kimberly D. Potter, for the State.

Mercedes O. Chut, for defendant-appellant.

WYNN, Judge.

Fleeing to elude arrest constitutes a felony if the State establishes at least two of the statutory aggravating factors under section

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20-141.5(b) of the North Carolina General Statutes. Here, Defendant contends the State failed to present sufficient evidence to support his conviction for felony fleeing to elude arrest. Because the evidence supported finding the section 20-141.5(b) aggravating factors of driving more than fifteen miles per hour over the speed limit and reckless driving, we affirm Defendant's conviction.

The facts tend to show that in June 2004 while patrolling in Buncombe County, Officer William Cummings received information that "a subject wanted on [two felony] warrants" was possibly in the area, and that he was "operating . . . a powder blue Nissan or Datsun 280-Z[.]" Upon seeing a powder blue Datsun 280-Z "passing cars on the double yellow line" about an hour later, Officer Cummings "turned on the overhead lights" to his squad car and pursued the vehicle.

The vehicle passed through a construction zone nearly striking a gasoline truck, rounded a curve in the road and stopped. Thereafter, "a white male, average weight, [average height] . . . dressed in all black or all dark clothing" with "dark hair" exited the vehicle, ran across the road, jumped over an approximate ten-foot wall and disappeared into the woods.

Officer Cummings determined that the blue Datsun from which the suspect fled was registered to Brenda Darlene Lovelace in Canton, North Carolina. He summoned other officers to form a perimeter around the area, since there were "limited places [for the suspect] to come out."

Upon receiving a call that "[the subject] had been picked up by his wife in a green jeep with a black rag top on it", Officer Cummings spotted the vehicle and initiated a felony traffic stop. The female driver who identified herself as "Miss Lovelace," drove a vehicle registered to the same address as the blue Datsun. The passenger in the vehicle, Defendant Jerry Dale Smith, was dressed "in dark clothing, completely soaked from head to toe," and "had trouble walking." Officer Cummings asked Defendant if he needed an ambulance to which he responded that "he possibly hurt [his ankle] when he jumped over the wall," but that "he'd be fine" without an ambulance. Officer Cummings then took him into custody and placed him in the back of the patrol car.

Officer Cummings testified that during the ride to the Buncombe County Detention Center, he "closed the shield on the cage" between

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Defendant and himself and took care not to speak with Defendant. But Defendant initiated conversation with Officer Cummings and essentially confessed to the crime. Officer Cummings explained:

As he was riding in the back seat he stated several times that he was sorry, that he was scared, that he knew he was wanted, that he figured that when we passed him that we were looking for him. I told him he about hit the tanker truck. He stated he was a good driver, that wouldn't have happened.

Defendant was charged and later found guilty of felonious operation of a vehicle to elude arrest and being an habitual felon. The trial court sentenced Defendant to a term of 133 to 169 months imprisonment. Defendant appeals contending the trial court erred by denying his motions to (I) dismiss the charge of felonious operation of a vehicle to elude arrest, (II) suppress his confession, and (III) continue his trial.

I.

[1] “When a defendant moves to dismiss a charge against him on the ground of insufficiency of the evidence, the trial court must determine ‘whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense.’” *State v. Garcia*, 358 N.C. 382, 412, 597 S.E.2d 724, 746 (2004) (citation omitted); *see also State v. Morgan*, 359 N.C. 131, 161, 604 S.E.2d 886, 904 (2004); *State v. Butler*, 356 N.C. 141, 145, 567 S.E.2d 137, 139 (2002). Our Supreme Court has defined “substantial evidence” as “relevant evidence that a reasonable person might accept as adequate, or would consider necessary to support a particular conclusion.” *Garcia*, 358 N.C. at 412, 597 S.E.2d at 746 (citations omitted).

Additionally, “[i]f there is substantial evidence—whether direct, circumstantial, or both—to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied.” *Butler*, 356 N.C. at 145, 567 S.E.2d at 140 (alteration in original) (quoting *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 383 (1988)).

Here, Defendant was convicted of fleeing to elude arrest under section 20-141.5(b) of the North Carolina General Statutes which provides, in pertinent part:

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(a) It shall be unlawful for any person to operate a motor vehicle on a street, highway, or public vehicular area while fleeing or attempting to elude a law enforcement officer who is in the lawful performance of his duties. Except as provided in subsection (b) of this section, violation of this section shall be a Class 1 misdemeanor.

(b) If two or more of the following aggravating factors are present at the time the violation occurs, violation of this section shall be a Class H felony.

(1) Speeding in excess of 15 miles per hour over the legal speed limit. . . .

(3) Reckless driving as proscribed by G.S. 20-140.

N.C. Gen. Stat. § 20-141.5(a)-(b) (2005).

Defendant contends the State failed to present sufficient evidence to support the aggravating factors necessary to support a conviction for felony fleeing to elude arrest. However, a review of the record reveals that Officer Cummings testified that Defendant sped “at least in excess of sixty [miles per hour]” in speed-zone areas of thirty-five and forty-five miles per hour. This evidence supports finding that Defendant drove more than fifteen miles per hour over the speed limit as required for a charge under section 20-141.5(b)(1) of the North Carolina General Statutes.

As to the second aggravating factor of reckless driving, section 20-140 of the North Carolina General Statutes defines “reckless driving” as (a) driving “carelessly and heedlessly in willful or wanton disregard of the rights or safety of others”; or (b) driving “without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property.” N.C. Gen. Stat. § 20-140(a)-(b) (2005). The record reveals that Officer Cummings testified that it was rainy that day and that during the high-speed chase, Defendant came extremely close to hitting an oil tanker at speeds in excess of sixty miles per hour. Officer Cummings further testified that he observed Defendant crossing double yellow lines shortly after he passed Defendant’s car. This evidence was sufficient to show that Defendant’s actions satisfied the definition of “reckless driving” under section 20-140 which is referenced by section 20-141.5(b) of the North Carolina General Statutes.

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In sum, the State presented sufficient evidence to withstand Defendant's motion to dismiss the felonious fleeing to elude arrest charge.

II.

[2] The record shows Defendant failed to preserve for appellate review the issue of whether his confession should have been suppressed. To preserve a question for appellate review, North Carolina Rule of Appellate Procedure 10(b)(1) requires a party to state the "specific grounds" for the desired ruling. N.C. R. App. P. 10(b)(1). "Our Supreme Court has long held that where a theory argued on appeal was not raised before the trial court, the law does not permit parties to 'swap horses between courts in order to get a better mount' in the appellate courts." *State v. Holliman*, 155 N.C. App. 120, 123, 573 S.E.2d 682, 685 (2002) (citing *State v. Sharpe*, 344 N.C. 190, 194, 473 S.E.2d 3, 5-6 (1996)).

At trial in this case, Defendant specifically moved to suppress his confession on due process grounds:

COURT: And you move to suppress the statement because of what grounds?

MR. OLESIUK: Due process, your Honor.

At the end of the hearing, the trial court gave defense counsel an opportunity to clarify the grounds for the motion to suppress, and even specifically asked defense counsel whether Defendant was moving to suppress on grounds related to the voluntariness of his confession:

COURT: [Y]ou said due process. Are you contesting it on the voluntariness of the statement?

MR. OLESIUK: I am more with regard to the criminal procedure, sharing of Discovery and such as that. Due process, the timeliness of the information.

Thus, for the first time on appeal, Defendant asserts that the trial court erred in denying his motion to suppress under *Miranda*. As Defendant impermissibly presents a different theory on appeal than argued at trial, this assignment of error was not properly preserved for appellate review. See *Holliman*, 155 N.C. App. 120 at 124, 573 S.E.2d at 686 (holding that the defendant waived his assignment of

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error on appeal where he argued at trial that evidence should have been suppressed on the grounds that it was “coerced,” but then argued on appeal that the statement should have been suppressed for “lack of probable cause[.]”). Nonetheless, even if this issue was properly before this Court, we would uphold the trial court’s admission of his confession under *Miranda*.

For *Miranda* purposes, the United States Supreme Court defines “interrogation” as “[a] practice that the police should know is reasonably likely to evoke an incriminating response from a suspect[.]” *Rhode Island v. Innis*, 446 U.S. 291, 301, 64 L. Ed. 2d 297, 308 (1980). Moreover, “interrogation” for *Miranda* purposes does not include “words or actions . . . normally attendant to arrest and custody,” and must consist of “a measure of compulsion above and beyond that inherent in custody itself.” *Id.* at 300-01, 64 L. Ed. 2d at 307-08 (holding that no *Miranda* warning was required for admissibility of confession, even where police talked to each other suggestively about the defendant’s crime in his presence, because the defendant was not subjected to the “functional equivalent” of interrogation under such circumstances).

Our Supreme Court analyzed *Miranda* and its applicability in *State v. Walls*, 342 N.C. 1, 28, 463 S.E.2d 738, 750 (1995), *cert. denied*, 517 U.S. 1197, 134 L. Ed. 2d 794 (1996):

Miranda v. Arizona, 384 U.S. 436, 16 L. Ed. 2d 694, *reh’g denied*, 385 U.S. 890, 17 L. Ed. 2d 121 (1966), provides that custodial interrogation must cease when a suspect indicates he wishes to remain silent. ‘At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise.’ *Id.* at 474, 16 L. Ed. 2d at 723. The Court, however, made quite clear that the holding in *Miranda* did not affect the fact that ‘[v]olunteered statements of any kind are not barred by the Fifth Amendment.’ *Id.* at 478, 16 L. Ed. 2d at 726. The Court has defined ‘interrogation’ as ‘[a] practice that the police should know is reasonably likely to evoke an incriminating response from a suspect.’ *Rhode Island v. Innis*, 446 U.S. 291, 301, 64 L. Ed. 2d 297, 308 (1980).

Id. at 28, 463 S.E.2d at 750.

After considering the evidence introduced in the suppression hearing, the trial court made the following findings of fact:

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THE COURT: . . . the Court concludes that such statement by the defendant was made without any questions being asked of him. He was never given his *Miranda* rights and no questions were asked of him. Any statements he made were initiated by him, volunteered by him, and that any opportunity for silence was waived by him in view of his initiating contact.

This Court's review of the denial of a motion to suppress is 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 whether the findings of fact in turn support the conclusions of law. *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). If the trial court's conclusions of law are supported by its factual findings, this Court will not disturb those conclusions on appeal. *State v. Logner*, 148 N.C. App. 135, 138, 557 S.E.2d 191, 193-94 (2001).

After careful review of the record on appeal, we conclude the trial court properly denied Defendant's motion to suppress. Undisputed evidence in the record establishes that Defendant initiated the confession and that his confession was not made in response to any questioning by Officer Cummings:

Mr. Hess: And, did you ask [Defendant] any questions?

Officer Cummings: No, I never asked him anything other than his name.

Officer Cummings further testified that it was his practice to never ask questions of suspects until after booking, and that he closed the shield on the police car's cage after placing Defendant in the back seat. Defendant did not rebut any of this evidence, and he did not provide any evidence suggesting that his statement was involuntary, or that Officer Cummings had questioned him.

Nonetheless, Defendant argues on appeal that because he was in custody when he confessed, his confession is equivalent to the coercion inherent in "interrogation" for which *Miranda* warnings are required. However, the United States Supreme Court explicitly rejected this argument in *Innis*, explaining that *Miranda* protection is only triggered by "a measure of compulsion above and beyond that inherent in custody itself." *Innis*, 446 U.S. at 300, 64 L. Ed. 2d at 307. As the *Innis* Court held that a defendant's voluntary confession made in custody while riding in a police car where the officers were suggestively discussing the defendant's crime was not "interrogation",

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Defendant's argument in this case, that he was subjected to any "interrogation" for *Miranda* purposes, is without merit.

III.

[3] Defendant further argues that the trial court erred by denying his motion for a continuance. The standard of review for a trial court's ruling on a motion for a continuance

is addressed to the discretion of the trial court, and absent a gross abuse of that discretion, the trial court's ruling is not subject to review. When a motion to continue raises a constitutional issue, the trial court's ruling is fully reviewable upon appeal. Even if the motion raises a constitutional issue, a denial of a motion to continue is grounds for a new trial only when defendant shows both that the denial was erroneous and that he suffered prejudice as a result of the error.

State v. Jones, 172 N.C. App. 308, 311, 616 S.E.2d 15, 18 (2005) (quoting *State v. Taylor*, 354 N.C. 28, 33-34, 550 S.E.2d 141, 146 (2001)). Moreover,

to establish that the denial of a continuance motion was prejudicial, 'a defendant must show that he did not have ample time to confer with counsel and to investigate, prepare and present his defense. To demonstrate that the time allowed was inadequate, the defendant must show how his case would have been better prepared had the continuance been granted or that he was materially prejudiced by the denial of his motion.'

Id. (quoting *State v. Williams*, 355 N.C. 501, 540-41, 565 S.E.2d 609, 632 (2002)). Thus, "a motion for a continuance should be supported by an affidavit showing sufficient grounds for the continuance." *State v. Jones*, 342 N.C. 523, 531, 467 S.E.2d 12, 17 (1996) (quoting *State v. Kuplen*, 316 N.C. 387, 403, 343 S.E.2d 793, 802 (1986)); see also *State v. Cradle*, 281 N.C. 198, 208, 188 S.E.2d 296, 303, cert. denied, 409 U.S. 1047, 34 L. Ed. 2d 499 (1972) (explaining "[c]ontinuances should not be granted unless the reasons therefor are fully established. Hence, a motion for a continuance should be supported by an affidavit showing sufficient grounds.").

Analogous to this case, in *State v. McCullers*, 341 N.C. 19, 460 S.E.2d 163 (1995), a murder defendant moved to continue after the State provided the defendant with a list of six potential alibi witnesses on the Friday afternoon before the Monday on which the trial

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was scheduled. *Id.* at 32, 460 S.E.2d at 171. The defendant in that case argued that the witnesses “would be important for the defense,” and that he “had spent the weekend trying to locate the witnesses but had not had the opportunity to interview anyone.” *Id.* Our Supreme Court held that the trial court properly denied the defendant’s motion to continue, explaining that “defendant’s oral motion to continue was not ‘supported by an affidavit showing sufficient grounds,’ ” and that “the need to question these witnesses was not ‘fully established.’ ” *Id.* at 33, 460 S.E.2d at 171 (quoting *Cradle*, 281 N.C. at 208, 188 S.E.2d at 303). The Court rejected the defendant’s argument that his brief on appeal set forth sufficient reasons for a continuance, finding instead that these reasons should have been presented to the trial court at the time of the motion. *Id.*

Here, the prosecutor notified defense counsel regarding Defendant’s confession on the Friday afternoon before the trial was scheduled to begin. Defendant moved for a continuance at trial, offering the following explanation:

MR. OLESIUUK: I’ll ask for a motion to continue, your Honor, simply to be able to completely process the new information and to be better able to advise my client.

Defendant failed to provide an affidavit illustrating sufficient grounds for the continuance along with his motion citing any reasons for a continuance beyond his counsel’s general statement that he needed time to “process this information.” Specifically, Defendant failed to show how the additional time would have helped him to better prepare had the continuance been granted. While Defendant attempts to suggest reasons supporting the motion in his brief on appeal, as in *McCullers*, this attempt is insufficient to overcome his failure to provide these reasons to the trial court in an affidavit or otherwise. *McCullers*, 341 N.C. at 33, 460 S.E.2d at 171.

Moreover, Defendant has failed to demonstrate that he was materially prejudiced as a result of the denial of his motion to continue. See *State v. Ellis*, 130 N.C. App. 596, 599, 504 S.E.2d 787, 789 (1998) (where there is “overwhelming evidence of [a defendant’s] guilt,” a court must reject the defendant’s challenge for failure to satisfy the prejudice requirement). Unlike the alibi witnesses that could have potentially exonerated the defendant in *McCullers*, Defendant’s incriminating statements in this case merely added to the overwhelming evidence of his guilt. The jury was presented with evidence of multiple matching identifications of Defendant as the correct sus-

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pect, which were based both on his physical description as well as his address matching that to which the blue Datsun was registered. In addition, the jury heard Defendant's statement to Officer Cummings (to which Defendant does not object) that he hurt his foot when he "jumped over the wall." It follows that the overwhelming evidence of Defendant's guilt negates any inference that he suffered material prejudice as a result of the denial of the motion to continue.

No error.

Judges GEER and STEPHENS concur.

THE CITY OF CHARLOTTE, A MUNICIPAL CORPORATION, PLAINTIFF v. JOHN P. HURLAHE, JR., LINDA D. HURLAHE, ROBERT HULL, WILLIAM H. HOGUE, AND THELMA W. HOGUE, GARY L. BETOW, THRIFTY RENT-A-CAR SYSTEM, INC., TRSTE, INC., WACHOVIA BANK, N.A., CITY/COUNTY TAX COLLECTOR, AFFORDABLE TRANSPORTATION, INC., DEFENDANTS

No. COA05-1074

(Filed 20 June 2006)

1. Eminent Domain— lost profits—predicted rental income

Lost profits are not recoverable in a taking under eminent domain, but rental income is admissible on the question of fair market value. The trial court here did not err by admitting testimony from experts concerning their use of predicted rental income in determining the fair market value of property when used for a valet parking business near an airport. A cautionary instruction clarified any jury confusion on the issue.

2. Eminent Domain— condemnation—future use of land—airport parking

Future uses of the land are admissible in a condemnation action if the owner has taken steps to adapt the land prior to the taking. Testimony in a condemnation of land near an airport concerning the value of property as a valet parking business was admissible where it was undisputed that the property was largely covered by paved and gravel parking areas, defendant had used the property for parking cars, plaintiff used the property

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for airport parking after it was condemned, and an expert appraiser testified that the property was “ready to go” as a valet parking business.

3. Appeal and Error— preservation of issues—issue not raised at trial

An issue not raised at trial or assigned as error was not preserved for appellate review.

4. Eminent Domain— land near airport—evidence of possible use as parking lot

There was no prejudice in a condemnation action involving land near an airport from the admission of evidence that the owner would have used the land as a valet parking lot. Testimony about the possible uses of property is relevant to its highest and best use, the parties agree that airport parking is the highest and best use here, the city operated a parking lot on the property after the taking, and the City did not argue that the admission was prejudicial.

5. Appeal and Error— preservation of issues—failure to renew motion for directed verdict

Plaintiff’s failure to renew its motion for a directed verdict at the close of all the evidence meant that it did not preserve for appellate review the denials of its motions for a directed verdict and for a motion for a new trial or a judgment n.o.v.

Appeal by plaintiff from judgment entered 9 November 2004 by Judge Yvonne Mims Evans, in Mecklenburg County Superior Court. Heard in the Court of Appeals 28 March 2006.

Morris York Williams Surles & Barringer, LLP, by Robyn M. Lacy and John P. Barringer, for plaintiff.

The Odom Firm, PLLC, by T. LaFontine Odom, Sr. and Thomas L. Odom, Jr., for defendants.

Rebecca Cheney, for City of Charlotte.

Nexsen, Pruet, Adams, Kleemeir, PLLC, by Robert H. Hull, Jr., M. Jay DeVaney and Eric H. Biesecker, for Trustee in the Deed of Trust.

Harkey and Lambeth, by Averill Harkey, for William Hogue.

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LEVINSON, Judge.

Plaintiff, the city of Charlotte, appeals from judgment awarding defendants John and Linda Hurlahe damages of \$2,000,000 plus interest, and from the trial court's denial of plaintiff's post trial motions for a new trial or judgment notwithstanding the verdict. Defendants cross-appeal from an order granting plaintiff's motion to extend the time for plaintiff to serve its proposed record on appeal, and denying defendants' motion to dismiss plaintiff's appeal. We affirm.

In 1986 defendants moved to Charlotte, North Carolina. Defendants bought property near Charlotte/Douglas International Airport in 1986; they bought an adjoining tract in 1993, for a total of approximately 3.6 acres. Defendants' land ("the subject property"), was located less than a mile from the airport terminal passenger drop-off area, and close to highways providing access to the airport. This appeal arises from plaintiff's condemnation of the subject property.

From 1986 to 2002 defendants operated a Thrifty Car Rental franchise on the subject property. Defendants also rented parking spaces to rental car customers and other travelers. The property had over 450 parking spaces, both paved and gravel. During the fall of 2001 defendants' business dropped off, following the events of 11 September 2001 and the resultant decrease in air travel. Defendants could not meet their financial obligations, and on 16 October 2002 Thrifty Car Rental terminated defendants' franchise. Several weeks later, defendants were contacted by the city about condemnation of the subject property.

On 30 December 2002 plaintiff filed a Complaint, Declaration of Taking, and Notice of Deposit, alleging that the city had on that day taken the subject property by eminent domain. Plaintiff sought determination of the amount of compensation owed to defendants, which plaintiff alleged was \$842,500. Before trial all other issues were resolved, and a jury trial was conducted in October 2004 on the issue of the amount of compensation defendants were owed for the condemnation of the subject property.

At trial, both plaintiff and defendants presented the testimony of expert witnesses, who offered varying opinions on the fair market value of the subject property. On 15 October 2004 the jury returned a verdict finding that defendants were entitled to damages of \$2,000,000 in compensation for the taking of the subject property.

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Upon this verdict, the trial court on 9 November 2004 entered judgment in favor of defendants. Plaintiff's post trial motions for a new trial or judgment notwithstanding the verdict were denied, and on 7 December 2004 plaintiff appealed both the judgment and the denial of these motions. On 7 June 2005 defendants filed a motion in the trial court, seeking dismissal of plaintiff's appeal. Defendants cross-appeal from the denial of this motion, and from the court's granting of plaintiff's motion for extension of time to serve its proposed record on appeal.

Background

Condemnation is defined as a "determination and declaration that certain property (esp. land) is assigned to public use, subject to reasonable compensation; the exercise of eminent domain by a governmental entity." BLACK'S LAW DICTIONARY 310 (8th ed. 2004). "Eminent domain" is the "inherent power of a governmental entity to take privately owned property, . . . subject to reasonable compensation for the taking." BLACK'S LAW DICTIONARY 562 (8th ed. 2004). Plaintiff is authorized to exercise the power of eminent domain, and is directed to follow the condemnation procedures set forth in N.C. Gen. Stat. § 136-103 *et seq.* (2005).

N.C. Gen. Stat. § 136-112 (2005), sets out damages to which a condemnee is entitled, and provides in pertinent part that "[w]here the entire tract is taken the measure of damages for said taking shall be the fair market value of the property at the time of taking." N.C. Gen. Stat. § 136-112(2) (2005). The fair market value of a property may be defined as "the price which a willing buyer would pay to purchase the asset on the open market from a willing seller, with neither party being under any compulsion to complete the transaction." *Carlson v. Carlson*, 127 N.C. App. 87, 91, 487 S.E.2d 784, 786 (1997) (citation omitted).

Plaintiff's Appeal

[1] Plaintiff argues that the trial court erred by "admitting evidence concerning the net income of a hypothetical valet parking business on the subject property." We disagree.

Plaintiff challenges the court's admission of certain testimony. "Admission of evidence is 'addressed to the sound discretion of the trial court and may be disturbed on appeal only where an abuse of such discretion is clearly shown.' Under an abuse of discretion stand-

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ard, we defer to the trial court's discretion and will reverse its decision 'only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision.' *Gibbs v. Mayo*, 162 N.C. App. 549, 561, 591 S.E.2d 905, 913 (quoting *Sloan v. Miller Building Corp.*, 128 N.C. App. 37, 45, 493 S.E.2d 460, 465 (1997); and *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985)), *disc. review denied*, 358 N.C. 543, 599 S.E.2d 45 (2004). Accordingly, we must determine whether the trial court abused its discretion in admitting evidence of the predicted net income from operation of a valet parking lot on the subject property.

"In a condemnation case the issue for determination is damages based upon the difference in fair market value of the property before and after the taking. Accepted methods of appraisal in determining fair market value include: (1) the comparable sales method, (2) the cost approach, and (3) the capitalization of income approach." *City of Statesville v. Cloaninger*, 106 N.C. App. 10, 16, 415 S.E.2d 111, 115 (1992) (emphasis added) (citing *Metro. Sewerage Dist. of Buncombe Co. v. Trueblood*, 64 N.C. App. 690, 308 S.E.2d 340 (1983); and 4 J. Sackman, NICHOLS' THE LAW ON EMINENT DOMAIN §§ 12B.04, 12B.08, 12B.11 (rev. 3d ed. 1990)). "[T]he income approach is generally considered the most reliable method for determining the market value of investment property[.]" *In re Appeal of the Greens of Pine Glen Ltd. P'Ship*, 356 N.C. 642, 648, 576 S.E.2d 316, 320 (2003) (determination of fair market value for tax assessment). "Under the income approach, an appraiser calculates the economic rent the property earns and deducts normal operating expenses to arrive at net operating income. That figure is then capitalized [divided] by a rate of return [percent] to determine the fair market value of the property." *Dept. of Transportation v. Fleming*, 112 N.C. App. 580, 583, 436 S.E.2d 407, 409 (1993) (citing 5 J. Sackman, NICHOLS' THE LAW OF EMINENT DOMAIN § 19.01[2] (rev. 3d ed. 1993)).

In the instant case, the challenged testimony was offered by two of defendants' expert witnesses, both of whom used the income method to determine the fair market value of the subject property. The first, Bruce Tomlin, was recognized by the court as an expert in commercial real estate appraisal. Tomlin testified that the income approach was commonly used in the appraisal of commercial or non-residential property. He told the jury that "the income approach is where you consider what could you achieve in net income from the operation of the real estate[,]" and said that:

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[You] . . . collect rental comparables, to see what income you could generate. You will look at occupancy rates. . . . [T]hen you'll come down to an effective . . . gross income. . . .

After you have your effective gross income, you take off your expenses[,] . . . [to reach the] N.O.I. or net operating income. . . . And then, investors value that out in the market place. . . . Take the [net operating income] and divide it by [the appropriate] percent capitalization rate.

Tomlin explained that the capitalization rate was a measure of the perceived risk of investing in a property, and that the greater the risk, the higher the capitalization rate. Tomlin also testified about the procedure he used to obtain the information necessary for application of the income approach to the subject property.

Similar testimony was offered by defense witness Roscoe Shiplett, also recognized by the court as an expert in real estate appraisal. Shiplett testified that, because of the absence of comparable sales of airport parking lots at Douglas Airport, the income approach was the most appropriate method to determine the fair market value of the subject property. He explained the calculations required to convert the parking lot rental net income to fair market value. Both Tomlin and Shiplett testified regarding the reasons that the income approach was used, and the process by which they derived the necessary numerical values. We conclude that the testimony of both Tomlin and Shiplett was admissible on the issue of the subject property's fair market value as ascertained by the income approach, and that the trial court did not abuse its discretion by admitting this evidence. Plaintiff, however, argues that evidence of the net income from operation of a parking lot on the subject property constituted inadmissible evidence of "lost profits." We disagree.

Plaintiff correctly states that "[l]oss of profits are not elements of recoverable damages in an award for a taking under the power of eminent domain." *Dept. of Trans. v. Byrum*, 82 N.C. App. 96, 99, 345 S.E.2d 416, 418 (1986) (citation omitted). Thus, for example, if identical adjoining stores were taken in the condemnation of a shopping center, the owners of these two stores should be entitled to the same amount in damages, even if one owner ran a profitable fine jewelry business, while the other operated a failing shoe repair shop.

In *Dept. of Transportation v. Fleming*, 112 N.C. App. 580, 582, 436 S.E.2d 407, 409 (1993), the landowner's witnesses calculated the

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value of the condemned property “based entirely on the net income from the operation of defendants’ plumbing business.” This Court stated that “[a]lthough the income approach is an accepted method of appraisal, ‘[i]n assessing the value of property on the basis of income, care must be taken to distinguish between income from the property and income from the business conducted upon the property.’” *Id.* at 583, 436 S.E.2d at 409 (quoting 4 J. Sackman, NICHOLS’ THE LAW OF EMINENT DOMAIN § 12B.09 (rev. 3d ed. 1993)). Comparing rental income derived directly from property to profits from a plumbing business, the Court found “no evidence that the real estate contributed in any unique way to the income derived from the business.” *Id.* at 584, 436 S.E.2d at 410.

However, “rental income . . . has long been an accepted consideration in arriving at fair market value of the property at the time of the taking.” *Byrum*, 82 N.C. App. at 100, 345 S.E.2d at 419 (distinguishing the income from rental of campground spaces from the profits of a restaurant and game room located in the campground). Thus, “[w]hen rental property is condemned the owner may not recover for lost rents, but rental value of property is competent upon the question of the fair market value of the property at the time of the taking.” *Kirkman v. Highway Commission*, 257 N.C. 428, 432, 126 S.E.2d 107, 110 (1962) (citation omitted).

This Court has previously upheld the admission of evidence of the rental income from an airport parking lot in determination of the fair market value of property condemned for airport use. In *Raleigh-Durham Airport Authority v. King*, 75 N.C. App. 121, 330 S.E.2d 618 (1985), plaintiff argued that the trial court erred in its “admission of the testimony of defendant Mary King as to the revenues and expenses of the parking business operated on the 3.6 acres at issue in this case” and contended it “was evidence of the profits of defendants’ business and that although evidence of rents paid for use of the land is admissible, evidence of the profits of a business conducted on land is not admissible to prove the fair market value of the land.” *King*, 75 N.C. App. at 123, 330 S.E.2d at 619-20. This Court held:

[Defendant] was essentially renting or leasing parking spaces to airline passengers. Evidence of the rental revenues from land may be admitted and considered in determining the fair market value of the land at the time of taking.

Id. And, in *Raleigh-Durham Airport Authority v. King*, 75 N.C. App. 57, 63, 330 S.E.2d 622, 625-26 (1985), this Court stated that:

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[T]he airport was the ‘principal market maker’ in the area, affecting property values and commercial viability of land in the vicinity of the airport. Airport rentals of space inside the terminal, . . . established the maximum rent that could be charged[, and]. . . availability of that space directly affected the amount of rent that could be charged outside the terminal. Thus, [the witness’s] use of airport rentals allowed him to appraise the defendants’ property within the context of the commercial and economic realities of the area.

In the present case, neither Tomlin nor Shiplett testified that defendants were entitled to damages in the amount of “lost profits”; instead, each performed the calculations necessary to convert rental income to fair market value. We conclude that their testimony did not constitute improper evidence of “lost profits.”

[2] Plaintiff also argues that the challenged testimony was inadmissible, on the grounds that it pertained to a “hypothetical” business. In support of this position, plaintiff cites several cases holding that damages in a condemnation case should not be calculated by reference to a proposed use of the land for which the land was not adapted at the time of the taking. For example, in *State v. Johnson*, 282 N.C. 1, 191 S.E.2d 641 (1972), the North Carolina Supreme Court noted that:

In condemnation proceedings, the well established rule is that in determining fair market value the essential inquiry is, ‘what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted—that is to say, what is it worth from its availability for all valuable uses?’

Id. at 14, 191 S.E.2d at 651 (quoting *Barnes v. Highway Commission*, 250 N.C. 378, 387, 109 S.E.2d 219, 227 (1959)). In *Johnson* this Court held that, on the facts presented therein, “it is not proper for the jury . . . to consider an undeveloped tract of land as though a subdivision thereon is an accomplished fact.” *Id.* at 15, 191 S.E.2d at 651. And, in *City of Wilson v. Hawley*, 156 N.C. App. 609, 577 S.E.2d 161 (2003), this Court upheld the exclusion of evidence regarding the potential for operating a sweet potato farm on property where the defendant had not converted wooded acreage to farm fields.

However, “[i]f an owner has taken steps prior to the date of taking to adapt his land for future uses, the future uses to which the land is adapted are admissible.” *Hawley*, 156 N.C. App. at 613, 577 S.E.2d

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at 164. In the instant case, it is undisputed that the subject property was largely covered by paved and gravel parking areas, that defendant had used the property for parking cars, and that plaintiff used it for airport parking after it was condemned. Tomlin even testified that the subject property was “ready to go” for use as a valet parking business. We conclude that this use of the property was properly considered by the jury.

[3] On appeal plaintiff also raises for the first time the additional issue of whether rental income from a valet parking business should be excluded on the grounds that the *nature* of such a business is that of a service, rather than rental. Plaintiff failed to raise this issue at trial, or to assign error on this basis, and thus has not preserved this question for appellate review. N.C.R. App. P. 10(a) and (b)(1).

Finally, we note that plaintiff asked for and received a cautionary instruction to the jury stating in pertinent part that:

Loss of profits of a business conducted on the property taken is not an element of recoverable damages. Accordingly, value based on the net income of a business is not the true measure of damages and is not permissible. Notwithstanding, when the income is directly attributable to the land itself, such income may be considered in determining the value of the property.

Accordingly, any jury confusion arising from admission of the challenged testimony was properly clarified and explained by the trial court. We conclude that the trial court did not abuse its discretion by admitting evidence of the net income that might be obtained from operation of a valet parking business on the property. This assignment of error is overruled.

[4] Plaintiff argues next that the trial court erred by admitting evidence of the Hurlahe’s intended future use of the subject property. We disagree.

Testimony about possible uses of the property is relevant to determination of its highest and best use. “Indeed, the highest and best use, the highest and most valuable use, the highest and most profitable use, or the most advantageous use are generally accepted factors in determining the market value of land taken in condemnation proceedings.” *Williams v. Highway Commission*, 252 N.C. 514, 517, 114 S.E.2d 340, 342 (1960) (citation omitted).

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Defendant John Hurlahe testified that, had the property not been condemned, he would have operated it as an airport parking lot. In fact, the parties agree that airport parking is the highest and best use of the property. It is undisputed that the city operated a parking lot on the subject property after taking it from defendant. In this context, we perceive no harm to plaintiff from defendant's testimony that, like the plaintiff, he too would have used the land for a parking lot.

"The burden is on the appellant not only to show error, but to show prejudicial error, i.e., that a different result would have likely ensued had the error not occurred." *Responsible Citizens v. City of Asheville*, 308 N.C. 255, 271, 302 S.E.2d 204, 214 (1983) (citation omitted). In the instant case, plaintiff does not argue on appeal that admission of this testimony prejudiced their case, and we discern no prejudice. This assignment of error is overruled.

[5] Plaintiff also argues that the trial court committed reversible error by denying its motion for directed verdict. However, although plaintiff moved for directed verdict at the end of the defendants' evidence, it failed to renew this motion at the close of all the evidence. This Court has previously held:

By offering their own evidence, defendants waived their motion for a directed verdict made at the close of plaintiffs' evidence and, in order to preserve the question of the sufficiency of the evidence for appellate review, they were required to renew this motion at the close of all the evidence. Defendants did not, however, renew their motion for directed verdict at the close of the evidence. Because of this failure, defendants are not entitled to argue this issue on appeal.

Cannon v. Day, 165 N.C. App. 302, 305-06, 598 S.E.2d 207, 210, (citing *Gibbs v. Duke*, 32 N.C. App. 439, 442, 232 S.E.2d 484, 486 (1977)), *disc. review denied*, 359 N.C. 67, 604 S.E.2d 309 (2004). This assignment of error is overruled.

In a related assignment of error, plaintiff argues that the trial court abused its discretion by denying their motion for a new trial or, in the alternative, for judgment notwithstanding the verdict. Under N.C. Gen. Stat. § 1A-1, Rule 50 (2005):

- (b) (1) Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, . . . a party who has moved for a directed verdict may

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move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict[.] . . . [T]he motion shall be granted if it appears that the motion for directed verdict could properly have been granted. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative.

(emphasis added). “Plaintiff failed to move for a directed verdict at the close of all the evidence. Therefore, plaintiff failed to preserve [the] right to move for judgment notwithstanding the verdict.” *Tatum v. Tatum*, 318 N.C. 407, 408, 348 S.E.2d 813, 813 (1986) (citation omitted). This assignment of error is overruled.

We have considered plaintiff’s remaining assignments of error and conclude they are without merit.

Defendants’ Cross-Appeal

Defendants cross-appeal from the denial of their motion to dismiss plaintiff’s appeal, and from the trial court’s order granting plaintiff additional time to prepare the Record on Appeal. We have considered their arguments in this regard and find them to be without merit. This assignment of error is overruled.

For the reasons discussed above, the judgment in this case is

Affirmed.

Chief Judge MARTIN and Judge ELMORE concur.

STATE OF NORTH CAROLINA v. DANNY RAY WISE

No. COA05-1018

(Filed 20 June 2006)

1. Evidence— hearsay—Sex Offender Registration documents—records of regularly conducted activity

A Sex Offender Registration Worksheet and Notice of Pending Registration were records of regularly conducted activity under N.C.G.S. § 8C-1, Rule 803(6) and were properly admitted into a prosecution for failing to register as a sex of-

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fender. Although police reports are specifically excluded under Rule 803(8), the inadmissibility of evidence under one hearsay exception does not necessarily preclude admission under another exception.

2. Criminal Law— judge’s discussion with attorneys—case reopened—judicial neutrality

The trial court did not depart from its neutral role in a prosecution for failing to register as a sex offender when it conducted a discussion with the attorneys away from the jury about whether the State had to produce evidence of defendant’s release date (due to the effective date of the statute), which the State had not done and was opposed to doing, and then allowed the State to reopen its case to introduce that missing evidence.

3. Criminal Law— State allowed to reopen case—no abuse of discretion

The trial court did not abuse its discretion by allowing the State in a prosecution for failing to register as a sex offender to reopen its case and present evidence of defendant’s release date from prison after the parties had rested but before the case was given to the jury.

4. Sexual Offenses— failing to register as sex offender—sufficiency of evidence

The trial court did not err by denying defendant’s motion to dismiss a charge of failing to register as a sex offender where defendant contended that there was no evidence that he had failed to change his registered address within ten days of moving, but the language of his confession, taken in the light most favorable to the State, was sufficient to permit the inference that defendant had not lived at the registered address within ten days of his arrest.

Appeal by defendant from judgment entered 12 January 2005 by Judge W. Erwin Spainhour in Cabarrus County Superior Court. Heard in the Court of Appeals 30 March 2006.

Attorney General Roy Cooper, by Assistant Attorney General Ashby T. Ray, for the State.

Mercedes O. Chut for defendant appellant.

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McCULLOUGH, Judge.

Danny Ray Wise (defendant) appeals from a conviction and judgment for failing to register as a sex offender. We hold that he received a fair trial, free from prejudicial error.

Facts

On 17 August 1995, defendant was convicted in Cabarrus County Superior Court of indecent liberties with a child. Pursuant to this conviction, defendant was required upon release from prison to register as a sex offender with the North Carolina Sex Offender and Public Protection Registry and to notify the local sheriff of a change in address within ten days of moving. N.C. Gen. Stat. § 14-208.11 (2005); N.C. Gen. Stat. § 14-208.7 (2005).

Defendant completed the initial registration requirements with the Cabarrus County Sheriff's Office in early June of 1998 following his release from prison, and notified the sheriff's office of a change in address on six separate occasions.

In June 2003, defendant informed the Cabarrus County Sheriff's Office that his address was 1000 Saint John's Church Road, Concord, North Carolina. On 1 July 2004, a sheriff's deputy attempted to locate defendant at this registered address, but he was unable to do so. The deputy also looked for defendant at 176 Cabarrus Avenue and at an address on Mooney Road, both in Concord, North Carolina. The deputy was unable to locate defendant at either residence. The next day, defendant telephoned the deputy and told him that he knew the deputy was looking for him because he was hiding in some bushes at the 176 Cabarrus Avenue address and saw the deputy arrive. Defendant also informed the deputy that he was not living at the registered address and that he was living at the 176 Cabarrus Avenue address. He promised to turn himself in once he made some money. The deputies arrested defendant the next day while he was at work.

Defendant was interviewed following his arrest. He waived his *Miranda* rights and made the following statement:

I, Danny Wise, didn't stay with my father at 1000 Saint John's Church [R]oad Concord, NC 28025 because when [sic] went to live there, Marge Isenhower was living with my father. She is a bitch and I didn't want to be around her and her daughter. They knew what I was charged with and I thought they might get me in trouble. Marge took my mother's pictures off the wall. I didn't

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like her and could not live with her. So, then I went to 40406 Millingport Road Stanfield, NC in Stanly County, NC. I lived with my sister Cheryl Lefler and “Tippy” Clifford Hyatt. Lately, I have been living with “Scooter” Donald Roses at 176 Cabarrus Avenue, Concord, NC 28025. Today I am changing my registration to this address. I understand that if I move from this address I must change it with the sheriff within 10 days.

A Cabarrus County jury convicted defendant of failing to register as a sex offender pursuant to N.C. Gen. Stat. § 14-208.11. The trial court sentenced defendant as an habitual felon to 120-153 months of imprisonment.

Defendant now appeals to this Court.

Legal Discussion

I.

[1] In his first argument on appeal, defendant contends that the trial court erred by admitting a “Notice of Pending Registration” and a “Sex Offender Registration Worksheet.” Both documents were used to prove the date of defendant’s release from prison. The trial court admitted these documents pursuant to both Rule 803(6) and Rule 803(8) of the North Carolina Rules of Evidence. We conclude that the trial court properly admitted the documents under Rule 803(6). This conclusion makes it unnecessary for us to address defendant’s argument concerning Rule 803(8).

Rule 803(6) of the North Carolina Rules of Evidence makes records of regularly conducted activity admissible as a specific hearsay exception. “Records of regularly conducted activity” is defined to include:

A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term “business” as used in this paragraph includes business, institution, association, profession,

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occupation, and calling of every kind, whether or not conducted for profit.

N.C. Gen. Stat. § 8C-1, Rule 803(6) (2005). This Court has previously held a police report or record is admissible under Rule 803(6) upon a showing that it is the practice of the police to generate and keep such a report or record. *See, e.g., Nunnery v. Baucom*, 135 N.C. App. 556, 565, 521 S.E.2d 479, 485 (1999); *Wentz v. Unifi, Inc.*, 89 N.C. App. 33, 39, 365 S.E.2d 198, 201 (1988).

In the instant case, the trial court admitted two different documents. The first was a “Notice of Pending Registration,” which is a form that notifies local law enforcement officers of the date of release for a sex offender planning to live in their county and indicates that the offender is expected to register his new address with that agency within ten days. Deputy Burgess offered the following testimony concerning the Notice of Pending Registration the Cabarrus County Sheriff’s Office received for defendant:

[PROSECUTOR]: [Deputy] Burgess, first of all, let me ask you, are you currently in your activities with the sheriff’s department considered the records custodian for [defendant]’s file as it pertains to his registration requirements?

[DEPUTY BURGESS]: Yes, I am.

....

[PROSECUTOR]: Now, let’s go back to June of 1998. If a person is . . . incarcerated for a sex offense, such that it would otherwise be a reportable conviction, is a sheriff’s department notified as to when they are being released?

[DEPUTY BURGESS]: Yes, they are.

....

[PROSECUTOR]: How does that occur?

[DEPUTY BURGESS]: When a defendant is to be released from the Department of Correction, the Department of Correction issues a digital criminal information [DCI] system message to the county in which the sex offender is going to reside.

[PROSECUTOR]: And do they still do it that way today?

[DEPUTY BURGESS]: Yes, they do.

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[PROSECUTOR]: Now, is there a document in your file that is consistent with the documents that you received currently here in 2005 from DCI?

[DEPUTY BURGESS]: Yes, there is.

[PROSECUTOR]: (Hands Witness Exhibit) I am going to show you what's previously been marked as State's Exhibit Number 11. Can you identify this document?

[DEPUTY BURGESS]: Yes, I can.

[PROSECUTOR]: And what is that?

[DEPUTY BURGESS]: It is the message that the Department of Correction sent our agency.

[DEFENSE ATTORNEY]: Objection, unless he has personal knowledge of it.

[THE COURT]: Objection is overruled. It is admitted under Rule 803(6)—strike that. Yes, sir, Rule 803(6) of the Rules of Evidence.

[PROSECUTOR]: Was this, in fact, obtained from your file on Danny Wise?

[DEPUTY BURGESS]: Yes, it was.

The trial court also admitted a "Sex Offender Registration Worksheet" which defendant completed with the assistance of Deputy Deaver of the Cabarrus County Sheriff's Office. This document contained, *inter alia*, background information about defendant and his date of release from prison following his conviction for a sex offense. Deputy Deaver did not testify; however, Deputy Burgess offered the following testimony concerning the document:

[PROSECUTOR]: (Hands Witness Exhibit) Now, I am going to show you another document that has previously been marked as State's Exhibit Number 12. Can you identify this document?

[DEPUTY BURGESS]: Yes that's the sex offender registration worksheet.

[PROSECUTOR]: Okay. Is it a record that was made by the sheriff's department?

[DEFENSE ATTORNEY]: Objection, unless he has personal knowledge of the creation.

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[THE COURT]: Objection overruled.

[PROSECUTOR]: As the custodian, was this a record that was made by the sheriff's department?

[DEPUTY BURGESS]: Yes, it was.

. . . .

[PROSECUTOR]: Is it kept in the normal course of business by your office?

[DEPUTY BURGESS]: Yes, it is.

[PROSECUTOR]: Is it regular practice of the sheriff's department, in fact, to establish a sex offender worksheet when a person initially comes and registers?

[DEPUTY BURGESS]: Yes, sir. Every time.

Based on Deputy Burgess' testimony, the trial court admitted both documents into evidence.

Defendant contends that, because some police reports are specifically excluded from the hearsay exception of Rule 803(8), which addresses the admissibility of public records and reports, the documents at issue necessarily were excluded from admission under Rule 803(6) as records of regularly conducted activity. However, we are not persuaded that the inadmissibility of evidence under one hearsay exception necessarily precludes admission under another exception. Further, the language of Rule 803(8) plainly indicates that the legislature is fully capable of excluding certain police reports from a hearsay exception if it so desires. The legislature chose not to limit the applicability of Rule 803(6) to police records and reports which qualify as records of regularly conducted activity. Therefore, there is no merit in defendant's argument that Rule 803(6) is limited by Rule 803(8).

Moreover, we conclude that Deputy Burgess' testimony sufficed to show that the "Notice of Pending Registration" and the "Sex Offender Registration Worksheet" were records of regularly conducted activity admissible under 803(6), and the trial court properly allowed them into evidence.

This assignment of error is overruled.

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II.

[2] In his second argument on appeal, defendant contends that he is entitled to a new trial because the trial court departed from its neutral role as a judicial officer by assisting the prosecution in its understanding of the elements of the offense charged and the type of evidence needed to prove its case. This contention lacks merit.

“The law imposes on the trial judge the duty of absolute impartiality.” *State v. Fleming*, 350 N.C. 109, 125-26, 512 S.E.2d 720, 732 (1999) (citation omitted). However,

“[n]ot every ill-advised expression by the trial judge is of such harmful effect as to require a reversal. The objectionable language must be viewed in light of all the facts and circumstances, ‘and unless it is apparent that such infraction of the rules might reasonably have had a prejudicial effect on the result of the trial, the error will be considered harmless.’ ”

State v. Blue, 17 N.C. App. 526, 529, 195 S.E.2d 104, 106 (1973) (citations omitted). Indeed, our Supreme Court has declined to hold that the following conduct by a trial judge was prejudicial to a defendant:

[T]he judge informed the prosecutor that certain statements would be inadmissible; so the prosecutor rephrased his questions to restrict the witness’ response During a bench conference, the judge explained to the prosecutor that luminal only reacts to the heme in hemoglobin, not to animal fat. On three occasions the judge intervened *ex mero motu* to correct improper questions, once to explain in a bench conference why the question was improper and twice to rephrase a question. Several times the judge explained why he sustained or overruled defense counsel’s objections. On two occasions the prosecutor had to rephrase his questions—the latter instance was based on hearsay which the judge subsequently ruled was not hearsay, explaining why it was not to defense counsel in a bench conference. At another point the judge sustained defendant’s objection and during the ensuing bench conference suggested how the question could be rephrased. On another occasion after two objections by defense counsel, the judge rephrased the question for the prosecutor.

Fleming, 350 N.C. at 127, 512 S.E.2d at 733.

In the instant case, the prosecution initially failed to produce evidence of defendant’s release date from prison. During a discussion

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with the trial court, the prosecutor contended that he did not have to produce evidence of a release date because the applicability of the statute was an issue of law to be decided by the court rather than an issue of fact to be decided by the jury. The following colloquy then ensued:

THE COURT: . . . [T]he statute clearly says Sections 1 and 2 of this act became effective January 1, 1996, and are applicable to all persons convicted on or after that date and to all persons released from a penal institution on or after that date period.

After hearing this discussion and thinking about this thing, in the context of this case, where a person is released—strike that—where a person is convicted prior to the effective date of this statute, I think that this statute creates an additional requirement that the State must be able to prove in order to get along in this case; and so are you asking now that the State be permitted to reopen its case in chief and to—do you have the evidence of when the—

[PROSECUTOR]: Yes, sir, I have that evidence.

THE COURT: In my discretion, I will allow it. I will allow it. I mean, I plan on not committing any injustice to be done in that. The defendant objects to that?

[DEFENSE ATTORNEY]: Absolutely, Your Honor.

Thereafter, the prosecution presented evidence that defendant had a release date of 2 June 1998.

Defendant claims that the judge acted as the prosecutor by allowing the prosecution to reopen the case and suggesting to the prosecution that it needed to make a motion to reopen the case. Furthermore, defendant claims that had the judge not appraised the prosecutor of the law, the State's case against defendant would have failed, and therefore the judge's interference was prejudicial. In making these assertions, defendant relies upon *State v. Steele*, 23 N.C. App. 524, 209 S.E.2d 372 (1974). In *Steele*, the judge interjected over 100 times with questions and comments, which cumulatively had the effect of prejudicing the jury. *Id.* at 525, 209 S.E.2d at 373.

The instant case is clearly distinguishable from *Steele*, because in the present case the judge merely settled a legal dispute outside of the presence of the jury. Further, given the facts and circumstances of

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the present case, we hold that the judge did not depart from his neutral role as a judicial officer by discussing the law with the attorneys or by permitting the State to reopen its case.

This assignment of error is overruled.

III.

[3] In his third argument on appeal, defendant asserts that the trial court erred by allowing the State to reopen its case and present additional evidence (of defendant's release date) after the parties had rested but before the case was presented to the jury. Pursuant to section 15A-1226 of the General Statutes, "[t]he judge in his discretion may permit any party to introduce additional evidence at any time prior to verdict." N.C. Gen. Stat. §15A-1226(b) (2005). A judge's decision in this regard will be reversed only upon a showing of an abuse of discretion. *State v. Riggins*, 321 N.C. 107, 109, 361 S.E.2d 558, 559 (1987). We discern no such abuse of discretion in the instant case.

This assignment of error is overruled.

IV.

[4] In his fourth argument on appeal, defendant contends that the trial court erred by denying his motion to dismiss the charge of failing to register as a sex offender. This contention lacks merit.

A trial court should deny a motion to dismiss if, considering the evidence in the light most favorable to the State and giving the State the benefit of every reasonable inference, "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). "Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Id.* "[T]he rule for determining the sufficiency of evidence is the same whether the evidence is completely circumstantial, completely direct, or both." *State v. Wright*, 302 N.C. 122, 126, 273 S.E.2d 699, 703 (1981).

"If a person required to register [as a sex offender] changes address, the person shall provide written notice of the new address not later than the tenth day after the change to the sheriff of the county with whom the person had last registered." N.C. Gen. Stat. § 14-208.9(a) (2005). Failing to notify the last registering sheriff of a change of address is a Class F felony. N.C. Gen. Stat. § 14-208.11(a)(2) (2005).

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Defendant insists that there was no evidence that he failed to change his registered address within ten days of moving. More specifically, defendant notes that his confession supplied the only evidence of a change of address, and the confession provided no time frame for when he moved from his registered address at St. John's Church Road. However, we conclude that the language of defendant's confession, taken in the light most favorable to the State, was sufficient to permit the jury to infer that defendant had not lived at the registered address within ten days of his arrest.

The evidence before the jury tended to show that, in June of 2003, defendant informed the Cabarrus County Sheriff's Office that his address was 1000 Saint John's Church Road. Authorities did not attempt to locate defendant at that address until over a year later, in July of 2004. In his confession defendant stated, "I . . . didn't stay with my father at 1000 Saint John's Church Road . . . because when [I] went to live there, Margie Isenhower was living with my father." From this language, the jury could infer that the father's girlfriend was living at the St. John's Church Road address at the time defendant moved there. Further, a reasonable juror could infer that defendant's problems with his father's girlfriend began soon after he began living at this address, and caused defendant to move out soon thereafter. We note also that defendant's statement permits an inference that he did not actually stay at the St. John's Church Road address inasmuch as he used the language "when [I] *went* to live there . . ." as opposed to "when I *lived* there." (Emphasis added.)

Defendant also indicated that he moved to another address in a different county before moving to the 176 Cabarrus Avenue address, where he was living when the deputy tried to locate him. In his confession, defendant used the language, "*Lately*, I have been living . . . at 176 Cabarrus Avenue . . ." (Emphasis added.) Especially given that defendant had two previous addresses within that same time period, his use of the term "lately" permits an inference that he had not lived at the St. John's Church Road for a period in excess of ten days.

Defendant also argues that the trial court should have dismissed the sex offender registration charge because there was no evidence that he was released from prison on or after 1 January 1996, which, according to defendant, is required to sustain a conviction for this offense. However, as indicated in section I of this opinion, the State did present evidence that, on 2 June 1998, defendant was released from the prison sentence imposed for taking indecent liberties with a child.

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Therefore, the State's evidence was sufficient for the case to go to the jury. The trial court did not err by denying defendant's motions to dismiss. This assignment of error is overruled.

No error.

Judges CALABRIA and STEELMAN concur.

ROADWAY EXPRESS, INC., PLAINTIFF v. MICKEY JOE HAYES AND INZONE, INC., D/B/A INZONE, DEFENDANTS v. CANDACE SUE HORN, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF MARK JOSEPH HORN, INTERVENING PLAINTIFF

No. COA05-1204

(Filed 20 June 2006)

1. Appeal and Error— appealability—discovery orders— privilege against self-incrimination—physician-patient privilege

Interlocutory discovery orders affected a substantial right and were immediately appealable by defendant where defendant asserted his Fifth Amendment privilege against self-incrimination and the physician-patient privilege as reasons for not producing documents and responding to plaintiff's discovery request in an action arising out of an automobile accident.

2. Discovery— medical records—physician-patient privilege

The trial court did not abuse its discretion in an action arising out of an automobile accident by ordering the production of defendant's medical records in the interest of justice, because: (1) the results of a blood test are not protected under the Fifth Amendment when the results of the test are neither testimonial nor communicative; and (2) defendant's medical records are not protected by the physician-patient privilege since the trial court reviewed the medical records to determine their relevance to the matter and limited the scope of production, plaintiff contends defendant's physical or mental condition contributed to the accident, and defendant asserted the sudden emergency doctrine as an affirmative defense to plaintiff's claims.

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3. Discovery— admissions—interrogatories—medications at time of automobile accident

The trial court erred by ordering defendant to respond to plaintiff's second request for admissions and interrogatories relating to factual information on medications he may have been under the influence of at the time of an automobile accident, because defendant is entitled to assert his Fifth Amendment privilege to protect himself from self-incrimination in relation to prescription drugs defendant may have been under the influence of at the time of the accident. However, if the trial court determines such responses are essential to evaluate the application of the sudden emergency doctrine, the trial court must hold that defendant's choice to invoke his rights not to respond to the request for admissions and interrogatories precludes his assertion of the sudden emergency defense to plaintiff's allegations.

Appeal by Defendant Mickey Joe Hayes from orders entered 17 June and 30 June 2005 by Judge Anderson D. Cromer and Judge Ronald E. Spivey, respectively, in Superior Court, Forsyth County. Heard in the Court of Appeals 9 May 2006.

Womble, Carlyle, Sandridge & Rice by Jack M. Strauch, for plaintiff-appellee Roadway Express, Inc.

Teague, Rotenstreich & Stanaland, LLP by Kenneth B. Rotenstreich and Paul A. Daniels, for the defendant-appellant Mickey Joe Hayes.

Brian E. Gates for defendant-appellee Inzone.

Law Offices of Jonathan S. Dills, P.A., by Jonathan S. Dills, for intervening plaintiff-appellee Constance Sue Horn.

WYNN, Judge.

The Fifth Amendment provides a shield against self-incrimination. U.S. CONST. amend. V. In this case, Defendant argues that the Fifth Amendment protects him from producing (1) his medical records and (2) factual information regarding medications that he may have been under the influence of at the time of the accident. We uphold the order to produce his medical records but reverse the order compelling him to disclose factual information regarding his use of medications.

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The facts indicate that on 7 March 2004, Defendant Mickey Hayes's vehicle collided with a tractor trailer driven by Mark Joseph Horn and owned by Plaintiff Roadway Express, Inc. As a result of the collision, the tractor trailer struck a bridge guardrail causing the tractor to detach from the trailer, fall off the bridge and overturn before landing on an embankment below the bridge. Mr. Horn died at the scene of the accident.

Plaintiffs Roadway Express, Inc. and Constance Horn, widow of the truck driver, brought an action against Mr. Hayes and Inzone, Inc. Plaintiffs alleged that Mr. Hayes was legally intoxicated from beverages that he had consumed at Inzone nightclub/sports bar from which Plaintiffs sought recovery based on its alleged willful, wanton, and reckless disregard for the rights of others.

During discovery, Plaintiff Roadway Express requested all medical records regarding Defendant Hayes's medical treatment after the accident. Defendant objected to the discovery request, arguing that his medical records were protected by the physician-patient privilege and his Fifth Amendment right against self-incrimination.

The trial judge ordered Defendant to produce the requested medical records under seal and conducted an *in camera* inspection. Afterwards, on 17 June 2005, the trial judge ordered Defendant to provide copies of the records to Plaintiff on the condition that:

The records and the information contained therein are not to be shared with anyone other than experts retained by the parties (but not if such experts are also retained by the State to assist with the criminal prosecution of Hayes arising out of the subject collision).

Plaintiff also served a set of admissions on Defendant to:

1. Admit that on March 6, 2004, you took the prescription medication diazepam.
2. Admit that on March 7, 2004, you took the prescription medication diazepam.
3. Admit that during the early morning of March 7, 2004, you were under the influence of the prescription medicine diazepam.
4. Admit that on March 7, 2004, the prescription medication diazepam was present in your system.

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5. Admit that you consumed alcoholic beverages during the late evening of March 6, and the early morning of March 7, 2004, while knowing diazepam was present in your system.

Additionally, Plaintiff, through interrogatories, asked whether Defendant had been taking any prescription medications at the time of the accident, including diazepam. Defendant refused to respond to Plaintiff's request for admissions or interrogatories relating to any prescription drugs he may have been under the influence of at the time of the accident, arguing that such information was protected under the physician-patient privilege and the Fifth Amendment.

On 23 June 2005, Plaintiff filed a motion to compel production of Defendant's responses to Plaintiff's request for admissions and interrogatories. On 30 June 2005, the trial judge granted Plaintiff's motion to compel and ordered Defendant to serve complete responses to Plaintiff's request for admissions and interrogatories.

[1] From the 17 June 2005 order to produce his medical records, and the 30 June 2005 order to respond to Plaintiff's request for admissions and interrogatories, Defendant appeals. But we note that discovery orders are interlocutory and therefore not immediately appealable unless they affect a substantial right. *Isom v. Bank of America, N.A.*, 177 N.C. App. —, —, 628 S.E.2d 458, 461 (2006). However, "when . . . 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[.]" *Sharpe v. Worland*, 351 N.C. 159, 166, 522 S.E.2d 577, 581 (1999). Moreover, a trial judge's ruling requiring a party to provide evidence over a Fifth Amendment objection is also immediately appealable. *See Staton v. Brame*, 136 N.C. App. 170, 523 S.E.2d 424 (1999) (reversing trial court's order compelling Defendant's testimony in civil action where Defendant asserted Fifth Amendment privilege against self-incrimination). Here, because Defendant Hayes asserts his Fifth Amendment privilege against self-incrimination and the physician-patient privilege as reasons for not producing documents and responding to Plaintiff's discovery requests, the orders on appeal are immediately appealable.

The issues on appeal are (I) Do the Fifth Amendment privilege against self-incrimination and the physician-patient privilege shield Defendant from producing "any and all records related to any medical

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treatment that [he] received as a result of the automobile accident” and (II) Does the Fifth Amendment shield Defendant from providing factual information regarding medications that he may have been under the influence of at the time of the accident?

I.

[2] Fifth Amendment protection applies in any type of proceeding, whether it is criminal, civil, administrative, investigatory, or adjudicatory. *Maness v. Meyers*, 419 U.S. 449, 463-64, 42 L. Ed. 2d 574, 586-87 (1975). The protection exists not only for evidence which may directly support a criminal conviction, but for “information which would furnish a link in the chain of evidence that could lead to prosecution, as well as evidence which an individual reasonably believes could be used against him in a criminal prosecution.” *Id.* at 461, 42 L. Ed. 2d at 585 (citation omitted). However, the Fifth Amendment privilege only applies to testimonial or communicative acts. *Schmerber v. California*, 384 U.S. 757, 761, 16 L. Ed. 2d 908, 914 (1966).

In *Schmerber*, the United States Supreme Court held that blood test evidence was neither testimonial nor communicative and therefore the evidence was admissible. *Id.* at 765, 16 L. Ed. 2d at 916-17. “[B]oth federal and state courts have usually held that [the Fifth Amendment] offers no protection against compulsion to submit to fingerprinting, photographing, or measurements . . . the privilege is a bar against compelling ‘communications’ or ‘testimony’, but that compulsion which makes a suspect or accused the source of ‘real or physical evidence’ does not violate it.” *Id.* at 764, 16 L. Ed. 2d at 916.

Indeed, “North Carolina has long recognized the distinction between compulsory testimonial evidence and compulsory physical disclosure.” *State v. Strickland*, 276 N.C. 253, 260, 173 S.E.2d 129, 133 (1970).

“The established rule in this jurisdiction is that ‘(t)he scope of the privilege against self-incrimination, in history and in principle, includes only the process of testifying by word of mouth or in writing, i.e., the process of disclosure by utterance. It has no application to such physical evidential circumstances as may exist on the accused’s body or about his person.”

Id. (quoting *State v. Paschal*, 253 N.C. 795, 797, 117 S.E.2d 749, 750-51 (1961)).

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The facts of this case are analogous to those in *Schmerber*. The medical records sought by Plaintiff include a hospital lab analysis and a State Bureau of Investigation lab analysis of Defendant's blood taken after the accident. As in *Schmerber*, the results of Defendant's blood test are not protected under the Fifth Amendment because the results of the test are neither testimonial nor communicative. Under the facts of this case, Defendant's Fifth Amendment right against self-incrimination does not shield him from producing his medical records.

Likewise, Defendant's medical records are not protected by the physician-patient privilege. Section 8-53 of the North Carolina General Statutes provides that "[n]o person, duly authorized to practice physic or surgery, shall be required to disclose any information which he may have acquired in attending a patient in a professional character, and which information was necessary to enable him to prescribe for such patient . . . or to do any act for him as a surgeon[.]" N.C. Gen. Stat. § 8-53 (2005). Medical records are covered by the statute to the extent that the records contain entries made by physicians and surgeons, or under their direction, that include information and communications obtained by the doctor for the purpose of providing care to the patient. *Sims v. Charlotte Liberty Mut. Ins. Co.*, 257 N.C. 32, 38, 125 S.E.2d 326, 331 (1962).

The physician-patient privilege is strictly construed and the patient bears the burden of establishing the existence of the privilege and objecting to the introduction of evidence covered by the privilege. *Mims v. Wright*, 157 N.C. App. 339, 342, 578 S.E.2d 606, 609 (2003). The physician-patient privilege is not an absolute privilege, and it is in the trial court's discretion to compel the production of evidence that may be protected by the privilege if the evidence is needed for a proper administration of justice. See N.C. Gen. Stat. § 8-53. "Judges should not hesitate to require the disclosure where it appears to them to be necessary in order that the truth be known and justice be done." *Sims*, 257 N.C. at 39, 125 S.E.2d at 331.

Here, the trial judge methodically ordered Defendant to produce his medical records. In the initial order ordering the production of Defendant's medical records under seal for an *in camera* review, the trial judge limited the scope of the production by requesting only those medical records that mention or reflect the results of any tests performed to determine Defendant's blood alcohol content and the presence of controlled substances in his body. It was only after the trial judge reviewed the medical records and determined their rele-

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vance to the matter that he ordered Defendant to produce them to Plaintiff. Even in the order requiring Defendant to produce the medical records, the trial judge limited the scope of production, providing “[t]he records and the information contained therein are not to be shared with anyone other than experts retained by the parties (but not if such experts are also retained by the State to assist with the criminal prosecution of Hayes arising out of the subject collision.)”

Defendant’s reliance on *Mims* to support his argument that the trial court erred in ordering the production of his medical records in violation of the physician-patient privilege is misplaced. In *Mims*, this Court held that the trial judge abused his discretion in ordering the production of the defendant’s medical records where there was no evidence in the record that they might have “[led] to a justifiable conclusion that the interests of justice outweighed the protected privilege.” *Mims*, 157 N.C. App. at 344, 578 S.E.2d at 610. Unlike the plaintiffs in *Mims*, Plaintiff in this case contends Defendant’s physical or medical condition contributed to the accident. *Id.* Moreover, Defendant in this case has asserted the sudden emergency doctrine as an affirmative defense to Plaintiff’s claims, which places his medical condition at the time of the accident into question. Thus, in light of Plaintiff’s allegations and Defendant’s affirmative defense to those allegations, there is evidence in the record that may justify the disclosure of Defendant’s medical records in the interest of justice.

“The decision that disclosure is necessary to a proper administration of justice ‘is one made in the discretion of the trial judge, and the defendant must show an abuse of discretion in order to successfully challenge the ruling.’” *State v. Smith*, 347 N.C. 453, 461, 496 S.E.2d 357, 362 (1998) (citation omitted). As we can discern no abuse of the trial court’s discretion in ordering the production of Defendant’s medical records in the interest of justice, we affirm the 17 June 2005 order compelling the production of Defendant’s medical records.

II.

[3] Defendant further contends the Fifth Amendment protects him from having to respond to inquiries under the request for admissions and second set of interrogatories regarding factual information about his use of alcohol, diazepam, and any other medications. We agree.

The Fifth Amendment protects individuals from being compelled to testify in a way that could incriminate him or might subject him to

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finer, penalties, or forfeiture. *State v. Pickens*, 346 N.C. 628, 637, 488 S.E.2d 162, 166 (1997). To determine whether the Fifth Amendment privilege applies, the trial court must evaluate whether, given the implications of the question and the setting in which it was asked, a real danger of self-incrimination by the witness exists. *Id.*, 488 S.E.2d at 167. The court should only deny the claim of Fifth Amendment privilege if there is no possibility of such danger. *Id.*

In this case, we cannot say that there is no possibility of danger for self-incrimination by Defendant in responding to Plaintiff's request for admissions and interrogatories, which relate to the prescription drugs Defendant may have been under the influence of at the time of the accident. Plaintiff argues that the trial judge's statement in the order compelling Defendant to respond to the discovery requests that "the information is not to be shared with anyone other than experts retained by the parties (but not if such experts are also retained by the State to assist with the criminal prosecution of Hayes arising out of the subject collision) and persons assisting with the prosecution or defense of the action[.]" cures any concerns about the production of this evidence in any other proceeding, including a criminal matter. We hold, however, that this limitation is insufficient to ensure that Defendant's Fifth Amendment rights are protected and that there is no possibility of danger of self-incrimination. We, therefore, conclude the trial court erred when ordering Defendant to respond to Plaintiff's second request for admissions and interrogatories. Accordingly, we reverse the trial court's 30 June 2005 order compelling Defendant to respond to Plaintiff's second request for admissions and second set of interrogatories.

Notwithstanding, Defendant's refusal to respond to Plaintiff's request for admissions and interrogatories related to any prescription drugs he may have been under the influence of at the time of the accident may preclude him from asserting certain affirmative defenses. *McKillop v. Onslow County*, 139 N.C. App. 53, 62-63, 532 S.E.2d 594, 600-01 (2000). This Court has held that "if . . . a defendant pleads an affirmative defense[,] he should not have it within his power to silence his own adverse testimony when such testimony is relevant to the . . . defense." *Cantwell v. Cantwell*, 109 N.C. App. 395, 397, 427 S.E.2d 129, 130 (1993).

In *Cantwell*, the plaintiff was asked about matters that related to her alleged adulterous activities, and she asserted her Fifth Amendment privilege against self-incrimination. This Court held that she could properly assert the Fifth Amendment as a basis for not tes-

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tifying regarding the alleged adultery, but that she could not maintain her alimony claim if she refused to testify. 109 N.C. App. at 398, 427 S.E.2d at 131. The Court reasoned that adultery bars alimony and, therefore, without the plaintiff's testimony, she was not providing the judge with enough information to make a determination about alimony. *Id.*

This Court applied similar reasoning in *Qurneh v. Colie*, 122 N.C. App. 553, 471 S.E.2d 433 (1996). In *Qurneh*, the father sought to obtain custody of his child, but refused to testify about his illegal drug use based on his right against self-incrimination. The Court ruled that the trial court correctly found that the father's refusal to answer questions about his illegal drug involvement denied the trial court the ability to make a determination of whether he was fit to have custody of his child. This Court held that the father could not be compelled to testify about his illegal substance abuse, but that he could not also maintain his claim for custody without testifying on this issue. *Id.* at 558, 471 S.E.2d at 436. "The privilege against self-incrimination is intended to be a shield and not a sword." *Id.*¹

In the case *sub judice*, Defendant asserted the affirmative defense of sudden emergency.² Under the sudden emergency doctrine, a person is not held to the ordinary standard of care, but to the same standard of care that an ordinarily prudent person would have used when faced with a similar emergency. *Sparks v. Willis*, 228 N.C. 25, 28, 44 S.E.2d 343, 344-45 (1947). Defendant's state of mind, including whether he was under the influence of prescription drugs, at the time of the accident must be evaluated to determine whether Defendant had the ability to act as an ordinarily prudent person would have acted at the time of the accident.

Upon remand for trial of this matter, our holding permits Defendant to assert his Fifth Amendment privilege to protect himself from self-incrimination in responding to Plaintiff's request for admissions and interrogatories relating to factual information on medications he may have been under the influence of at the time of the accident. However, at trial, if the trial court determines such responses

1. Additionally, this Court has recognized that "[t]he finder of fact in a civil case may use a witness' invocation of his Fifth Amendment privilege against self-incrimination to infer that his truthful testimony would have been unfavorable to him." *McKillop*, 139 N.C. App. at 63-64, 532 S.E.2d at 601.

2. Defendant also asserted contributory negligence as an affirmative defense; however, that defense does not appear to be affected by Defendant's invocation of his Fifth Amendment rights.

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are essential to evaluate the application of the sudden emergency doctrine, the trial court must hold that Defendant's choice to invoke his rights not to respond to the request for admissions and interrogatories precludes his assertion of the sudden emergency defense to Plaintiff's allegations.

Affirmed in part; reversed in part.

Judges GEER and STEPHENS concur.

CYNTHIA ESTELLE BOOKER-DOUGLAS, ADMINISTRATRIX OF THE ESTATE OF LEROY DOUGLAS, JR., DECEASED EMPLOYEE, PLAINTIFF v. J & S TRUCK SERVICE, INC., EMPLOYER, LIBERTY MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANTS

No. COA05-1026

(Filed 20 June 2006)

Workers' Compensation— death benefits—causation

The Industrial Commission did not err by finding no causal relationship between a truck driver's compensable injury, which left him quadriplegic, and his subsequent death from an enlarged heart.

Appeal by plaintiff from an opinion and award filed 26 May 2005 by the North Carolina Industrial Commission. Heard in the Court of Appeals 16 March 2006.

Law Offices of Kathleen G. Sumner, by Kathleen G. Sumner, for plaintiff appellant.

Hedrick Eatman Gardner & Kincheloe, L.L.P., by Tonya D. Davis and Jeffrey A. Doyle, for defendant appellees.

McCULLOUGH, Judge.

Cynthia Booker-Douglas appeals from an opinion and award of the North Carolina Industrial Commission denying her claim for death benefits following the death of her husband. We affirm the challenged opinion and award.

Facts

On 19 September 1985, decedent Leroy Douglas, Jr., was employed as a truck driver for defendant J & S Truck Service. On that

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particular date, Douglas was assigned to a long distance drive with at least one other driver. While Douglas was asleep in the passenger seat of the truck, the other driver lost control of the vehicle. The ensuing accident caused irreparable injury to Douglas' spinal cord, and rendered him quadriplegic. From the date of Douglas' accident through 6 October 1994, he received temporary total disability benefits. He thereafter received permanent total disability benefits until his death. Douglas died on 6 April 2001 of sudden cardiac death, and the autopsy revealed that he had hypertrophic heart disease, or an "enlarged heart."

In August of 1991, Cynthia Booker-Douglas began working part-time as Douglas' certified nursing assistant. In 1995, when Douglas moved from High Point to Greensboro, Booker-Douglas became his sole care-giver. She provided twenty-four-hour care for Douglas, for which she was paid \$1,517.40 per week by J & S' workers' compensation carrier. She and Douglas were married on 8 November 1997.

Following Douglas' death, Booker-Douglas filed a claim on behalf of his estate with the North Carolina Industrial Commission. Booker-Douglas' claim alleged that Douglas' 19 September 1985 spinal cord injury caused the hypertrophic heart disease which resulted in his death. Booker-Douglas sought death benefits, and burial expenses.

At a hearing before the Industrial Commission, J & S Truck Service and its workers' compensation carrier, Liberty Mutual Insurance (hereinafter "defendants"), presented evidence tending to show that Douglas' fatal hypertrophic heart disease was not caused by his compensable quadriplegia. According to the testimony of Dr. Sewell Dixon, an expert cardiovascular surgeon retained by defendants, hypertrophic heart disease is an enlargement of the heart muscle, resulting from the heart having to work harder to pump blood throughout the body. According to Dr. Dixon, it also can be caused by cardiomyopathy, an abnormality in the muscle of the heart which causes the rest of the heart to work harder to compensate.

Booker-Douglas averred that Douglas' heart was enlarged due to his quadriplegia; however, Dr. Dixon testified that, with quadriplegics, physical inactivity generally causes the heart to atrophy, because the body's muscles require less oxygen, not more. Dr. Dixon stated that there are two ways that quadriplegia could be related to sudden cardiac death. One way is if the death was the result of a pulmonary embolism. A pulmonary embolism is when a blood clot forms in the leg and travels up through the heart and causes a sudden obstruction

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of blood flow to the lungs. Pulmonary embolisms are common in people who are inactive because blood clots are more likely to form in areas with decreased blood circulation, a common result of inactivity. However, the pathologist performing Douglas' autopsy found no evidence of a pulmonary embolism.

According to Dr. Dixon, another way quadriplegia could cause sudden cardiac death is if a decedent had significant coronary artery disease. There is a high correlation between people who are obese, have high blood pressure, smoke, and do not get enough exercise, and coronary artery disease. However, there was no evidence that Douglas had coronary heart disease.

Booker-Douglas averred that Douglas had lung and heart problems prior to his death that went undiagnosed and that these problems caused his enlarged heart. This averment was based on an autopsy that revealed that Douglas had pulmonary congestion and edema, *i.e.*, fluid in the lungs. Booker-Douglas claimed that fluid in Douglas' lungs would have caused the heart to work harder, and therefore become enlarged. When examined on this point, Dr. Dixon explained that an enlarged heart is usually the cause, not the result, of pulmonary edema. Dr. Dixon testified that Douglas' pulmonary congestion or edema was most likely caused by the attempts to resuscitate Douglas.

A Deputy Commissioner with the Industrial Commission denied Booker-Douglas' claim on 27 May 2004. On an appeal by Booker-Douglas, the Full Commission (hereinafter "the Commission") also denied Booker-Douglas' claim, based on a finding that Douglas died of a fatal arrhythmia due to an enlarged heart that was caused by cardiomyopathy, and that there was no causal relationship between the cardiomyopathy and Douglas' quadriplegia or his compensable injury.

Booker-Douglas now appeals to this Court.

Standard of Review

The standard of review for an opinion and award of the North Carolina Industrial Commission is "(1) whether any competent evidence in the record supports the Commission's findings of fact, and (2) whether such findings of fact support the Commission's conclusions of law." *Creel v. Town of Dover*, 126 N.C. App. 547, 552, 486 S.E.2d 478, 480 (1997). "The Commission's findings of fact are conclusive on appeal if supported by competent evidence, notwithstanding evidence that might support a contrary finding." *Hobbs v. Clean*

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Control Corp., 154 N.C. App. 433, 435, 571 S.E.2d 860, 862 (2002). In determining the facts of a particular case, “the Commission is the sole judge of the credibility of the witnesses and the weight accorded to their testimony.” *Effingham v. Kroger Co.*, 149 N.C. App. 105, 109-10, 561 S.E.2d 287, 291 (2002) (citations omitted). “This Court reviews the Commission’s conclusions of law *de novo*.” *Deseth v. LensCrafters, Inc.*, 160 N.C. App. 180, 184, 585 S.E.2d 264, 267 (2003).

Legal Discussion

The dispositive issue on appeal is whether the Commission erred by determining that Douglas’ death of hypertrophic heart disease was not causally related to the quadriplegia which resulted from his 1985 compensable injury. We discern no error in the Commission’s determination.

Workers’ Compensation death benefits are governed, as follows, by section 97-38 of the North Carolina General Statutes:

If death results proximately from a compensable injury or occupational disease . . . the employer shall pay or cause to be paid, subject to the provisions of other sections of this Article, weekly payments of compensation equal to sixty-six and two-thirds percent (66 2/3%) of the average weekly wages of the deceased employee at the time of the accident . . . and burial expenses

. . . .

When weekly payments have been made to an injured employee before his death, the compensation to dependents shall begin from the date of the last of such payments. Compensation payments due on account of death shall be paid for a period of 400 weeks from the date of the death of the employee; provided, however, after said 400-week period in case of a widow or widower who is unable to support herself or himself because of physical or mental disability as of the date of death of the employee, compensation payments shall continue during her or his lifetime or until remarriage

N.C. Gen. Stat. § 97-38 (2005). For death benefits to be awarded under this statute, a compensable injury must be the proximate cause of the employee’s death. *Id.*

In the instant case, there was evidence that Douglas’ compensable quadriplegia was not the cause of his death from hyper-

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trophic heart disease. Specifically, Dr. Dixon offered the following deposition testimony:

[DEFENSE COUNSEL]: . . . [D]o you have an opinion to a reasonable degree of medical certainty as to whether or not there's any causal relationship between Mr. Douglas' enlarged heart and cardiomyopathy and his quadriplegia?

[DR. DIXON]: I don't see how you can construct a logical relationship, if that answers the question properly, and I think it does. My—my medical opinion is that there's not a relationship between quadriplegia and a cardiomyopathy.

[DEFENSE COUNSEL]: And what is your opinion with respect to whether or not there's a causal relationship between quadriplegia and an enlarged heart?

[DR. DIXON]: I don't think there is a causal relationship. The literature, in fact, says just the reverse occurs, that the heart would be—tend to be smaller, not enlarged.

On appeal, Booker-Douglas makes several arguments as to why, in her view, the Commission could not rely upon Dr. Dixon's testimony to find and conclude that there was no causal nexus between Douglas' quadriplegia and death and why the Commission was compelled to find that there was such a causal nexus. We find these arguments unpersuasive.

1.

Booker-Douglas first contends that Dr. Dixon's testimony was insufficient to establish the lack of a causal nexus between Douglas' quadriplegia and his death of heart disease because the doctor's testimony was speculative under the standard established by *Holley v. ACTS, Inc.*, 357 N.C. 228, 581 S.E.2d 750 (2003). We disagree.

In *Holley*, our Supreme Court held that an award of compensation in a case involving a complex medical question must be premised upon an expert's non-speculative opinion that a work-related accident caused an employee's injury. *Id.* at 234, 581 S.E.2d at 754. In such cases, if an expert's opinion as to causation is based on speculation, his opinion is not competent evidence which supports a finding that an accident at work caused the employee's injury. *Id.*; see also *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 233, 538 S.E.2d 912, 916 (2000). However, medical certainty from the expert is not required, and even

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if an expert is unable to state with certainty that there is a nexus between an event and an injury, his testimony relating the two is at least some evidence of causation if there is additional evidence which establishes that the expert's testimony is more than conjecture. See *Singletary v. N.C. Baptist Hosp.*, — N.C. App. —, —, 619 S.E.2d 888, 893-94 (2005); *Adams v. Metals USA*, 168 N.C. App. 469, 482, 608 S.E.2d 357, 365, *aff'd per curiam*, 360 N.C. 54, 619 S.E.2d 495 (2005).

In the instant case, our review of the record reveals that Dr. Dixon's testimony concerning causation was not speculative. Rather, his opinion was unequivocal as to a lack of a causal link between Douglas' compensable quadriplegia and his death of heart disease. Further, Dr. Dixon stated that his opinion was based on his survey of medical literature. Accordingly, the doctor's testimony was not incompetent under our Supreme Court's decision in *Holley*.

2.

Booker-Douglas further contends that Dr. Dixon's testimony could not be considered by the Commission because he was paid a fee which was outside of the fee schedule established by the Commission for payment to medical providers. This contention also lacks merit.

Booker-Douglas' argument concerning Dr. Dixon's fee is premised upon her interpretation of sections 97-26(a) and (b), 97-90(a), and 97-91 of the North Carolina General Statutes. Section 97-26 provides, in pertinent part, as follows:

(a) Fee Schedule.—The Commission shall adopt a schedule of maximum fees for medical compensation, except as provided in subsection (b) of this section, and shall periodically review the schedule and make revisions pursuant to the provisions of this Article.

The fees adopted by the Commission in its schedule shall be adequate to ensure that (i) injured workers are provided the standard of services and care intended by this Chapter, (ii) providers are reimbursed reasonable fees for providing these services, and (iii) medical costs are adequately contained.

. . . .

(b) Hospital Fees.—Each hospital subject to the provisions of this subsection shall be reimbursed the amount provided for in

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this subsection unless it has agreed under contract with the insurer, managed care organization, employer (or other payor obligated to reimburse for inpatient hospital services rendered under this Chapter) to accept a different amount or reimbursement methodology.

N.C. Gen. Stat. § 97-26 (2005). Section 97-90(a) states that

[f]ees for attorneys and charges of health care providers for medical compensation . . . shall be subject to the approval of the Commission; but no physician or hospital or other medical facilities shall be entitled to collect fees from an employer or insurance carrier until he has made the reports required by the Commission in connection with the case.

N.C. Gen. Stat. § 97-90(a), (b) (2005). Section 97-91 is merely a legislative instruction to the Commission that it should determine all workers' compensation issues not settled by valid agreement of the parties.

Read closely and in context, the foregoing provisions are not applicable to the fee paid to Dr. Dixon. Sections 97-26 and 97-90(a) govern payment for "medical compensation," which is defined by section 97-2(19) as

medical, surgical, hospital, nursing, and rehabilitative services, and medicines, sick travel, and other treatment, including medical and surgical supplies, as may reasonably be required to effect a cure or give relief and for such additional time as, in the judgment of the Commission, will tend to lessen the period of disability[.]

N.C. Gen. Stat. § 97-2(19) (2005). In the instant case, Dr. Dixon was retained as an expert witness. He did not provide medical services to Douglas. Expert witness fees are not mentioned in section 97-26, 97-90(a), or 97-2(19). Further, it would be inappropriate to interpret these provisions as being applicable to expert witness fees, given that the purpose of the provisions is to ensure that injured employees receive medical treatment, *see* N.C. Gen. Stat. § 97-26(a), and given that, in some circumstances, medical providers are permitted to negotiate a higher fee with a workers' compensation carrier, *see* N.C. Gen. Stat. § 97-26(b). Accordingly, Dr. Dixon's testimony was not required to be excluded by the Commission because of the fee paid to the doctor.

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3.

Booker-Douglas also challenges the Commission's causation determination on the ground that the Commission erroneously failed to apply a legal presumption that Douglas' death was caused by his compensable injury. In support of her contention that such a presumption exists, Booker-Douglas notes that a presumption of compensability arises "where the evidence shows that death occurred while the decedent was within the course and scope of employment, but the medical reason for death is not adduced." *Pickrell v. Motor Convoy, Inc.*, 322 N.C. 363, 369, 368 S.E.2d 582, 585-86 (1988).

The instant case does not involve a situation where an employee died within the course and scope of his employment, and Booker-Douglas has cited no cases which apply the presumption, from which she seeks to benefit, to circumstances analogous to those presented in the instant case. Further, as already indicated, there was evidence from which the Commission could find and conclude that Douglas' death was not caused by his quadriplegia and, therefore, was not causally related to his 1985 compensable injury. Accordingly, even assuming *arguendo* that Booker-Douglas was entitled to a presumption of compensability, the Commission was not precluded from denying compensation in the instant case.

4.

Booker-Douglas further asserts that the Commission should have applied a "chain of causation test" to determine that Douglas' death was caused by his work-related quadriplegia. Booker-Douglas admits that the cases applying this test involved employees who had committed suicide, and she provides an entirely unprepossessing argument as to why this rule should be applied in the instant case. As already indicated, the Commission was not precluded from finding and concluding that Douglas' death was unrelated to the injuries he sustained in the 1985 work-related accident.

5.

The foregoing analysis makes it unnecessary for us to address Booker-Douglas' claims regarding the level of benefits that she should receive.

The assignments of error are overruled. The Commission's opinion and award is

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Affirmed.

Judges TYSON and LEVINSON concur.

OCEAN HILL JOINT VENTURE, OCEAN HILL PROPERTIES, INC.; THE VILLAGES AT OCEAN HILL COMMUNITY ASSOCIATION, INC.; ERNEST WOOD & WIFE, JANE WOOD; RICHARD GONZALEZ & WIFE, DEBRA GONZALEZ; ROSALEE CHIARA; ROBERT RAMIREZ & WIFE, JANICE SERINO; GARY ROBINSON & WIFE, SUSAN ROBINSON; DANIEL HUNT & WIFE, CATHY HUNT; BARRY HEYMAN & WIFE, ELLEN HEYMAN; STEPHEN DAIMLER & WIFE, CAROL DAIMLER; DAVID BOVA & WIFE, CARRIE BOVA, PETITIONERS/APPELLEES v. THE CURRITUCK COUNTY BOARD OF COMMISSIONERS, RESPONDENT, AND OCEAN HILL I PROPERTY OWNERS ASSOCIATION, INC., RESPONDENT/APPELLANT

No. COA05-1405

(Filed 20 June 2006)

1. Highways and Streets— closing public road—statutorily mandated de novo hearing—burden of proof

The trial court did not err by placing the burden on appellant to illustrate the board of county commissioners correctly determined that closing the roads in Ocean Hill I to the general public was not contrary to the public interest, because: (1) the burden of proof was initially placed on appellant who sought to change the status of Ocean Hill I roads from public to private; and (2) pursuant to a statutorily mandated de novo hearing, the burden of proof remained with appellant.

2. Highways and Streets— closing public road—directed verdict—more than a scintilla of evidence

A de novo review revealed that the trial court did not err by denying appellant's motion for directed verdict in an action seeking to close Ocean Hill I roads to the general public, because: (1) appellant's repeated incorrect argument concerning the burden of proof is unavailing on this issue as well; and (2) a petitioner's testimony that closing Ocean Hill I roads would deprive her of a safe route to the beach was not only more than a scintilla of evidence supporting appellees' assertion that closing these roads is contrary to the public interest, but also is conflicting testimony favorable to appellees precluding the granting of appellant's motion for directed verdict.

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3. Highways and Streets— closing public road—instructions—burden of proof—questions of public interest

The trial court did not submit an incorrect burden of proof to the jury in an action seeking to close Ocean Hill I roads to the general public and did not improperly empower the jury to determine a question of law, because: (1) the Court of Appeals has already held that the burden of proof was correctly placed on appellant; (2) appellant never objected to the submitted jury instruction in the final pretrial conference order, and appellant submitted the exact question to the jury in its requested jury instruction; and (3) our Supreme Court has ratified the ability of juries to deliberate upon questions of public interest.

Appeal by respondent-appellant from judgment entered 10 March 2005 and order entered 1 April 2005 by Judge J. Richard Parker in Currituck County Superior Court. Heard in the Court of Appeals 13 April 2006.

C. Everett Thompson, II, for petitioners-appellees.

Katherine F. McKenzie for respondent-appellee.

The North Carolina Association of County Commissioners, by James B. Blackburn, III, amicus curiae.

Robinson, Bradshaw & Hinson, P.A., by John R. Wester and Jonathan C. Krisko and Trimpi & Nash, LLP, by Thomas P. Nash, IV, and John G. Trimpi, for respondent-appellant.

CALABRIA, Judge.

Ocean Hill I Property Owners Association (“appellant”) appeals the judgment entered upon a jury verdict determining the closing of the public roads and streets in Section 1 of the Ocean Hill Subdivision (“Ocean Hill I”) to the general public was contrary to the public interest. Appellant also appeals the court’s order denying their motion for a new trial. We find no error.

In the late 1970’s in Currituck County, Ocean Hill Joint Venture (“Joint Venture”) and Ocean Hill Properties, Inc. (“Properties”) (collectively “the petitioners”) developed a residential subdivision (“the subdivision”), which included Ocean Hill I. The recorded plat for Ocean Hill I (“the Ocean Hill I plat”) identified eight residential roads (“Ocean Hill I roads”), three to provide beach access and three to connect other future planned developments within the subdivision.

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The Ocean Hill I plat “dedicate[d] all streets, alleys, walks, parks, and other open space to public or private use as noted.” However, the Ocean Hill I plat failed to identify which streets were public and which were private. Appellant asserts, and the petitioners disagree, that despite the ambiguity in the plat whether Ocean Hill I roads were designated for public or private use, these roads had been private in character since the subdivision’s inception. In the early 1990’s, Ocean Hill I property owners asked Joint Venture to repair the roads due to wear and tear. On 24 March 1993, pursuant to an agreement, Joint Venture conveyed title to the roads to appellant and appellant agreed to repair and insure the roads. Since 1993, appellant repaired, maintained, and insured Ocean Hill I roads.

In 1989, construction in a new development named the Villages at Ocean Hill (“the Villages”) surrounding Ocean Hill I dead-ended three Ocean Hill I roads previously designated to connect Ocean Hill I to future developments in the subdivision. The only access for Ocean Hill I residents was limited to North Carolina Route 12, a public highway passing through the Villages and connecting to Coral Lane, one of the eight original roads platted in Ocean Hill I. As a result, disputes arose regarding the increase in the number of non Ocean Hill I residents using their roads.

On 6 September 2001, appellant requested the Board withdraw Joint Venture’s dedication of Ocean Hill I roads and close them to the public, pursuant to N.C. Gen. Stat. § 153A-241. On 7 October 2002, following a public hearing, the Board approved a resolution to withdraw the dedication of Ocean Hill I roads. On 4 November 2002, subsequent to the public hearing, the Board voted unanimously to close the roads. Specifically, they explained that “closing . . . the roads would not be contrary to the public interest and would not deprive any individual owning property in the vicinity of the roads reasonable means of ingress and egress to his property.” On the same day, the Board approved an order to close Ocean Hill I roads to the general public.

On 27 November 2002, pursuant to N.C. Gen. Stat. § 153A-241, petitioners appealed the Board’s order by filing a *writ of certiorari* in Currituck County Superior Court. Petitioners alleged closing Ocean Hill I roads to the general public “[was] against and contrary to the public interest” and claimed they were “persons aggrieved” by the order. On 3 December 2002, pursuant to N.C. Gen. Stat. § 153A-241, the trial court ordered the Board to certify the complete record

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resulting in the 4 November 2002 order. On 6 February 2003, appellant filed an answer to petitioners' writ and requested a jury trial.

At trial, two members of the Currituck County Board of Commissioners ("the Board") and a law enforcement officer testified for appellant. Commissioner Paul O'Neal referred to Ocean Hill I and stated, "[a] subdivision that is going to be open to the public . . . is required to have more than one ingress and egress . . . [and the Board] would require some parking for the general public." The second member of the Board to testify, James Etheridge, explained, "there [are] no parking areas . . . [,] there is no off street parking . . . [,] [and] [t]here is only one entrance and exit[.]" Finally, Sheriff Susan Johnson ("Sheriff Johnson") of Currituck County focused on safety issues not only because of congestion but also because Ocean Hill, Section 1 "is so difficult to traverse, I think that public safety outweighs public interest in some cases.

At trial, Gerald Friedman, a land developer involved with the subdivision, testified for the petitioners. He explained the roads in Ocean Hill I were to be public, the State was to eventually take over the roads, and the conveyance of the roads to appellant in 1993 was not intended to give away public access. Hood Ellis, an attorney who represented Gerald Friedman in the development of the subdivision, also testified for the petitioners. He said "[Ocean Hill] was always going to be a public subdivision. In other words, the neighborhood just like I live in. We have residential platted lots on public streets." Several residents of the Villages also testified. One of the petitioners, Rosalee Chiara, had safety concerns if the roads in Ocean Hill, Section 1, were made private. She was not concerned about getting to and from her home but was concerned about being deprived "of getting to and from the beach safely."

At the conclusion of the evidence, both petitioners and appellant moved for a directed verdict and the trial court denied each motion. The jury determined closing Ocean Hill I roads to the general public was contrary to the public interest. Appellant's motion for a new trial was denied. Appellant appeals the judgment entered upon the jury verdict and order denying the motion for a new trial.

I. *Burden of Proof*:

[1] Appellant argues the trial court erred by placing the burden on them to illustrate the Board correctly determined that closing the roads in Ocean Hill I was not contrary to the public interest.

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Appellant contends the trial court placed the burden of proof upon the wrong party. We disagree.

a. *De novo hearing:*

N.C. Gen. Stat. § 153A-241 (2005), in pertinent part, states

Any person aggrieved by the closing of a public road or an easement may appeal the board of commissioners' order to the appropriate division of the General Court of Justice within 30 days after the day the order is adopted. *The court shall hear the matter de novo and has jurisdiction to try the issues arising and to order the road or easement closed upon proper findings of fact by the trier of fact.*

(emphasis added). “The word *de novo* means fresh or anew; for a second time[.]” *Caswell County v. Hanks*, 120 N.C. App. 489, 491, 462 S.E.2d 841, 843 (1995) (citing *In Re Hayes*, 261 N.C. 616, 622, 135 S.E.2d 645, 649 (1964)). “A court empowered to hear a case *de novo* is vested with full power to determine the issues and rights of all parties involved, and to try the case as if the suit had been filed originally in that court.” *Id.* (citation and internal quotation marks omitted). In fact, as in the instant case, “a *de novo* hearing or trial conducted pursuant to a specific statutory mandate requires judge or jury to disregard the facts found in an earlier hearing or trial and engage in independent fact-finding.” *N.C. Dep't of Envtl. & Natural Res. v. Carroll*, 358 N.C. 649, 661, 599 S.E.2d 888, 895 n.3 (2004) (emphasis added). In *Hanks, supra*, this Court determined that “[t]he plain language of N.C. Gen. Stat. § 67-4.1(c)¹ . . . requires that the superior court must hear the case on its merits from beginning to end as if no hearing had been held by the Board and without any presumption in favor of the Board's decision.” *Hanks*, 120 N.C. App. at 491, 462 S.E.2d at 843 (emphasis added). Similarly, in the instant case, N.C. Gen. Stat. § 153A-241 mandates a *de novo* hearing by the superior court for an appeal of a county board order to close a public road. Thus, the trial court properly held a *de novo* hearing respecting the determination of the Board to close Ocean Hill I roads.

1. N.C. Gen. Stat. § 67-4.1(c) (2005) provides a person or Board will determine whether a dog is “dangerous.” The dog owner can seek review of that determination by an appellate Board. If the dog owner seeks review of the appellate board decision, N.C. Gen. Stat. § 67-4.1(c) states, in pertinent part, “[t]he appeal shall be heard de novo before a superior court judge sitting in the county in which the appellate Board whose ruling is being appealed is located.”

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Pursuant to the statutorily mandated *de novo* hearing and *Hanks and Carroll*, *supra*, there is no presumption in favor of a lower tribunal's determination and, furthermore, the burden of proof remains on the party who shouldered the burden at the lower tribunal. "Since the hearing on appeal in the Superior Court was *de novo*, if the [appellant] had the burden of proof at the first hearing, obviously [they] also had the burden at the *de novo* hearing in the Superior Court." *Joyner v. Garrett*, 279 N.C. 226, 236, 182 S.E.2d 553, 560 (1971). Consequently, the trial court correctly determined that the burden of proof, initially placed upon the appellant because they sought to change the status of Ocean Hill I roads from public to private, remained on the appellant for the trial *de novo*. Thus, pursuant to a *de novo* hearing, we hold the burden of proof remained with the appellant and overrule appellant's corresponding assignments of error numbers one, five, six, and seven.

II. *Directed Verdict*:

[2] Appellant argues the trial court erred in denying their motion for directed verdict. Appellant contends appellees failed to present any evidence to support the jury verdict. We disagree.

"The party moving for a directed verdict 'bears a heavy burden under North Carolina law.'" *Ligon v. Strickland*, 176 N.C. App. 132, 135, 625 S.E.2d 824, 827-28 (2006) (citing *Martishius v. Carolco Studios, Inc.*, 355 N.C. 465, 473, 562 S.E.2d 887, 892 (2002) (quoting *Taylor v. Walker*, 320 N.C. 729, 733, 360 S.E.2d 796, 799 (1987))). "The standard of review for a motion for directed verdict is whether the evidence, considered in a light most favorable to the non-moving party, is sufficient to be submitted to the jury." *Herring v. Food Lion, LLC*, 175 N.C. App. 22, 26, 623 S.E.2d 281, 284 (2005), *aff'd*, 360 N.C. 472, 628 S.E.2d 761 (2006). "A motion for directed verdict should be denied if more than a scintilla of evidence supports each element of the non-moving party's claim." *Id.* "Moreover, if there is conflicting testimony that permits different inferences, one of which is favorable to the non-moving party, a *directed verdict in favor of the party with the burden of proof is improper.*" *Long v. Harris*, 137 N.C. App. 461, 465-66, 528 S.E.2d 633, 636 (2000) (emphasis added) (citing *United Lab., Inc. v. Kuykendall*, 322 N.C. 643, 662, 370 S.E.2d 375, 386 (1988)). "This Court reviews a trial court's grant of a motion for directed verdict *de novo.*" *Herring*, 175 N.C. App. at 26, 623 S.E.2d at 284.

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In the instant case, appellant's entire argument is premised upon the identical rationale overruled above, namely, that the burden of proof was placed upon the wrong party. We previously determined, in section one of this opinion, that pursuant to a statutorily mandated *de novo* hearing, the burden of proof remained on the appellant because they shouldered the initial burden when the Board first convened to determine whether or not to close Ocean Hill I roads. Nevertheless, appellant alleges in their brief that the burden was on the petitioners to prove the Board's decision to close Ocean Hill I roads was incorrect and absent such supporting evidence, the trial court's denial of their directed verdict motion was in error. This repeated argument remains unavailing here and, moreover, pursuant to *Long, supra*, the testimony of petitioner Rosalee Chiara, that closing Ocean Hill I roads would deprive her of a safe route to the beach is not only more than a scintilla of evidence supporting appellees' assertion that closing these roads is contrary to the public interest, but also is "conflicting testimony" favorable to appellees precluding the granting of appellant's motion for directed verdict. *See Murdock v. Ratliff*, 310 N.C. 652, 659, 314 S.E.2d 518, 522 (1984) (stating "in order to justify granting a motion for a directed verdict in favor of the party with the burden of proof, the evidence must so clearly establish the fact in issue that no reasonable inferences to the contrary can be drawn.") Thus, appellant's corresponding assignments of error numbers two and three are overruled.

III. *Jury Instructions*:

[3] Appellant argues the trial court erred by submitting the incorrect burden of proof to the jury. We disagree. "On appeal, this Court considers a jury charge contextually and *in its entirety*." *Hughes v. Webster*, 175 N.C. App. 726, 730, 625 S.E.2d 177, 180 (2006) (emphasis added). "The charge will be held to be sufficient if 'it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed[.]'" *Id.* 175 N.C. App. at 730, 625 S.E.2d at 180-81 (quoting *Jones v. Satterfield Development Co.*, 16 N.C. App. 80, 86-87, 191 S.E.2d 435, 440 (1972)). "The party asserting error bears the burden of showing that the jury was misled or that the verdict was affected by an omitted instruction." *Id.* 175 N.C. App. at 730, 625 S.E.2d at 181. "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).

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Appellant's proposed instruction states, in pertinent part, "[t]he issue for you to determine is whether that closing was contrary to the public interest." The instruction concludes "[o]n this issue the petitioners have the burden of proof. As I have instructed you earlier, this means that the petitioners are required to prove, by the greater weight of the evidence, the existence of those facts which would entitle them to a favorable answer to the issue." We previously determined in parts one and two of this opinion the burden of proof was correctly placed on appellant. Therefore, we reject appellant's assertion that the burden of proof should have been placed upon appellees according to their jury instructions because it is an incorrect statement of the law. Appellant also asserts the trial court erred by empowering the jury to determine a question of law. Specifically, appellant argues the issue determining whether closing Ocean Hill I roads was contrary to the public interest was not a question of fact for the jury but a question of law for the court. However, in the final pre-trial conference order the appellant never objected to the submitted jury instruction. More importantly, appellant submitted the exact question to the jury in their requested jury instruction. Furthermore, in *Utilities Com. v. Carolina Scenic Coach Co.*, 218 N.C. 233, 239-40, 10 S.E.2d 824, 828 (1940) our Supreme Court ratified the ability of juries to deliberate upon questions of public interest. We overrule appellant's assignments of error numbers four, eight and nine.

No error.

Judges McCULLOUGH and STEELMAN concur.

STATE OF NORTH CAROLINA v. STANLEY ARNOLD BROWN

No. COA05-943

(Filed 20 June 2006)

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

Defendant's contention that the trial court erred by admitting certain photographs was heard on appeal despite his failure to object at trial (a motion in limine is not sufficient) where he relied on the amended Evidence Rule 103(a) in effect at the time of trial, which has recently been held to be inconsistent with

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Appellate Rule 10(b)(1). Refusing to review defendant's appeal would be a manifest injustice because he relied on a procedural statute presumed constitutional at the time of trial.

2. Evidence— prior crimes or bad acts—admissible to show preparation and planning

The trial court did not err in a trial for statutory sexual offense with a person thirteen years old by admitting nude photographs which defendant had shown to the victim. The photographs demonstrated defendant's preparation and planning, a permissible purpose other than showing defendant's character.

3. Sexual Offenses— sexual act with thirteen-year-old—evidence sufficient

The evidence was sufficient to convict defendant of a sexual act with a thirteen-year-old.

4. Sexual Offenses— sexual act with thirteen-year-old—variance between indictment and evidence—time of offense

There was not a fatal variance between the indictment and the evidence in a trial for a sexual act with a thirteen-year-old where defendant contended that the evidence showed that the victim was twelve years old during some of the time specified in the indictment, but the victim testified that she was thirteen when one of the offenses occurred. The trial court properly instructed the jury about what it must find to convict and defendant did not contend that he was deprived of the opportunity to present an adequate defense due to the variation.

Appeal by defendant from judgments entered 13 January 2005 by Judge Cy A. Grant in Hertford County Superior Court. Heard in the Court of Appeals 15 March 2006.

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

William D. Spence for defendant-appellant.

HUNTER, Judge.

Stanley Arnold Brown ("defendant") appeals from judgments entered 13 January 2005 consistent with jury verdicts finding him guilty of two counts of statutory sexual offense of a person thirteen years old. For the reasons stated herein, we find no error.

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The evidence tends to show that defendant resided with the family of Sarah¹ for several years and was involved for some time in a relationship with Sarah's grandmother, her primary caretaker. During the summer and fall of 2003, defendant began to touch Sarah's breasts and vagina. Sarah was twelve years old at that time. In December of 2003, Sarah testified that while watching a movie in defendant's room, defendant pulled down her pants and placed his penis in her vagina. Sarah stated that a second incident occurred later while she was playing a video game in defendant's room. Defendant entered the room, threw her on the bed, pulled down her pants, and stuck his penis in her vagina. Sarah stated that her family moved away from defendant after her thirteenth birthday, 16 April 2004. Sarah testified that no further incidents occurred after her family moved away from defendant.

Testimony was also offered by Odie Rollings ("Rollings"), a federal inmate housed at the Pitt County Jail, in corroboration of Sarah's testimony. Rollings testified defendant told Rollings he had sex with Sarah twice. Rollings stated that defendant told him the first time he touched Sarah was in December 2003, and the second time was while defendant was in his room playing video games.

Defendant testified at trial that he had not touched Sarah inappropriately and had not raped her.

Defendant was convicted of two counts of statutory sex offense of a person thirteen years old, and was sentenced to consecutive sentences of 240 to 297 months. Upon motion to the trial court by the State, the judgment in 04CRS002310 was set aside. Defendant appeals from his judgment and conviction in 04CRS003406.

I.

[1] Defendant first contends the trial court erred in overruling defendant's motion *in limine* to exclude photographs of nude women and in admitting the photographs into evidence. We disagree.

Defendant relied on the amended Rule 103(a) of the North Carolina Rules of Evidence in effect at the time of trial, which directed, "[o]nce the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal." N.C. Gen. Stat. § 8C-1, Rule 103(a)(2) (2005). This Court

1. Name changed to protect the identity of the juvenile pursuant to N.C.R. App. P. 26(g)(4).

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has recently held Rule 103 to be inconsistent with Rule 10(b)(1) of the North Carolina Rules of Appellate Procedure. *State v. Tutt*, 171 N.C. App. 518, 521, 615 S.E.2d 688, 690 (2005) (footnote omitted) (stating that “Rule 103(a)(2) of the North Carolina Rules of Evidence is in direct conflict with Rule 10(b)(1) of the Rules of Appellate Procedure as interpreted by our case law on point[,]” in accord with previous Supreme Court opinions, *State v. Stocks*, 319 N.C. 437, 439, 355 S.E.2d 492, 493 (1987), *State v. Bennett*, 308 N.C. 530, 535, 302 S.E.2d 786, 790 (1983), and *State v. Elam*, 302 N.C. 157, 160, 273 S.E.2d 661, 664 (1981), striking down statutes providing review of errors even though no objection, exception or motion was made in the trial division). We note that we are bound by the prior decisions of this Court. See *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989).

Rule 10(b)(1) of the North Carolina Rules of Appellate Procedure states, in part, that “[i]n order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion[.]” N.C.R. App. P. 10(b)(1). “[A] motion *in limine* is not sufficient to preserve for appeal the question of admissibility of evidence if the defendant does not object to that evidence at the time it is offered at trial.” *State v. Grooms*, 353 N.C. 50, 65, 540 S.E.2d 713, 723 (2000). Defendant offered no objection to the admission of the photographs at issue at trial, and failed to preserve the issue for review.

However, as defendant relied on a procedural statute presumed constitutional at the time of trial, it would be a manifest injustice to not review defendant’s appeal on the merits. We therefore review this assignment of error in our discretion pursuant to Rule 2 of the North Carolina Rules of Appellate Procedure. N.C.R. App. P. 2.; see *Tutt*, 171 N.C. App. at 524, 615 S.E.2d at 693 (invoking Rule 2 to review evidence in the Court’s discretion to prevent manifest injustice).

[2] N.C. Gen. Stat. § 8C-1, Rule 404(b) (2005) states in part that:

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

Id. In *State v. Williams*, 318 N.C. 624, 350 S.E.2d 353 (1986), evidence was offered by the defendant’s wife, the victim’s step-mother, that the

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defendant had taken her and the victim to an X-rated drive-in movie with explicit sexual scenes, and had encouraged the victim to look at them. *Id.* at 626-27, 350 S.E.2d at 355. The defendant in *Williams* contended that such evidence was impermissible character evidence and should not have been admitted. *Id.* at 631, 350 S.E.2d at 357. *Williams* found that the evidence of the “daughter’s presence at the film at defendant’s insistence, and his comments to her show[ed] his preparation and plan to engage in sexual intercourse with her and assist[ed] in that preparation and plan by making her aware of such sexual conduct and arousing her.” *Id.* at 632, 350 S.E.2d at 358.

In *State v. Rael*, 321 N.C. 528, 364 S.E.2d 125 (1988), the defendant also contended that the admission of evidence which included pornographic magazines and movies was error, as the items “tended to prove only the character of the defendant in order to show that he acted in conformity therewith.” *Id.* at 534, 364 S.E.2d at 129. In *Rael*, the victim testified that on the day of the incident, the defendant had shown him pornographic magazines and movies. *Id.* at 533, 364 S.E.2d at 128. *Rael* found that the videotapes, magazines, and testimony concerning them were relevant to corroborate the victim’s testimony, and were therefore admissible. *Id.* at 534, 364 S.E.2d at 129.

Here, Sarah testified that defendant showed her four photographs of nude adult women with whom she was acquainted prior to the first time defendant engaged in a sexual act with her, and that defendant told her that he was going to take similar pictures of her. Sarah further testified that defendant attempted to take pictures of her, but that defendant was unable to get her grandmother’s camera. The admission of the photographs into evidence served to corroborate Sarah’s testimony of defendant’s actions and provided evidence of a plan and preparation to engage in sexual activities with her.

Unlike in the cases of *State v. Bush* and *State v. Smith* cited by defendant, where the proffered evidence at trial were not items shown to the victim, the photographs admitted here, like the movie in *Williams* and the videotapes and magazines in *Rael*, were shown to the victim and demonstrated defendant’s preparation and planning to engage in sexual acts with the victim. See *State v. Bush*, 164 N.C. App. 254, 261, 595 S.E.2d 715, 719 (2004) (finding error in admission of pornographic videotapes when there was “no evidence that defendant provided pornographic videotapes to [the victim] or employed the tapes to seduce [the victim]”); *State v. Smith*, 152 N.C. App. 514, 522, 568 S.E.2d 289, 294 (2002) (holding “[e]vidence of defendant’s mere possession of pornographic materials does not tend ‘to make the

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existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence' ”). As the photographs were admitted for a permissible purpose other than to show defendant's character in conformity therewith, we find no error in the trial court's admission of the evidence. Defendant's assignment of error is overruled.

II.

[3] Defendant next contends the trial court erred in failing to dismiss the charges against defendant for insufficient evidence. We disagree.

“ ‘In ruling on a motion to dismiss the trial court is to consider the evidence in the light most favorable to the State.’ ” *State v. Buff*, 170 N.C. App. 374, 379, 612 S.E.2d 366, 370 (2005) (citation omitted). “ ‘In so doing, the State is entitled to every reasonable intendment and every reasonable inference to be drawn from the evidence; contradictions and discrepancies do not warrant dismissal of the case—they are for the jury to resolve.’ ” *Id.* “The court is to consider all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State.” *State v. Earnhardt*, 307 N.C. 62, 67, 296 S.E.2d 649, 653 (1982).

Defendant was charged with a violation of N.C. Gen. Stat. § 14-27.7A, statutory sexual offense of a person thirteen years old. N.C. Gen. Stat. § 14-27.7A(a) (2005) states:

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.

Id. Defendant here was indicted for commission of a sexual act with a thirteen-year-old. A sexual act for the purposes of the statute is defined 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).

Defendant contends that insufficient evidence was offered to show that defendant committed a sexual act, in this case insertion of his finger into the victim's vagina, while she was thirteen years of age. A review of the transcript shows that Sarah testified that defendant “stuck his fingers in [her] vagina” while she was thirteen years old

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and living at the address on South Drive her family shared with defendant. When taken in the light most favorable to the State, such testimony provides substantial evidence sufficient to survive a motion to dismiss for insufficient evidence. Defendant's assignment of error is overruled.

III.

[4] Defendant finally contends the trial court erred in failing to dismiss the charges against defendant and in signing and entering judgment and commitment in 04CRS003406 because of a fatal variance in the indictment and the evidence at trial. We disagree.

The purpose of an indictment is to give a defendant notice of the crime for which he is being charged; and it has long been established that

“[a]n indictment or criminal charge is constitutionally sufficient if it appraises the defendant of the charge against him with enough certainty to enable him to prepare his defense and to protect him from subsequent prosecution for the same offense.”

State v. Bowen, 139 N.C. App. 18, 24, 533 S.E.2d 248, 252 (2000) (citations omitted). This Court has previously held that “the date given in the bill of indictment is not an essential element of the crime charged and the fact that the crime was in fact committed on some other date is not fatal.” *State v. Burton*, 114 N.C. App. 610, 612, 442 S.E.2d 384, 386 (1994) (citation omitted). Further, we have recognized a “[j]udicial tolerance of variance between the dates alleged and the dates proved” in cases involving child sexual abuse. *Id.* at 613, 442 S.E.2d at 386; see also *State v. Norris*, 101 N.C. App. 144, 150-51, 398 S.E.2d 652, 656 (1990). “Unless a defendant demonstrates that he was deprived of the opportunity to present an adequate defense due to the temporal variance, the policy of leniency governs.” *Burton*, 114 N.C. App. at 613, 442 S.E.2d at 386.

Defendant was indicted on the grounds that “between 3-01-04 and 6-30-04” he “unlawfully, willfully and feloniously did engage in a sexual act with [Sarah], a person of the age of 13 years. At the time of the offense, the defendant was at least six years older than the victim and was not lawfully married to the victim.” At trial, evidence was presented that Sarah's thirteenth birthday was 16 April 2004. Defendant contends that as the evidence presented at trial showed that Sarah was twelve years of age for a portion of the time period specified in the indictment, a fatal variance occurred.

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As discussed *supra* in Section II, Sarah specifically testified that one of the offenses occurred while she was thirteen years of age, prior to her move at the end of April, a date within the time period set out by the indictment. The trial court instructed the jury that:

The defendant, Mr. Brown, has been charged with statutory sexual offense against a victim who was thirteen years old at the time of the offense. For you to find the defendant guilty of this offense, the State must prove four things beyond a reasonable doubt.

First, that the defendant engaged in a sexual act with the victim. . . .

Second, that at the time of the act, the victim was thirteen years old. Third, that at the time of the act, the defendant was at least six years older than the victim. And fourth, that at the time of the act, the defendant was not lawfully married to the victim.

. . .

[I]f you find from the evidence beyond a reasonable doubt that between the dates of March 1, 2004 and April 30, 2004, the defendant engaged in a sexual act with the victim who was thirteen years old by inserting his finger into the vagina of [Sarah], and that the defendant was at least six years older than the victim, and was not lawfully married to the victim, it would be your duty to return a verdict of guilty. If you do not so find or if you have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

(Emphasis added.) The trial court properly instructed the jury that they must find that the victim was thirteen years old at the time of the act in order to find defendant guilty, and evidence presented at trial supports this instruction. Defendant does not contend that he was deprived of the opportunity to present an adequate defense due to the temporal variance in the indictment. As the indictment was sufficient to inform defendant “‘of the charge against him with enough certainty to enable him to prepare his defense and to protect him from subsequent prosecution for the same offense[,]’” we conclude no fatal variance existed between the indictment, the proof presented at trial, and the instructions given to the jury. *Bowen*, 139 N.C. App. at 24, 533 S.E.2d at 252 (citation omitted). Defendant’s assignment of error is overruled.

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As the trial court did not err in its admission of photographs or denial of defendant's motion to dismiss for insufficient evidence, and no fatal variance exists between the indictment and jury instructions, we find no error in defendant's conviction and judgment.

No error.

Judges HUDSON and BRYANT concur.

TERRY RAMEY, D/B/A RAMEY WRECKER SERVICE, PLAINTIFF v. HONORABLE MICHAEL F. EASLEY, THE GOVERNOR OF THE STATE OF NORTH CAROLINA, THE DEPARTMENT OF CRIME CONTROL AND PUBLIC SAFETY, THE NORTH CAROLINA HIGHWAY PATROL, AND JOHN DOES 1-4, DEFENDANTS

No. COA05-1404

(Filed 20 June 2006)

**Administrative Law— wrecker services—safety exception—
not preempted by federal law**

The trial court did not err by granting summary judgment for defendants in an action challenging the Highway Patrol's regulation of private wrecker services. The General Assembly delegated to the Department of Crime Control and Public Safety and the Highway Patrol the authority to make regulations governing inclusion in the Patrol's Wrecker Rotation List. Those regulations are not preempted by federal law because they fall within the safety regulation exception of 49 U.S.C. § 14501(c)(2)(A).

Appeal by plaintiff from order entered 15 July 2005 by Judge Ronald K. Payne in Haywood County Superior Court. Heard in the Court of Appeals 11 May 2006.

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

Attorney General Roy Cooper, by Assistant Attorney General Jeffrey R. Edwards, for defendants-appellees.

TYSON, Judge.

Terry Ramey d/b/a Ramey Wrecker Service ("plaintiff") appeals from order entered denying his motion for summary judgment and

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granting summary judgment in favor of The Honorable Michael F. Easley, the Department of Crime Control and Public Safety (“DCCPS”), the North Carolina Highway Patrol (“Highway Patrol”), and John Does 1-4 (collectively, “defendants”). We affirm.

I. Background

Plaintiff owns and operates Ramey’s Wrecker Service in Haywood County and uses trucks and equipment to tow motor vehicles. The North Carolina Department of Public Safety and Crime Control adopted rules and regulations governing private companies and equipment included on the Wrecker Rotation Services List maintained by the Highway Patrol. These rules and regulations became effective on 1 April 2001. Any wrecker service desiring to be included and remain on the Highway Patrol’s Wrecker Rotation Services List is required to meet certain regulations contained in the North Carolina Administrative Code. Plaintiff’s business was included on the Highway Patrol’s Wrecker Rotation Services List. Plaintiff was removed from the Wrecker Rotation Services List for failing to: (1) respond to at least 75% of the calls made to him by the Highway Patrol; (2) maintain a current Department of Transportation inspection sticker on his large wrecker; and (3) have proper cables installed on his wreckers.

Plaintiff initially filed a complaint in the Haywood County District Court against Governor Easley, DCCPS, the Highway Patrol, John Does 1-6, and the Department of Transportation Highway Division (“DOT”). Plaintiff voluntarily dismissed with prejudice his claims against the DOT and John Does 5 and 6. Plaintiff sought a declaratory judgment for the wrecker rotation regulations to be declared illegal. He asserts federal law preempts the Highway Patrol’s ability to establish regulations for private wrecker companies to be included on its Wrecker Rotation Services List. Plaintiff also sought money damages for an alleged interference with business advantage.

Defendants moved for summary judgment arguing the declaratory judgment and money damages plaintiff sought were barred by the doctrine of sovereign immunity. Plaintiff also moved for summary judgment. The trial court denied summary judgment for plaintiff and granted summary judgment in favor of defendants. Plaintiff appeals.

II. Issues

Plaintiff argues the trial court erred by: (1) failing to grant partial summary judgment in favor of plaintiff because the Highway Patrol

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has no “grant of rule-making authority” and no authority to regulate private wrecker businesses; and (2) granting summary judgment in favor of defendants because federal law preempts the rules promulgated by defendants.

III. Standard of Review

Summary judgment is proper if the “pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” N.C. Gen. Stat. § 1A-1, Rule 56(c) (2005). The evidence must be considered in a light most favorable to the non-moving party. *Summey v. Barker*, 357 N.C. 492, 496, 586 S.E.2d 247, 249 (2003). When reviewing a lower court’s grant of summary judgment, our standard of review is *de novo*. *Id.*

In most cases, the denial of a motion for summary judgment establishes only that there is a genuine issue of material fact, and the ruling does not dispose of the case. However, in the instant case, the denial of [plaintiff’s] summary judgment motion and the grant of summary judgment in favor of . . . defendants disposed of the cause as to all parties and left nothing to be judicially determined by the trial court. Therefore, [plaintiff’s] appeal of the denial of its summary judgment motion and the grant of summary judgment in favor of defendants was a final judgment on the merits of the case, instead of being an interlocutory appeal.

Carriker v. Carriker, 350 N.C. 71, 73, 511 S.E.2d 2, 4 (1999).

Plaintiff sought for a declaratory judgment. *See* N.C. Gen. Stat. § 1-253 (2005) (“Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed. . . . The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.”). We review issues of statutory construction *de novo*. *A&F Trademark, Inc. v. Tolson*, 167 N.C. App. 150, 153-54, 605 S.E.2d 187, 190 (2004), *cert. denied*, — U.S. —, 163 L. Ed. 2d 62 (2005).

IV. Summary Judgment in Favor of Plaintiff: Statutory Authority

Plaintiff asserts the trial court erred in failing to grant summary judgment in his favor and argues the Highway Patrol has no grant of rule making authority. We disagree.

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Article II, Section 1 of the North Carolina Constitution vests the legislative power in the General Assembly. N.C. Const. art. I, sec. 1. The General Assembly is constitutionally prohibited from delegating its law making power to any other branch or agency which it may create. *Adams v. North Carolina Dep't of Natural & Economic Resources*, 295 N.C. 683, 696, 249 S.E.2d 402, 410 (1978).

However, it has long been recognized by this Court that the problems which a modern legislature must confront are of such complexity that strict adherence to ideal notions of the non-delegation doctrine would unduly hamper the General Assembly in the exercise of its constitutionally vested powers. A modern legislature must be able to delegate—in proper instances—a *limited portion* of its legislative powers to administrative bodies which are equipped to adapt legislation to complex conditions involving numerous details with which the Legislature cannot deal directly. Thus, we have repeatedly held that the constitutional inhibition against delegating legislative authority does not preclude the legislature from transferring adjudicative and rule-making powers to administrative bodies *provided such transfers are accompanied by adequate guiding standards to govern the exercise of the delegated powers*.

Id. at 696-97, 249 S.E.2d at 410 (internal quotations omitted) (emphasis supplied).

N.C. Gen. Stat. § 20-184 (2005) provides:

The Secretary of Crime Control and Public Safety, under the direction of the Governor, shall have supervision, direction and control of the State Highway Patrol. The Secretary shall establish in the Department of Crime Control and Public Safety a State Highway Patrol Division, *prescribe regulations governing said Division, and assign to the Division such duties as he may deem proper*.

(emphasis supplied). N.C. Gen. Stat. § 20-188 (2005) provides, “[the Highway Patrol] shall be subject to such orders, rules and regulations as may be adopted by the Secretary of Crime Control and Public Safety.” N.C. Gen. Stat. § 20-188 also delegates to the Highway Patrol the duty to “enforce all laws and regulations respecting travel and the use of vehicles upon the highways of the State.”

Plaintiff posits the legislature has not granted the Highway Patrol authority to regulate private wrecker businesses. Plaintiff stipulates

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the legislature granted to defendants the statutory authority to “provide public safety within the State of North Carolina” Plaintiff argues that the statutes contained in Chapter 20 “only pertain to the granting of the authority specifically necessary for public safety.”

The regulations governing the Highway Patrol’s Wrecker Rotation Services List are contained in Title 14A of the North Carolina Administrative Code. *See* 14A NCAC 9H .0308 (2004). The Administrative Code states, “In order to perform its traffic safety functions, the Patrol is required to use wrecker services to tow disabled, seized, wrecked and abandoned vehicles.” 14A NCAC 9H .0319 (2004). The Administrative Code mandates that the Highway Patrol’s Troop Commander “shall arrange for the Telecommunications Center to maintain a rotation wrecker system within each District of the Troop.” 14A NCAC 9H .0320 (2004). Members of the Highway Patrol must “assure the impartial use of wrecker services” included on the Wrecker Rotation Services List. 14A NCAC 09H .0319. Whenever possible, members of the Highway Patrol are required to dispatch the wrecker service requested by the motorist requiring the wrecker service. *Id.*

In order to perform its traffic safety functions, the Highway Patrol utilizes private wrecker services to remove abandoned, seized, damaged, or disabled vehicles from public roadways. The Highway Patrol promulgated regulations for private wrecker services included on its rotation list to meet in order to be called to the scene and to safely remove vehicles from the public roadways.

In the interest of public safety, the Highway Patrol has delegated authority to promulgate regulations setting forth the requirements a private wrecker service must meet in order to be included and remain on the Highway Patrol’s Wrecker Rotation Services List. N.C. Gen. Stat. § 20-184; N.C. Gen. Stat. § 20-188. The challenged regulations clearly relate to public highway safety. The trial court did not err in denying plaintiff’s motion for partial summary judgment. This assignment of error is overruled.

V. Summary Judgment in Favor of Defendants: Preemption

Plaintiff asserts the trial court erred in granting summary judgment in favor of defendants and argues federal law preempts the Highway Patrol’s authority to regulate private wrecker companies. We disagree.

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Plaintiff contends 49 U.S.C. § 14501 preempts the rules promulgated by the Highway Patrol. The statute, entitled, “Federal authority over intrastate transportation,” provides in pertinent part:

(c) Motor carriers of property.

(1) General rule. Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier (other than a carrier affiliated with a direct air carrier covered by section 41713(b)(4) [49 U.S.C. § 41713(b)(4)]) or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.

(2) Matters not covered. Paragraph (1)—

(A) *shall not restrict the safety regulatory authority of a State with respect to motor vehicles*, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization;

(B) does not apply to the intrastate transportation of household goods; and

(C) does not apply to the authority of a State or a political subdivision of a State to enact or enforce a law, regulation, or other provision relating to the price of for-hire motor vehicle transportation by a tow truck, if such transportation is performed without the prior consent or authorization of the owner or operator of the motor vehicle.

49 U.S.C. § 14501(c) (2005) (emphasis supplied).

To determine whether the Highway Patrol’s regulations fall within the “safety regulatory authority” exception in 49 U.S.C. § 14501(c)(2)(A), we review whether the challenged regulations are “genuinely responsive to safety concerns.” *See City of Columbus v. Ours Garage & Wrecker Serv.*, 536 U.S. 424, 442, 153 L. Ed. 2d 430, 446 (2002) (“Local regulation of prices, routes, or services of tow trucks that is not genuinely responsive to safety concerns garners no exemption from § 14501(c)(1)’s preemption rule.”).

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Although North Carolina courts have not addressed this issue, other jurisdictions have upheld similar regulations under the “safety regulatory authority” exception contained in 49 U.S.C. § 14501(c)(2). *See Cole v. City of Dallas*, 314 F.3d 730 (5th Cir. 2002) (regulation barring applicants from receiving a wrecker driver’s permit to tow motor vehicles if they had a criminal history was held to fall under the safety exception); *Ace Auto Body & Towing, Ltd. v. City of New York*, 171 F.3d 765, 766 (2d Cir. 1999), *cert. denied*, 528 U.S. 868, 145 L. Ed. 2d 140 (2000) (towing ordinance requiring, *inter alia*, licensing, display of information, record keeping, disclosure of criminal history, and maintaining local storage and repair facilities fell within the safety exception); *Hott v. City of San Jose*, 92 F. Supp.2d 996, 999 (N.D. Cal. 2000) (regulations requiring tow truck operators to maintain liability insurance, pass criminal background checks, and to keep records and display information fell within the safety exception). Plaintiff failed to cite any authority to invalidate the regulations, or to show the regulations are not exempt under the “safety regulatory authority” exception of 49 U.S.C. § 14501.

Here, the Rotation Wrecker Service Regulations set forth thirty-two conditions a private wrecker service must meet and comply with in order to be included and remain on the Wrecker Rotation Services List. These regulations require the wrecker service to: (1) maintain legally required lighting and other safety equipment to protect the public; (2) remove all debris from the highway prior to leaving the collision scene; (3) maintain a full-time office within the Rotation Wrecker Zone; (4) consistently respond to calls in a timely manner; (5) impose reasonable charges for work performed; and (6) secure all personal property at the scene of a collision to the extent possible; and (7) preserve personal property in a towed vehicle.

The regulations also provide for the type and amount of insurance coverage the wrecker service must maintain, the type of equipment the wrecker service is required to have available, and prohibits persons with convictions for certain crimes from being included on the rotation list.

These provisions promote public safety at the scene to which the wrecker service is summoned and preserves personal property towed from the scene. These regulations protect the public and are “genuinely responsive to safety concerns.” *City of Columbus*, 536 U.S. at 442, 153 L. Ed. 2d at 446.

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Here, the Highway Patrol's regulations fall within the "safety regulatory authority" exception set forth in 49 U.S.C. 14501(c)(2)(A), and are not preempted by federal law. The trial court properly granted summary judgment in favor of defendants. This assignment of error is overruled. Our review and decision does not consider or condone laws, rules, or regulations related to price, route, or service of any motor carrier which is not in the interest of public safety or within other statutory exemption. *Id.*

VI. Conclusion

The trial court did not err in denying plaintiff's motion for partial summary judgment. The General Assembly delegated to the Department of Crime Control and Public Safety and the Highway Patrol the authority to promulgate regulations regarding the requirements a private wrecker service must meet to be included and remain on the Highway Patrol's Wrecker Rotation Services List in the interest of public safety. N.C. Gen. Stat. § 20-184; N.C. Gen. Stat. § 20-188; 14 NCAC 9H .0308; 14A NCAC 9H .0319.

The trial court did not err in granting summary judgment in favor of defendants. The Highway Patrol's regulations for private wrecker services to be and remain on the Highway Patrol's Wrecker Rotation Services List fall within the "safety regulatory authority" exception set forth in 49 U.S.C. § 14501(c)(2)(A) and are not preempted by federal law. The trial court's order is affirmed.

Affirmed.

Judges McCULLOUGH and HUDSON concur.

IN RE A.R.G.

[178 N.C. App. 205 (2006)]

IN RE: A.R.G.

No. COA05-1268

(Filed 20 June 2006)

Child Abuse and Neglect— permanency planning order—not final—appeal interlocutory

A permanency planning order for a neglected and dependent juvenile directing DSS to pursue adoption after the death of the mother was not a final order as set forth in N.C.G.S. § 7B-1001, and the father's appeal was dismissed as interlocutory.

Judge WYNN dissenting.

Appeal by respondent from order entered 25 May 2005 by Judge David A. Leech in Pitt County District Court. Heard in the Court of Appeals 11 April 2006.

Anthony Hal Morris, for petitioner-appellee Pitt County Department of Social Services.

Annick Lenoir-Peek, for respondent-appellant.

Nancy Ray, for Guardian ad Litem.

LEVINSON, Judge.

Respondent-father purports to appeal from a permanency planning order entered pursuant to the requirements set forth in N.C. Gen. Stat. § 7B-906. The order on appeal does not constitute a final order, and this appeal must therefore be dismissed.

In April 2003, the Pitt County Department of Social Services (DSS) filed a petition alleging that A.R.G. was a neglected and dependent juvenile. In September 2003, the trial court adjudicated the child to be neglected and dependent; awarded custody to DSS; and ordered a goal of reunification with the mother. The trial court entered custody review orders on 26 November 2003, 26 January 2004, and 28 June 2004, under which custody with DSS and the goal of reunification with the mother remained the same. On 14 September 2004, the trial court entered an order allowing DSS to "pursue permanency" for A.R.G. with another family. On 2 November 2004, the mother died as a result of an automobile accident. Following a permanency planning hearing, the trial court entered an order on 25 May

IN RE A.R.G.

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2005, concluding that was in the child's best interest for DSS to pursue adoption with the current foster family and to initiate termination of respondent's parental rights. In this order, the trial court found, *inter alia*, that father was unaware of A.R.G.'s foster residence; had sent no letters or cards to A.R.G.; first contacted the assigned social worker for A.R.G. in October, 2004; and "advocated that the permanent plan be placement of his son with his mother[.]"

The record demonstrates that father attended four hearings, as follows:

May 08, 2003	Matter Continued	Father appeared
May 21, 2003	Matter Continued	Did not appear
July 16, 2003	Matter Continued	Did not appear
July 31, 2003	Adjudication Hearing	Did not appear
October 23, 2003	7B-906 Hearing	Did not appear
December 4, 2003	7B-906 Hearing	Did not appear
March 4, 2004	7B-906 Hearing	Did not appear
June 3, 2004	Matter Continued	Did not appear
June 24, 2004	Matter Continued	Did not appear
July 29, 2004	Matter Continued	Did not appear
September 2, 2004	Matter Continued	Did not appear
August 12, 2004	7B-906 Hearing	Did not appear
October 24, 2004	Matter Continued	Did not appear
November 2, 2004	Mother died	
November 4, 2004	Matter Continued	Father appeared
January 13, 2005	Matter Continued	Father appeared
Feb. 24/May 05, 2005	7B-906 Hearing	Father appeared

N.C. Gen. Stat. § 7B-1001 (2003), provides that appeal may be taken from "any final order of the court in a juvenile matter[.]" The statute defines a "final order", and states that it includes:

- (1) Any order finding absence of jurisdiction;
- (2) Any order which in effect determines the action and prevents a judgment from which appeal might be taken;
- (3) Any order of disposition after an adjudication that a juvenile is abused, neglected, or dependent; or
- (4) Any order modifying custodial rights.

N.C. Gen. Stat. § 7B-1001 (2003).¹

1. This statute was amended effective October 1, 2005. We apply the version of G.S. § 7B-1001 in effect at the time the order on appeal was entered.

IN RE A.R.G.

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In *In re Weiler*, 158 N.C. App. 473, 581 S.E.2d 134 (2003), this Court concluded that the permanency planning order on appeal constituted a “disposition order” within the meaning of Section (3) of G.S. § 7B-1001 and was therefore appealable. In *Weiler*, the permanency planning order changed the permanent plan “as to mother” from reunification to adoption:

The present order again changed the disposition from reunification with the mother to termination of parental rights. An order that changes the permanency plan in this manner is a dispositional order that fits squarely within the statutory language of section 7B-1001. . . . Thus, the appeal is properly before us and petitioner’s motion to dismiss is denied.

Id. at 477, 581 S.E.2d at 136-37.

This Court recently discussed what constitutes a “final” juvenile order, and held that “the statutory language of G.S. § 7B-1001(3), referring to an ‘order of disposition after an adjudication that a juvenile is abused, neglected, or dependent’, means the dispositional order that is entered after an adjudication [of abuse, neglect or dependency] under G.S. § 7B-905, and **does not** mean every permanency planning, review, or other type of order entered at some unspecified point following such a disposition.” *In re B.N.H.*, 170 N.C. App. 157, 160, 611 S.E.2d 888, 890, *disc. review denied*, 359 N.C. 632, 615 S.E.2d 865 (2005). *B.N.H.* further held that this Court would “limit the holding of *Weiler* to the specific facts of that case, and decline[d] to extend its reasoning further.” *Id.* at 162, 611 S.E.2d at 891.

In the instant case, A.R.G. was not residing with father at the time he was removed from the custody of mother, and nothing in the record suggests reunification with father was ever the permanent plan. Every order in the record shows, instead, that the court’s focus was consistently related to the viability of returning the juvenile to mother and to the specific requirements placed on her to assist in reunification efforts. The court’s orders reflect that father had very little contact or involvement with this juvenile following the juvenile’s removal from mother’s home. Not one court order in the record either allows, encourages, or describes any type of visitation between father and A.R.G. The fact that no type of “reunification” with father was ever a permanent plan is sufficient, in and of itself, to distinguish this appeal from *Weiler*, where the permanent plan as to the mother was changed from reunification to adoption. We nevertheless also

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observe that, in the G.S. § 7B-906 review order next-preceding the order on appeal, DSS was expressly authorized by the juvenile court to “pursue permanency.” Consequently, not only was reunification with father never the plan to begin with—something that would preclude interlocutory appellate review of the subject order under *B.N.H.*, but there also had not been any change in the permanent plan from reunification to adoption—something essential to this Court’s review of a permanency planning order in *Weiler*. In short, none of the provisions of G.S. § 7B-1001(1)-(4) apply, and the order on appeal is not a final order for purposes of appeal.

We easily conclude that both the statutory definition of a “final order” set forth in G.S. § 7B-1001, and also our holding in *B.N.H.* requires this Court to dismiss the subject appeal. Father’s interlocutory appeal, taken without noting the grounds for appellate review or making a substantial right argument in his brief, illustrates the long delays meant to be avoided by the operation of G.S. § 7B-1001. Father did not have any type of court-sanctioned visitation with A.R.G. before the entry of the order on appeal, and there has never been any goal of reunification of A.R.G. with father. Under these circumstances, and at this juncture of this juvenile proceeding, this interlocutory appeal has done nothing to further the interests of the juvenile or the father.

Dismissed.

Judge ELMORE concurs.

Judge WYNN dissents in a separate opinion.

WYNN, Judge, dissenting.

The majority dismisses this appeal by a parent as being interlocutory because it involves a review order and not a final disposition. Yet, the dispositive issue on appeal is not whether the parent challenges the “outcome” of the review order; instead, the issue is whether DSS may institute proceedings without complying with the statutory mandates for doing so, thus, depriving the trial court of subject-matter jurisdiction. Indeed, audaciously, DSS recognizing that its petition was statutorily deficient, prepared the proper documents after notice of appeal was given to this Court, and by motion, asks this Court to now consider that documentation as part of the record on appeal. I would deny that motion, address this appeal which chal-

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lenges the subject-matter jurisdiction of the trial court, and vacate the proceedings below.

Moreover, the review order modified the custodial rights as it changed the plan to adoption and directed DSS to pursue termination of Respondent's parental rights. Therefore, the order was appealable. N.C. Gen. Stat. § 7B-1001(4) (2004). As this order was appealable, I would address the issues and must respectfully dissent.

The majority cites to *In re B.N.H.*, 170 N.C. App. 157, 611 S.E.2d 888 (2005), in support of their argument that the review order is not a final order and not appealable. In *B.N.H.*, this Court held that a permanency planning order that *does not modify custody* is not a final order and not immediately appealable pursuant to N.C. Gen. Stat. § 7B-1001(3). *Id.* at 162, 611 S.E.2d at 891.

Here, the previous review orders and permanency orders sought reunification with the mother, but made no mention of Respondent. The prior 14 September 2004 review order ceased reunification efforts with the mother and allowed DSS to pursue permanency for the minor child, however, again made no orders with respect to Respondent. In the 25 May 2005 review order on appeal, the trial court for the first time entered an order with respect to Respondent, that DSS should pursue termination of his rights and adoption for the minor child. As this was the first order that affected Respondent's parental rights, it is a change in custody and appealable pursuant to N.C. Gen. Stat. § 7B-1001(4). *See also In re Weiler*, 158 N.C. App. 473, 477, 581 S.E.2d 134, 136-37 (2003) (order that changed the disposition from reunification with the mother to termination of parental rights was appealable). Accordingly, as this order is immediately appealable I would address the issues.

On appeal, Respondent argues that the trial court lacked subject matter jurisdiction to enter the order of 25 May 2005 as the petition failed to contain the information required by sections 50A-209(a) and 7B-402. I agree and would vacate the order.

Section 50A-209(a) of the North Carolina General Statutes requires:

In a child-custody proceeding, each party, in its first pleading or in an attached affidavit, shall give information, if reasonably ascertainable, under oath as to the child's present address or whereabouts, the places where the child has lived during the last

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five years, and the names and present addresses of the persons with whom the child has lived during that period. . . .

N.C. Gen. Stat. § 50A-209(a) (2003).

The record on appeal confirms that DSS *never* filed an affidavit of status with the trial court. Indeed, DSS did not complete an affidavit until 28 December 2005, over six months after entry of the trial court's 25 May 2005 order and Respondent's 6 June 2005 Notice of Appeal. While DSS filed a Motion to Amend the Record on 29 December 2005, asking this Court to include the affidavit of status dated 28 December 2005, I would deny that motion because the affidavit of status was never before the trial court and therefore should not be included in the record on appeal.

Nonetheless, DSS cites to *In re Clark*, 159 N.C. App. 75, 79, 582 S.E.2d 657, 660 (2003), in support of its argument that failure to properly file an affidavit of status is not reversible error. In *Clark*, the Stokes County Department of Social Services failed to file an affidavit of status at the time of the filing of the petition. *Id.* However, the trial court gave Stokes County DSS five days to comply, and it filed the affidavit within five days. *Id.* at 79-80, 582 S.E.2d at 600. This Court found that “[a]lthough it remains the better practice to require compliance with section 50A-209,” as the affidavit was filed prior to the trial court rendering its decision, the trial court was able to determine whether jurisdiction existed. *Id.*

Unlike *Clark*, the trial court in this case was not able to determine whether jurisdiction existed before it rendered its decision as DSS failed to file an affidavit of status. Rather nothing in the record shows that DSS made any effort to comply with the provisions of section 50A-209(a) until well after the the trial court's decision and the Notice of Appeal had been given in this case.

Moreover, the Petition contained in the record on appeal shows that DSS did not include the child's date of birth or address as required by section 7B-402 which states,

The petition shall contain the name, date of birth, address of the juvenile, the name and last known address of the juvenile's parent, . . . and shall allege the facts which invoke jurisdiction over the juvenile. . . .

N.C. Gen. Stat. § 7B-402 (2003).

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“[N]atural parents have a constitutionally protected interest in the companionship, custody, care, and control of their children.” *Price v. Howard*, 346 N.C. 68, 72, 484 S.E.2d 528, 530 (1997). Therefore, proceedings to terminate constitutionally protected parental rights must be conducted with fairness and due process of the law. *See* N.C. Gen. Stat. § 7B-100(1) (2003) (purpose of Chapter 7B is: “To provide procedures for the hearing of juvenile cases that assure fairness and equity and that protect the constitutional rights of juveniles and parents[.]”). Section 50A-209 requires DSS to file an affidavit of status with the trial court in order to confer jurisdiction to the trial court. Compliance with this statute is a legislative requisite that in this case appears to have been neither difficult nor burdensome on DSS. The letter of the law must be followed to ensure due process of the law in terminating a parent’s constitutionally protected right to parent. When, as here, DSS fails to comply with statutes conferring jurisdiction to the trial court, this Court should vacate the trial court’s order.

As DSS failed to comply with sections 50A-209 and 7B-402 of the North Carolina General Statutes, the trial court was unable to determine whether jurisdiction existed. Therefore, I would vacate the trial court’s decision.

STATE OF NORTH CAROLINA v. STEVEN LEWIS BROOKS

No. COA05-935

(Filed 20 June 2006)

1. Burglary and Unlawful Breaking or Entering— entry beyond public area—initial consent void ab initio

An entry with the owner’s consent cannot be punished, even if it is with felonious intent, but subsequent conduct can render the consent void ab initio. The trial court here correctly denied motions to dismiss charges of felonious breaking or entering and felonious larceny where defendant entered a law firm which had a reception area open to the public, went beyond that area to commit a theft, and lied to a member of the firm about his reason for being there.

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2. Evidence— videotapes not authenticated—activity admitted by defendant—admission not prejudicial

There was no prejudicial error in the admission of videotapes that may not have been properly authenticated where defendant admitted the activity shown on the tapes.

Appeal by defendant from judgment entered 13 April 2005 by Judge Thomas D. Haigwood in Forsyth County Superior Court. Heard in the Court of Appeals 9 March 2006.

Attorney General Roy Cooper, by Assistant Attorney General Brent D. Kiziah, for the State.

Appellate Defender Staple Hughes, by Assistant Appellate Defender Matthew Wunsche, for defendant appellant.

McCULLOUGH, Judge.

Steven Lewis Brooks (defendant) appeals from conviction and judgment for felonious breaking or entering and felonious larceny. We hold that defendant received a fair trial, free from prejudicial error.

Facts

On 18 August 2004 between 10:00 a.m. and 11:30 a.m., defendant and Janice Perkins entered the law offices of Grace Holt Tisdale & Clifton in Winston-Salem, North Carolina. The law firm is open to people seeking legal representation, and it is arranged so that people visiting the firm may enter the reception area. The firm's lawyers generally meet with clients in conference rooms, and access to the attorneys' offices is by permission only.

Attorney Michael Grace noticed Perkins, who had been a client in a previous criminal case. As Perkins had been told that she should not return to the firm after that case, Grace told her that she should not be there. A legal assistant witnessed defendant walking in the hallway from the back of the firm, and she asked defendant if she could help him. Defendant answered that he was looking for a lawyer and asked if attorney Mireille Clough was available. Upon receiving a negative response, defendant sat in a chair outside of Clough's office. Defendant then moved towards the firm's bathroom, and approximately one minute thereafter, exited the law firm.

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Attorney Mireille Clough returned to the firm between 11:45 a.m. and noon, after being in court that morning. She placed a bag in one of the chairs in her office, retrieved some files, and left for court again. When she returned later in the day, Clough observed that her day planner and a wallet containing her credit cards were missing from her bag. She contacted her credit card company and was informed that her credit card had recently been used at a nearby Food Lion grocery store.

Attorney Donald Tisdale testified that he observed defendant exiting Clough's office at 1:30 p.m. on 18 August 2004. Upon noticing Tisdale, defendant asked whether Clough had returned from lunch. Tisdale replied that he would see if Clough had returned and then walked to his office to put something down. By the time Tisdale returned, defendant was gone.

The police procured a video of defendant and Perkins using Clough's credit card at the nearby Food Lion. Officers also seized four credit card receipts which indicated that Clough's credit card had been used at the Food Lion. While driving to interview a witness, Detective Gregory Dorn noticed Perkins on the porch of a home on Waughtown Street. Detective Dorn detained Perkins, entered the home, and found defendant sitting in the living room. Perkins accompanied Dorn, and other officers, to a location approximately one-quarter to one-half mile from the home, where the officers performed a search and located Clough's day planner. The police also found Clough's credit cards in a planter at the home on Waughtown Street.

Defendant was arrested. He confessed to entering the law office though, according to defendant, he diverted the attention of the secretary while Perkins stole Clough's personal items. Defendant further admitted to purchasing sixteen cases of beer and nine cartons of cigarettes with Clough's credit cards.

A Forsyth County jury convicted defendant of felonious breaking or entering and felonious larceny. The trial court sentenced defendant as an habitual felon to between 100 and 129 months of imprisonment. Defendant now appeals.

Legal DiscussionI.

In his first argument on appeal defendant contends that the trial court erred by denying his motions to dismiss the charges of

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felonious breaking and entering and felonious larceny. This contention lacks merit.

A trial court should deny a motion to dismiss if, considering the evidence in the light most favorable to the State and giving the State the benefit of every reasonable inference, “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). “Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion.” *Id.* “[T]he rule for determining the sufficiency of evidence is the same whether the evidence is completely circumstantial, completely direct, or both.” *State v. Wright*, 302 N.C. 122, 126, 273 S.E.2d 699, 703 (1981).

A. Felonious Breaking or Entering

[1] Pursuant to section 14-54(a) of the General Statutes, “[a]ny person who breaks or enters any building with intent to commit any felony or larceny therein shall be punished as a Class H felon.” N.C. Gen. Stat. § 14-54(a) (2005). Thus, “[t]he essential elements of felonious breaking or entering are (1) the breaking or entering (2) of any building (3) with the intent to commit any felony or larceny therein.” *State v. White*, 84 N.C. App. 299, 301, 352 S.E.2d 261, 262, *cert. denied*, 321 N.C. 123, 361 S.E.2d 603 (1987). The present defendant challenges only whether there was sufficient evidence of an illegal entry on his part.

“[A]n entry, even if with felonious intent, cannot be punished when it is with the owner’s consent.” *State v. Boone*, 297 N.C. 652, 657, 256 S.E.2d 683, 686 (1979). Our Supreme Court has held that, where a defendant “entered [a] store at a time when it was open to the public[, h]is entry was . . . with the consent, implied if not express, of the owner[, and could not] serve as the basis for a conviction for felonious entry.” *Id.* at 659, 256 S.E.2d at 687.

However, the subsequent conduct of the entrant may render the consent to enter void *ab initio*. *State v. Speller*, 44 N.C. App. 59, 60, 259 S.E.2d 784, 785 (1979); *see also State v. Winston*, 45 N.C. App. 99, 102, 262 S.E.2d 331, 333 (1980) (reversing conviction for breaking or entering where a defendant entered with consent, and the record “fail[ed] to disclose that the defendant after entry committed acts sufficient to render the implied consent void *ab initio*.”). This Court has upheld a conviction for breaking or entering where a defendant

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entered a store during normal business hours, but subsequently secreted himself in a portion of the store which was not open to the public and remained concealed there so that he could perpetrate a theft after the store closed. *Speller*, 44 N.C. App. at 60, 259 S.E.2d at 785. Specifically, we held that defendant's actions in "[g]oing into an area not open to the public and remaining hidden there past closing hours made the entry through the front door open for business unlawful." *Id.*

In the instant case, the evidence tended to show that defendant entered a law office which was open to members of the public seeking legal assistance. The firm had a reception area where members of the public were generally welcome and also areas beyond this reception area which were not open to the public. When defendant entered the reception area of the firm, he did so with implied consent from the firm. However, defendant took action which rendered this consent void *ab initio* when he went into areas of the firm that were not open to the public so that he could commit a theft, and when he misinformed a member of the firm as to the reason for his presence in these areas. Therefore, defendant illegally entered the firm.

Accordingly, the State introduced substantial evidence to satisfy the breaking or entering element of felonious breaking or entering. The trial court did not err by denying defendant's motion to dismiss this charge.

B. Felonious larceny

Larceny is the taking and carrying away of the property of another without the owner's consent with the intent to permanently deprive the owner of the property. *State v. Coats*, 74 N.C. App. 110, 112, 327 S.E.2d 298, 300, *cert. denied*, 314 N.C. 118, 332 S.E.2d 492 (1985). The crime of larceny is a felony, without regard to the value of the property in question, if the larceny is committed pursuant to a breaking or entering in violation of section 14-54 of the General Statutes. N.C. Gen. Stat. § 14-72(b)(2) (2005).

Defendant argues that the trial court should have dismissed the felonious larceny charge because there was no evidence of a breaking or entering on his part. As we have already indicated, the evidence permitted a jury finding that defendant illegally entered the law firm. Accordingly, the trial court did not err by denying defendant's motion to dismiss the felonious larceny charge.

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II.

[2] In his second argument on appeal, defendant contends that the trial court erred by admitting the videos from the Food Lion into evidence because the prosecution failed to properly authenticate these items of evidence. Even assuming *arguendo* that the tapes were not properly admitted in evidence, we conclude that defendant was not prejudiced by their admission.

At issue are State's Exhibits 18 and 20, both of which contained video footage of defendant and Perkins using Clough's credit card to purchase beer and cigarettes at a Food Lion. The footage was taken from the Food Lion's surveillance cameras. Exhibit 20 showed multiple scenes from different cameras within the store. The footage contained in Exhibit 20 was edited by the police to produce Exhibit 18. Both videos were shown to the jury; Exhibit 18 was shown in its entirety; but Exhibit 20 was only partially shown. Defendant contends that the exhibits were improperly shown to the jury because the State did not establish that the videotapes fairly and accurately illustrated the events filmed.

It is true that videotapes are admissible as evidence only when a proper foundation has been established. N.C. Gen. Stat. § 8-97 (2005); *State v. Cannon*, 92 N.C. App. 246, 254, 374 S.E.2d 604, 608 (1988), *rev'd on other grounds*, 326 N.C. 37, 387 S.E.2d 450 (1990). However, not all trial errors require reversal and "[d]efendant has the burden of showing that he was prejudiced by the admission of . . . evidence." *State v. Wingard*, 317 N.C. 590, 599-600, 346 S.E.2d 638, 645 (1986). Indeed, an error is not prejudicial unless "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial . . ." N.C. Gen. Stat. § 15A-1443 (2005).

In the instant case, we hold that the admission of the videotapes showing defendant and his accomplice purchasing beer and cigarettes on the victim's stolen credit card was not prejudicial given the admittance of defendant's statement in which he confessed to using the victim's credit card to purchase beer and cigarettes at the Food Lion. Specifically, defendant stated, "We went to Food Lion[;] we got some beer on the credit cards . . ." Later when asked by a detective what he and his accomplice bought at Food Lion, defendant stated, "[b]eer and cigarettes." In light of defendant's confession, there is no reasonable possibility that, had the challenged video exhibits not been admitted, a different result would have been reached at the trial.

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Defendant's assignments of error are overruled.

No error.

Judges TYSON and ELMORE concur.

STATE OF NORTH CAROLINA v. FRED C. SINK

No. COA05-874

(Filed 20 June 2006)

False Pretenses— aiding and abetting—private work by government employee

There was sufficient evidence to deny defendant's motion to dismiss the charge of aiding and abetting obtaining property by false pretenses based on a county worker performing a household repair for defendant, a county commissioner, on county time. Defendant's own statement and a prior bad act provided evidence from which intent and knowledge could be inferred.

Appeal by defendant from an order dated 10 March 2005 by Judge W. David Lee in Davidson County Superior Court. Heard in the Court of Appeals 27 March 2006.

Attorney General Roy Cooper, by Assistant Attorney General Daniel P. O'Brien, for the State.

Wyatt, Early, Harris, Wheeler, LLP, by John Bryson, for defendant.

BRYANT, Judge.

Fred C. Sink (defendant) appeals from an order dated 10 March 2005 consistent with a jury verdict finding him guilty of aiding and abetting obtaining property by false pretenses. For the reasons stated herein, we find no error.

Defendant was a Davidson County Commissioner. Ronald Carol Richardson (Richardson) was the Director of the Davidson County Buildings and Maintenance Department. Richardson fixed a toilet in defendant's residence. This is one of a number of times Richardson

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admitted using county property and county employees on county time to perform services for himself, other friends and officials.

Richardson testified that in the early part of 2002, he ran into defendant outside the Davidson County government center after the adjournment of a morning meeting. Defendant told Richardson that he was having some trouble with a toilet at his house that would not stop running. Richardson asked defendant if he wanted Richardson to take a look at the toilet. Richardson went to defendant's house at around 10:30 a.m., in a county vehicle and on county time, even though Richardson was not performing county business. It was a regular work day and he had other county duties to perform. Richardson fixed defendant's running toilet by adjusting the float. Richardson was not on lunch break at the time he performed the service; and defendant did not pay Richardson for the personal service or ask Richardson to take vacation or leave time. Richardson did not denote on his time sheets any time taken off to perform the service for defendant.

At trial the State presented evidence that defendant, when questioned by the SBI, stated that although he could not recall any specifics, Richardson may have come to his house on county time and in a county vehicle in 2002. Defendant stated it was possible he even rode with Richardson in a county vehicle to fix the toilet at defendant's house. Defendant stated he has always considered Richardson a good friend and indicated that Richardson would have done anything anyone asked.

The State provided additional evidence to which defendant did not object. During the 1990's, Richardson was an employee under Jessie Cecil (Director of Buildings and Maintenance for the county) and defendant was the County Director of Emergency Management. At that time, Richardson and Cecil went to defendant's house to fix the toilet in defendant's upstairs bathroom. They went in a county vehicle, on county time, when both of them had other county duties to perform. In 2002, defendant brought Richardson upstairs, to the same bathroom where Richardson and Cecil had fixed defendant's toilet in the 1990's. Richardson testified he was never told by defendant or by Cecil to take time off to perform the personal service; and it was not part of his county duties to perform purely personal services at the home of the Director of Emergency Management. The trial court gave a limiting instruction in accordance with Rule 404(b) that the prior act (1990's) evidence was to be considered solely to show defendant's intent, plan, scheme, or design with respect to

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the offense for which he was being tried. After his conviction by a jury, defendant appeals.

The dispositive issue is whether the trial court erred in denying defendant's motion to dismiss the charge of aiding and abetting obtaining property by false pretenses based on insufficient evidence. At the outset, we note defendant submitted a reply brief on 8 March 2006, two days after the time for filing a reply brief had passed, pursuant to N.C. R. App. P. 28(h)(3). Therefore, we grant the State's motion to strike defendant's reply brief and decide the case on the original briefs and record which were timely filed. *Steingress v. Steingress*, 350 N.C. 64, 65, 511 S.E.2d 298, 299 (1999).

"In considering a motion to dismiss, it is the duty of the court to ascertain whether there is substantial evidence of each essential element of the offense charged." *State v. Smith*, 300 N.C. 71, 78, 265 S.E.2d 164, 169 (1980). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* at 78-79, 265 S.E.2d at 169. In ruling on a defendant's motion to dismiss, the evidence is viewed in the light most favorable to the State and the State is allowed every reasonable inference. *Id.*

A person is guilty of a felony based on the common-law concept of aiding and abetting where, (1) the crime was committed by another person; (2) the defendant knowingly advised, instigated, encouraged, procured or aided the other person; and (3) the defendant's actions or statements caused or contributed to the commission of the crime by the other person. *State v. Francis*, 341 N.C. 156, 161, 459 S.E.2d 269, 272 (1995). Section 14-100 of the North Carolina General Statutes, governing the offense of obtaining property by false pretenses provides as follows:

If any person shall knowingly and designedly by means of any kind of false pretense whatsoever . . . obtain or attempt to obtain from any person within this State any money, goods, property, services, chose in action, or other thing of value with intent to cheat or defraud any person of such money, goods, property, services, chose in action or other thing of value, such person shall be guilty of a felony.

N.C. Gen. Stat. § 14-100 (2005).

Defendant argues the false pretense consists of Richardson falsely filling out his time sheet at the conclusion of his pay period

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and failing to note the time he spent fixing defendant's toilet was personal time. Further, defendant argues that while the State presented evidence that Richardson fixed defendant's toilet and later claimed to be paid for doing so, the State failed to present any evidence defendant was even aware of Richardson's false claim, or that he was present with and aided or assisted Richardson in making the false claim. Defendant's argument limits Richardson's felonious intent to occurring completely or spontaneously after fixing defendant's toilet by framing the felony as only the falsification of time records. The indictment, however, defines the false pretense not as falsifying the time sheet, but as performing the repair during normal working hours and receiving regular county pay when such act was not county business but strictly private work.

The statute provides a false pretense may be of a past or subsisting fact or future fulfillment or event. N.C. Gen. Stat. § 14-100(a) (2005). In *State v. Horton*, 73 N.C. App. 107, 326 S.E.2d 54 (1985), defendant purchased items from a department store, paying by check, and shortly thereafter, reported to her bank that the checks had been stolen and were therefore forgeries. *Horton* at 110-11, 326 S.E.2d at 57. The defendant argued there was no evidence to show she had made a misrepresentation to the department store. Our court determined:

When a person presents a check to a merchant in exchange for merchandise, [that person] is representing that the amount of money specified on the check will be given to the merchant when that check is presented to the drawer's bank. If the drawer then commits some act in the future, such as falsely reporting that the check was stolen, which causes the check to be dishonored and the merchant to receive no money for the merchandise, [the person] has made a misrepresentation as contemplated under G.S.14-100. In this case, there was ample evidence from which the jury could conclude that the defendant falsely reported the checks as having been stolen after having obtained merchandise in exchange for the checks.

Id. Similarly, in the case *sub judice*, Richardson's false pretense encompasses not only falsifying his time sheets, but includes providing private services on public time. Richardson wrongfully obtained public funds when he provided private services and later falsified his time sheets.

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When there is evidence that the individual knew about and aided in the offense, or shared the intent and was in a position to aid and encourage, the matter should go to a jury. *State v. Haywood*, 295 N.C. 709, 719, 249 S.E.2d 429, 435 (1978). Therefore, the State must show sufficient evidence of defendant's knowledge and intent that he instigated and encouraged Richardson in providing private services at taxpayer expense, while holding himself out to be working for the county. Knowledge and intent, as processes of the mind, are often not susceptible of direct proof and in most cases can be proved only by inference from circumstantial evidence. *State v. Keel*, 333 N.C. 52, 61, 423 S.E.2d 458, 464 (1992). The State presented evidence from which to infer knowledge and intent through defendant's own statement and through a prior bad act offered to prove intent. Upon questioning by the SBI agent, defendant did not deny he asked Richardson to come to his residence in 2002 and fix a toilet on county time. Further, defendant stated although he could not recall any specifics, Richardson may have come to his house on county time and in a county vehicle, and it was possible he even rode with Richardson in a county vehicle to fix the toilet at his house. In addition, the prior act evidence showed Richardson and another county employee went to defendant's house and on county time, fixed defendant's upstairs toilet—the same toilet Richardson fixed in 2002. From this evidence a jury could rationally conclude that defendant had the intent in 2002 to get a county employee, at county expense and during normal working hours, to provide him with purely private services. We conclude the evidence submitted by the State was sufficient to survive defendant's motion to dismiss. This assignment of error is overruled.

No error.

Chief Judge MARTIN and Judge HUDSON concur.

HODGE v. HARKEY

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ROBERT C. HODGE, AND WIFE LAURA R. HODGE, PLAINTIFFS v. CLYDE HARKEY, SR.,
CLINE OIL COMPANY, INC., ROBERT D. CLINE, B AND M INVESTMENTS, INC.,
AND MARY MARGARET STEEL POWELL, DEFENDANTS

No. COA05-1416

(Filed 20 June 2006)

Statutes of Limitation and Repose— land contamination—last acts or omissions—repair work

The trial court did not err by granting defendants' motion for summary judgment in an action arising out of petroleum contamination of the soil and groundwater of plaintiffs' property based on the ten-year statute of repose under N.C.G.S. § 1-52(16), because: (1) the last act giving rise to liability in land contamination cases for purposes of N.C.G.S. § 1-52(16) is the last date the party owned the offending property in which underground storage tanks (UST) were buried, owned a UST located on the property, or delivered gasoline to a UST, and defendants' last acts or omissions occurred more than ten years prior to the filing of this suit; (2) plaintiffs cite to no statutory authority which creates in defendants an ongoing responsibility, and the Court of Appeals lacks the authority to impose such an obligation; (3) the repair work defendants did in response to the North Carolina Department of Environment and Natural Resources's regulatory requirements did not begin the running of the statute of repose anew when the ten-year statute of repose had already expired prior to 2000 when these defendants took their remedial actions, and to allow the statute of repose to toll or start running anew each time a repair is made would subject a defendant to potential open-ended liability for an indefinite period of time; and (4) the fact that plaintiffs did not discover that their land was contaminated until after the statute of repose had expired does not extend their time for filing suit.

Appeal by plaintiffs from judgment entered 22 August 2005 by Judge Larry G. Ford in Rowan County Superior Court. Heard in the Court of Appeals 17 May 2006.

Hopf & Higley, P.A., by James F. Hopf, Donald S. Higley, II, and Charles C. Edwards, Jr., for plaintiffs-appellants.

The Law Offices of F. Bryan Brice, Jr., by Heather L. Spurlock and F. Bryan Brice, Jr., for defendant-appellee Harkey.

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Hartsell & Williams, P.A., by J. Merritt White, III and Christy E. Wilhelm, for defendant-appellees Cline Oil Company, Inc., B and M Investments, Inc., and Robert D. Cline.

STEELMAN, Judge.

Robert C. Hodge and his wife, Laura (plaintiffs), appeal an order of the trial court granting Clyde Harkey, Sr., Cline Oil Company, Inc., Robert D. Cline, and B and M Investments, Inc.'s (defendants) motion for summary judgment. For the reasons stated herein, we affirm.

This action arises out of the petroleum contamination of the soil and groundwater of plaintiffs' property located adjacent to a commercial parcel of land owned by defendant Mary Margaret Steel Powell (Powell). Powell leased the land to defendant Clyde Harkey, Sr. (Harkey) from 1976 until 1988. During this period, Harkey operated a retail convenience store known as the Community Cash & Carry. As part of the business, Harkey sold petroleum products. Underground storage tanks (UST) and UST systems were located and operated at the Cash & Carry site for the storage of gasoline and other petroleum products until 1988, when the USTs were removed from the site. Defendant Powell contracted with defendants Cline and Cline Oil Co., now B & M Investments, (hereinafter "Cline") to service the site with petroleum products from 1976 until 1988.

On 8 November 2000, the North Carolina Department of Environment and Natural Resources (DENR) discovered that petroleum products had been released from the USTs at the Cash and Carry site and contaminated plaintiffs' property and water supply. Plaintiffs received notification of the contamination on 15 November 2000 from DENR. Thereafter, defendants Harkey, Cline, and Cline Oil Co. received a series of notices from DENR that they were responsible parties and ordered them to take action with respect to the contamination. As part of the remedies DENR ordered, defendant Harkey constructed a new water supply well for plaintiffs, and defendant Cline provided bottled water during the interim.

On 8 September 2003 plaintiffs filed this action. On 13 December 2004 plaintiffs voluntarily dismissed with prejudice their claims against Powell. Defendants Harkey and Cline moved for summary judgment on all claims, asserting the ten-year statute of repose under N.C. Gen. Stat. § 1-52(16) as a bar to the action. The trial court granted summary judgment on all claims against defendants Harkey and Cline. Plaintiffs appeal.

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“[T]he standard of review on appeal from summary judgment is whether there is any genuine issue of material fact and whether the moving party is entitled to a judgment as a matter of law.” *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998); *see also* N.C. Gen. Stat. § 1A-1, Rule 56(c) (2006). The party moving for summary judgment bears the burden of establishing the lack of any triable issue of fact. *N.C. Farm Bureau Mut. Ins. Co. v. Fowler*, 162 N.C. App. 100, 102, 589 S.E.2d 911, 913 (2004). The moving party may meet this burden by showing that the “plaintiff cannot surmount an affirmative defense raised in bar of its claim.” *Lyles v. City of Charlotte*, 120 N.C. App. 96, 99, 461 S.E.2d 347, 350 (1995), *rev’d on other grounds*, 344 N.C. 676, 477 S.E.2d 150 (1996). When reviewing the evidence, this Court must view it in the light most favorable to the nonmoving party. *Fowler*, 162 N.C. App. at 102, 589 S.E.2d at 913.

In defendants’ motion for summary judgment, they asserted plaintiffs’ claims were time barred by the statute of repose. N.C. Gen. Stat. § 1-52(16) (2006) provides:

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, whichever event first occurs. *Provided that no cause of action shall accrue more than 10 years from the last act or omission of the defendant giving rise to the cause of action.*

(emphasis added). The plain language of the statute indicates that in cases involving property damage, no cause of action may be brought more than ten years after the defendant’s last act or omission. A complaint which seeks to impose liability upon a previous landowner or operator for adjoining land contamination constitutes an action for physical damage to claimant’s property, and is thus governed by N.C. Gen. Stat. § 1-52(16). *See Wilson v. McLeod Oil Co.*, 327 N.C. 491, 512-13, 398 S.E.2d 586, 597 (1990).

In *Wilson*, our Supreme Court considered the application of this particular statute of repose in the context of groundwater contamination. The plaintiffs sued the adjoining landowners for contamination of their well water. *Id.* at 498, 398 S.E.2d at 588. The defendants filed third-party complaints against the previous owners, Hilda Baxter, individually and in her capacity as personal representative of the estate of her husband, and against Alamance Oil Company, which

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supplied gasoline to USTs located on the offending property and who also owned the property at one time. *Id.* The Supreme Court affirmed the trial court's grant of summary judgment on all claims against Baxter and Alamance because the complaints were filed more than ten years after the Baxters sold the property and when Alamance last serviced the USTs. *Id.* at 512-13, 398 S.E.2d at 597. Thus, they were barred by N.C. Gen. Stat. § 1-52(16). *Id.*

Likewise, plaintiffs' causes of action against defendants Cline and Harkey are also barred by the statute of repose in N.C. Gen. Stat. § 1-52(16). As to defendants Cline, they removed the USTs from the property in 1988 and ceased delivering petroleum products to the site at that time. Thus, their last act or omission which could give rise to a cause of action occurred in 1988. Harkey's lease of the property ended in 1988. Since that time he has had no involvement with that property. Thus, his last act or omission which could give rise to a cause of action occurred in 1988. Plaintiffs' filed this suit in 2003. Since both Cline and Harkey's last acts or omissions occurred more than ten years prior to the filing of this action, all of plaintiffs' claims against both parties are barred by the statute of repose found in N.C. Gen. Stat. § 1-52(16). *See Id.* (concluding "*any action*" against Alamance, the gasoline provider, was barred by the statute of repose found in N.C. Gen. Stat. § 1-52(16)) (emphasis added); *Davidson v. Volkswagenwerk, A.G.*, 78 N.C. App. 193, 194, 336 S.E.2d 714, 716 (1985) (holding under similar statute of repose that language "*no action . . . shall be brought . . .*" prohibited further suit for any other type of claim) (emphasis in original).

Plaintiffs contend, however, their action is not barred by the statute of repose because defendants have an ongoing responsibility for the contamination and therefore, defendants have yet to perform the last act or omission for purposes of the application of the statute of repose. We disagree. Plaintiffs cite to no statutory authority which creates in defendants an "ongoing responsibility," nor was this Court able to discover any. Further, this Court lacks the authority to impose such an obligation.

In addition, plaintiffs contend the repair work defendants did in response to DENR's regulatory requirements began the running of the statute of repose anew. Our Supreme Court has articulated the events that toll the statute of repose in order to determine whether any such event has occurred within ten years of the filing of the action. These events are the last date a party owned the property in which USTs were buried, owned a UST, or delivered gasoline into a USTs. *Wilson*,

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327 N.C. at 514, 398 S.E.2d at 597-98. In the instant case, the ten-year statute of repose had already expired prior to 2000 when these defendants took their “remedial” actions. Any subsequent activity by either defendant cannot expand the statute of repose, regardless of who required that the remedial action be taken.

This Court has previously held that a statute of repose containing “no action” language barred all claims, including claims seeking to extend liability for subsequent repairs or remedial measures. *See Whitehurst v. Hurst Built, Inc.*, 156 N.C. App. 650, 577 S.E.2d 168 (2003); *Monson v. Paramount Homes, Inc.*, 133 N.C. App. 235, 515 S.E.2d 445 (1999). We find these cases instructive and applicable to the issue presented in the instant case. In *Monson*, this Court analyzed the statute of repose provided for in N.C. Gen. Stat. § 1-50(5) for improvements to real property and held “a ‘repair’ does not qualify as a ‘last act’ under N.C. Gen. Stat. § 1-50(5) [sic] unless it is required under the improvement contract by agreement of the parties.” 133 N.C. App. at 241, 515 S.E.2d at 450. We reasoned that “[t]o allow the statute of repose to toll or start running anew each time a repair is made would subject a defendant to potential open-ended liability for an indefinite period of time, defeating the very purpose of statutes of repose such as N.C. Gen. Stat. § 1-50(5)[sic].” *Id.* at 240, 515 S.E.2d at 449. As enunciated in *Wilson*, the last act giving rise to liability in land contamination cases for purposes of N.C. Gen. Stat. § 1-52(16) is the last date the party owned the offending property in which USTs were buried, owned a UST located on the property, or delivered gasoline to a UST. *Wilson*, 327 N.C. at 513-14, 398 S.E.2d at 597-98. The only action defendant Harkey took after 1988 was to install a replacement well for plaintiffs, which does not fit within any of the acts listed in *Wilson*. Rather, Harkey’s action is more akin to a repair. Defendant Cline performed no repairs, but did provide drinking water for plaintiffs. We are bound by the holdings in *Monson*, *Whitehurst*, and *Wilson*. *In the matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). Thus, neither of these actions can be classified as a “last act or omission” under N.C. Gen. Stat. § 1-52(16).

Based on the plain language of N.C. Gen. Stat. § 1-52(16), our Supreme Court’s decision in *Wilson*, and this Court’s decision in *Monson*, we conclude the trial court did not err in granting defendants Harkey and Cline’s motions for summary judgment as to all claims since plaintiffs’ action is barred by an affirmative defense, the statute of repose.

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The fact plaintiffs did not discover that their land was contaminated until after the statute of repose had expired does not extend their time for filing suit. The statute of repose began to run upon Harkey and Cline's last act or omission, not when the contamination was first discovered. "Statutes of limitation are inflexible and unyielding. They operate inexorably without reference to the merits of plaintiff's cause of action. . . . It is not for us to justify the limitation period prescribed . . . Suffice to say, this is a matter within the province of the General Assembly." *Hand v. Fieldcrest Mills, Inc.*, 85 N.C. App. 372, 381, 355 S.E.2d 141, 146 (1987) (quoting *Shearin v. Lloyd*, 246 N.C. 363, 370, 98 S.E.2d 508, 514 (1957)).

AFFIRMED.

Judge McGEE and Judge HUNTER concur.

JAMES BERNARD CREIGHTON, PLAINTIFF v. CHARLOTTE KIRK LAZELL-FRANKEL,
DEFENDANT

No. COA05-980

(Filed 20 June 2006)

Costs— attorney fees—civil contempt—child custody

The trial court did not err by denying plaintiff father's motion for attorney fees under N.C.G.S. § 50A-312 in a case where defendant mother filed a motion in the cause to enforce a North Carolina court order including a request that plaintiff father be held in civil contempt for his plans to violate the parties' child custody provisions, because defendant mother did not seek the expedited enforcement of a child custody determination, seek to register an out-of-state order, or otherwise utilize the remedies set forth in Part 3 of the Uniform Child Custody Jurisdiction and Enforcement Act.

Appeal by Plaintiff from order entered 3 September 2004 by Judge M. Patricia Devine in Orange County District Court. Heard in the Court of Appeals 15 March 2006.

Hayes Hofler, P.A., by R. Hayes Hofler and The Law Office of C. Connor Crook, by C. Connor Crook, for plaintiff.

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Nancy E. Gordon, for defendant.

Charlotte Kirk Lazell-Frankel pro se.

LEVINSON, Judge.

James Creighton (father) appeals from an order denying his motion for attorney's fees pursuant to N.C. Gen. Stat. § 50A-312 (2005). We affirm.

The pertinent facts may be summarized as follows: Father and Charlotte Lazell-Frankel (mother) were married on 4 February 1994 and have one child together. The parties divorced on 8 July 2002. The divorce order incorporated a 3 August 1999 separation agreement. This agreement specified the terms of custody for the minor child. The terms provided that the parties would alternate custody of the child; specifically, the parent with custody during the school year would retain custody until the end of summer camp, when the other parent would assume custody for the following school year. The divorce order also decreed that the trial court "should retain jurisdiction for the entry of further [o]rders and retain[] continuing and exclusive jurisdiction as to the issue of child custody and visitation."

On 24 June 2003 mother filed a motion in the cause to enforce the North Carolina court order, including a request that father be held in civil contempt for his plans to violate the custody provisions by failing to take the minor child to summer camp and wrongfully maintain custody of her. The 24 June 2003 motion also requested that continuing jurisdiction remain in North Carolina under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), N.C. Gen. Stat. § 50A-101, *et seq.* (2005). Mother contended that, although she was "domiciled" in West Africa for employment reasons, she was still a "resident" of North Carolina. Mother further asserted that father was "domiciled" in Tennessee. Mother's motion also alleged that father had filed a petition in Tennessee to register and modify the North Carolina custody order.

In a 14 August 2003 order, the trial court denied mother's motion. The court concluded that neither the parents nor the child retain any significant relationship with this State, and that Tennessee should assert jurisdiction because North Carolina was an "inconvenient forum" pursuant to N.C. Gen. Stat. § 50A-202(a)(1) (2005).

Following the 14 August 2003 order, father filed a motion for an award of attorney's fees, costs and expenses as a "prevailing party"

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pursuant N.C. Gen. Stat. § 50A-312 (2005). In a 3 September 2004 order, the trial court denied father's motion. The court reasoned that it no longer had jurisdiction to hear the matter because it had relinquished jurisdiction to Tennessee and, further, that:

1. The scope of Part 3 of North Carolina General Statute Chapter 50A is limited to cases which address child abductions, that is, orders to return a child or orders seeking enforcement of a custody determination.
2. The Defendant's motion, which was filed in good faith, was not filed to seek return of a child or enforcement of a custody determination and therefore, did not fall under the ambit of Part 3 of North Carolina General Statute Chapter 50A. Accordingly, 50A-312 is inapposite.

From this 3 September 2004 order, father appeals, contending that the trial court erred in denying his motion for attorney's fees, costs and expenses pursuant to G.S. § 50A-312. We disagree.

G.S. § 50A-312 provides that:

The court shall award the prevailing party, including a state, necessary and reasonable expenses incurred by or on behalf of the party, including costs, communication expenses, attorneys' fees, investigative fees, expenses for witnesses, travel expenses, and child care during the course of the proceedings, unless the party from whom fees or expenses are sought establishes that the award would be clearly inappropriate.

"Questions of statutory interpretation are questions of law, which are reviewed de novo by an appellate court." *In re Proposed Assessments v. Jefferson-Pilot Life Ins. Co.*, 161 N.C. App. 558, 559, 589 S.E.2d 179, 180 (2003) (citing *Dare County Bd. of Educ. v. Sakaria*, 127 N.C. App. 585, 588, 492 S.E.2d 369, 371 (1997)).

The intent of the legislature controls the interpretation of a statute. . . . When the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give the statute its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein.

In re Banks, 295 N.C. 236, 239-40, 244 S.E.2d 386, 388-89 (1978) (citations omitted).

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The UCCJEA provides a uniform set of jurisdictional rules and guidelines for the national enforcement of child custody orders. *See* N.C. Gen. Stat. §§ 50A-101 *et seq.* (2005). G.S. § 50A-312 is located under Part 3 of the Act, which provides for the registration and enforcement of custody determinations. The statutory definitions, which apply to Part 3 concerning Enforcement, state that a “petitioner” is “a person who seeks . . . enforcement of a child-custody determination. N.C. Gen. Stat. § 50A-301(1) (2005). A “respondent” is defined as “a person against whom a proceeding has been commenced for enforcement of an order for return of a child under . . . a child custody determination.” N.C. Gen. Stat. § 50A-301(2) (2005). A “child custody determination” is defined in the definitions provision and is applicable to the entire UCCJEA Article:

“Child-custody determination” means a judgment, decree, or other order of a court providing for the legal custody, physical custody, or visitation with respect to a child. The term includes a permanent, temporary, initial, and modification order. . . .

N.C. Gen. Stat. § 50A-102 (3) (2005).

Father contends that the trial court erroneously concluded that it had no authority to award him attorney fees and costs. He essentially argues that, even though this cause did not involve an abduction or seek the immediate return of a child, and even though it did not seek the expedited enforcement of custody orders and/or the registration of out-of-state orders, he qualifies as a “prevailing party” under G.S. § 50A-312. Father argues that mother’s 24 June 2003 motion in the cause sought enforcement of the portion of a court judgment setting forth child custody arrangements for the minor child. *See* G.S. § 50A-102 (3) (defining “child custody determination”); mother qualified as a person who sought enforcement of a child custody determination pursuant to G.S. § 50A-301(1); and that he qualified as “a person against whom a proceeding [was] commenced for . . . enforcement of a child-custody determination,” *see* G.S. § 50A-301(2). We disagree.

Here, mother filed a motion in the cause for contempt. She did not seek the expedited enforcement of a child custody determination; seek to register an out-of-state order; or otherwise utilize the remedies set forth in Part 3 of the UCCJEA. Consequently, Part 3 was not implicated, and the allowance set forth in G.S. § 50A-312 is inapplicable.

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Affirmed.

Judges McCULLOUGH and TYSON concur.

STATE OF NORTH CAROLINA v. GLENN ELLIOTT FARRAR, DEFENDANT

No. COA05-974

(Filed 20 June 2006)

Criminal Law— felonious escape from county jail—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of felonious escape from a county jail even though the incident occurred while defendant was being transported back to Central Prison (after being transported to a county jail from Central Prison for a court appearance), because the deputy testified that he placed defendant in the county jail both before and after defendant's hearing, thus making the deputy an officer of such jail within the meaning of N.C.G.S. § 14-256.

Appeal by defendant from judgment entered 27 January 2005 by Judge Ronald L. Stephens in the Superior Court in Alamance County. Heard in the Court of Appeals 8 March 2006.

Attorney General Roy Cooper, by Assistant Attorney General J. Philip Allen, for the State.

Richard G. Roose, for defendant-appellant.

HUDSON, Judge.

In January 2005, a jury convicted defendant of felonious escape from a local jail, assault on a government official, and injury to personal property. At the sentencing hearing, defendant pleaded guilty to habitual felon status. The court sentenced defendant to an active term of 135-171 months. Defendant appeals. We conclude that there was no error.

The evidence tends to show the following facts. On 9 November 2003, Deputy Richard Lee of the Alamance County Sheriff's De-

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partment picked up defendant from Central Prison in Raleigh and transported him to Alamance County for a court appearance. After the hearing, Lee again placed defendant in a holding cell while he took a lunch break. After his break, Lee began driving defendant back to Central Prison. When defendant complained of chest pains and asked to be taken to a doctor, Lee informed him that Central Prison had a medical unit. As Lee was driving on the highway, defendant kicked out the rear passenger window of the car and leaned his upper body out of the window. Defendant put his feet on the plexiglass window that separated the back seat from the front seat, shattered the window and attempted to force his way into the front seat. Lee radioed for help and pulled off the highway. Defendant, despite being handcuffed and shackled, dove head first through the broken rear passenger window. Lee exited his car, grabbed defendant, and ordered him to the ground. Defendant did not comply and Lee attempted to use "OC spray" to disable defendant, but defendant grabbed the can of spray from Lee. As Lee struggled with defendant, Deputy Wayne Barrow pulled up and disabled defendant with a taser gun.

Defendant argues that the trial court erred in denying his motion to dismiss the charge of felonious escape from a county jail. On appeal, we review the trial court's decision regarding a motion to dismiss for insufficiency of the evidence to 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. Crawford*, 344 N.C. 65, 73, 472 S.E.2d 920, 925 (1996). Defendant was convicted of violating N.C. Gen. Stat. § 14-256 (2004), which states that:

If any person shall break any prison, jail or lockup maintained by any county or municipality in North Carolina, being lawfully confined therein, or shall escape from the lawful custody of any superintendent, guard or officer of such prison, jail or lockup, he shall be guilty of a Class 1 misdemeanor, except that the person is guilty of a Class H felony if:

- (1) He has been convicted of a felony and has been committed to the facility pending transfer to the State prison system; or
- (2) He is serving a sentence imposed upon conviction of a felony.

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Id. Defendant argues that there was no evidence that he escaped from a county jail or from “the superintendent, guard, or an officer of” any county jail. We disagree.

Defendant cites *State v. Brame* in support of his argument. 71 N.C. App. 270, 321 S.E.2d 449 (1984). In *Brame*, Orange County Deputy Sheriffs took defendant into their custody at the Durham County jail to transport him to Orange County for trial. *Id.* at 272, 321 S.E.2d at 450. While traveling in the back seat of the car in Durham County, defendant freed himself of his handcuffs, held a gun to the officer’s head, and eventually took control of the vehicle and drove to his girlfriend’s house. *Id.* Defendant was convicted of violating N.C. Gen. Stat. § 14-256. *Id.* This Court held that “[t]here is no evidence in this record from which a jury could find beyond a reasonable doubt that the defendant escaped from the Durham County Jail, or from ‘the lawful custody of any superintendent, guard or officer of such . . . jail.’” *Id.* (emphasis and ellipses in original). Here, unlike in *Brame*, Deputy Lee testified that he placed defendant in the Alamance County jail both before and after defendant’s hearing. Thus we conclude that Lee was an officer of “such jail,” within the meaning of N.C. Gen. Stat. § 14-256 and that there was sufficient evidence to support his conviction.

No error.

Judges HUNTER and BRYANT concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 20 JUNE 2006

BIDDIX v. EMPLOYMENT SEC. COMM'N No. 05-1384	Burke (05CVS405)	Affirmed
BULLINS v. WALKER No. 05-1446	Wilkes (05CVS248)	Affirmed
CLODFELTER v. LEONARD No. 05-890	Forsyth (04CVS3153)	Affirmed
GRIFFIN v. LOPEZ No. 05-672	Halifax (01CVS207)	Affirmed
HARCO NAT'L INS. CO. v. BDO SEIDMAN, LLP No. 05-1429	Wake (05CVS2299)	Affirmed
IN RE J.W.B. No. 05-1504	Buncombe (04J339)	Affirmed
IN RE L.B. No. 05-1565	Harnett (04J128)	Affirmed
IN RE T.L. No. 06-17	Cleveland (02J201) (02J75)	Affirmed
PHILLIPS v. CHARLOTTE- MECKLENBURG HOSP. AUTH. No. 05-300	Mecklenburg (04CVS1182)	Affirmed
REMINGTON ARMS CO. v. HERITAGE GRAPHICS, LLC No. 05-1064	Rockingham (04CVS2102)	Affirmed
S.N.R. MGMT. v. DANUBE PARTNERS 141 No. 05-677	Durham (04CVS5305)	Dismissed
STATE v. AGNEW No. 05-1078	Pitt (03CRS54863)	No error
STATE v. BULLOCK No. 05-743	Wake (02CRS2837)	No error
STATE v. GISH No. 05-801	Onslow (03CRS60393)	No error
STATE v. HERRING No. 05-1060	New Hanover (02CRS21547)	No error

STATE v. JESSUP No. 05-1329	Forsyth (04CRS50113)	No error
STATE v. KERSEY No. 05-1303	Guilford (04CRS77618)	No prejudicial error
STATE v. LANEY No. 05-1360	Mecklenburg (03CRS213651) (03CRS213652) (03CRS213653) (03CRS213654) (03CRS213655)	No error
STATE v. McIVER No. 05-1283	Pender (04CRS52268)	No error
STATE v. MOSS No. 05-1309	Pasquotank (03CRS52017)	No error
STATE v. PORTER No. 05-1288	Forsyth (04CRS59546) (04CRS59836) (04CRS59837) (04CRS59894)	No error
STATE v. PURCELL No. 05-1351	Cumberland (03CRS67456) (03CRS67457) (03CRS67458)	No error
STATE v. RUSH No. 06-41	Forsyth (04CRS63710)	No prejudicial error
STATE v. SPENCER No. 05-1169	Guilford (03CRS99261) (03CRS99262) (03CRS99264)	No error
WALKER v. WALKER No. 05-1005	New Hanover (00CVD3315)	Reversed and remanded

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STATE OF NORTH CAROLINA v. ARMANDO ORTEZ

No. COA05-711

(Filed 5 July 2006)

1. Confessions and Incriminating Statements— Miranda warnings—flawed translation to Spanish

The Spanish translations of Miranda warnings used here contained grammatical errors, but reasonably informed defendant of his rights.

2. Confessions and Incriminating Statements— knowing waiver of rights—borderline IQ—Spanish only speaker

The trial court's unchallenged findings of fact support its conclusion of a knowing waiver of rights by a defendant with borderline or low average intellectual function who spoke only Spanish.

3. Criminal Law— motion for mistrial—jailhouse statement produced during trial

The trial court did not abuse its discretion by denying defendant's motion for a mistrial after a prisoner came forward during the trial to report a jailhouse conversation with defendant. There was no argument that the State violated discovery procedures, only that the statement contradicted defense counsel's opening statement. While the prisoner's statement was materially adverse to defendant's case, it did not cause substantial and irreparable prejudice.

Appeal by defendant from judgment entered 31 October 2003 by Judge John R. Jolly, Jr., in Superior Court, Wake County. Heard in the Court of Appeals 7 March 2006.

Attorney General Roy Cooper, by Assistant Attorney General Robert C. Montgomery, for the State.

Glover & Petersen, P.A., by Ann B. Petersen, for defendant-appellant.

McGEE, Judge.

Armando Ortez (defendant) was convicted of first-degree murder under the felony murder rule. The trial court sentenced defendant to life imprisonment without parole.

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Defendant filed a motion for a pre-trial hearing “to determine that . . . defendant [was] mentally retarded.” The trial court conducted a hearing on 14 July 2003 to determine whether defendant was mentally retarded. At the hearing, Dr. Antonio Puente (Dr. Puente) testified on behalf of defendant as an expert in neuropsychology. Dr. Puente testified that he conducted a series of intelligence tests on defendant in November 2002 and in March 2003. Dr. Puente testified that defendant’s IQ scores ranged from 55 to 75 and that defendant’s mean score on all the tests was 64.6. Dr. Puente determined that defendant was mildly mentally retarded. Dr. Puente testified that defendant’s mental retardation manifested itself before defendant reached the age of eighteen.

Dr. Patricio Lara (Dr. Lara) also testified on behalf of defendant as an expert in forensic psychiatry. Dr. Lara testified that he evaluated defendant on three different occasions in April and June of 2003, and also reviewed Dr. Puente’s findings. Dr. Lara testified that defendant was mildly mentally retarded.

Dr. Jennifer Schnitzer (Dr. Schnitzer) testified for the State as an expert in forensic psychology. Dr. Schnitzer testified that she administered a series of intelligence tests to defendant. Dr. Schnitzer testified that, based upon the results of one of the tests, defendant’s IQ was as high as 77. Dr. Schnitzer testified that defendant was not mentally retarded. Rather, Dr. Schnitzer testified that she diagnosed defendant with “borderline intellectual functioning.”

Dr. Charles Vance (Dr. Vance) testified for the State as an expert in forensic psychiatry. Dr. Vance testified that he did not think defendant was mentally retarded. Dr. Vance further stated as follows: “I cannot say for sure whether [defendant’s] IQ falls in the range of borderline intellectual functioning or low average, but normal intellectual functioning—and that’s why we diagnosed him with provisional—the provisional diagnosis, borderline intellectual functioning.”

The trial court found that defendant had failed to prove “by clear and convincing evidence that he [was] mentally retarded and that such [mental retardation] manifested itself before he became [eighteen] years of age.” The trial court also found “[t]hat the State of North Carolina [was] not precluded from seeking the death penalty against . . . [d]efendant.”

Defendant also filed a pre-trial motion to suppress statements made by defendant during an interrogation at the Raleigh Police

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Department on 7 August 2002, the day of his arrest, citing the following reasons:

- (1) The defendant did not understand his rights under Miranda v. Arizona, 38[4] U.S. 436 (1966);
- (2) The defendant did not knowingly and intelligently waive his Miranda rights;
- (3) The defendant did not voluntarily waive his Miranda rights;
- (4) The alleged statement the defendant gave to the police was involuntarily given;
- (5) The defendant's alleged statement is unreliable;
- (6) The defendant's alleged statement was taken in violation of the Vienna Convention on Consular Relations[.]

The trial court conducted a hearing on 24 July 2003 and 31 July 2003 on defendant's motion to suppress his statements. At the suppression hearing, the State presented testimony of Raleigh Police Detective Dale Montague (Detective Montague), Detective Randy Miller (Detective Miller), and Officer Isaac Perez (Officer Perez). Detectives Montague and Miller conducted an interrogation of defendant and testified in detail regarding their interrogation. Officer Perez, who was fluent in Spanish, testified that he served as interpreter during the interrogation. Officer Perez testified that he read defendant his *Miranda* rights in Spanish from a pre-printed *Miranda* rights waiver form (the waiver form). Detective Montague and Officer Perez testified that defendant signed the waiver form.

At the suppression hearing, defendant presented testimony of Eta Trabing (Ms. Trabing), a certified English and Spanish interpreter. Ms. Trabing testified regarding the waiver form which was read to defendant, and signed by him at the beginning of the interrogation session. Ms. Trabing testified that the phrase "corte de ley," used on the waiver form, had no meaning in Spanish. Ms. Trabing also testified that the word "interrogatorio," used on the waiver form as a translation for the word "questioning," "implied something very formal and usually where the party that [was] asking the questions [was] in a position of authority." Ms. Trabing further testified that nothing on the waiver form informed defendant that an attorney would be appointed for him if he was unable to afford one. Rather, the waiver form, translated into English, read as follows: "[I]f you want a lawyer and cannot get

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one, for you one will be named for you so that for you he can represent you during the interrogatory.”

Dr. Puente and Dr. Lara also testified at the suppression hearing. Their testimony at the suppression hearing was substantially similar to their testimony at the earlier hearing regarding whether defendant was mentally retarded. However, Dr. Lara also testified that defendant did not understand the *Miranda* rights as they were read to him by Officer Perez.

The trial court denied defendant’s motion to suppress, concluding that defendant made his statements “freely, voluntarily, and understandingly.” The trial court made the following uncontested findings of fact:

57. That . . . [d]efendant appeared alert and did not appear to be impaired in any manner.

58. That . . . [d]efendant did not appear tired.

59. That . . . [d]efendant appeared to understand.

. . .

67. That the interview of . . . defendant lasted approximately one and one half to two hours.

68. That during the course of the interview, . . . defendant requested food.

69. That the Detectives responded to the request for food by immediately taking a 45 minute break during which time they provided food and drink to . . . defendant.

70. That . . . [d]efendant’s responses to the questions asked by the Detectives were reasonable and appropriate to the questions posed.

. . .

72. That the interview was conducted in a conversational tone and at no time did either . . . [d]efendant or the officers raise their voices.

73. That the officers did not threaten . . . defendant with violence or make a show of violence at any point during the course of the interview.

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74. That the officers did not make promises, offer rewards or any other inducements to get . . . [d]efendant to make a statement.

. . .

77. That Officer Perez did not have difficulty in communicating with . . . [d]efendant and there were no long pauses between the questions posed by Detective Montague through Officer Perez and the responses provided by . . . defendant.

78. That this was not . . . [d]efendant's first experience with law enforcement officers.

79. That . . . [d]efendant's prior experience with law enforcement includes an incident with the Apex Police Department.

80. That on June 30, 2002, Apex Police Officer W.T. Allen arrested . . . [d]efendant for Breaking and Entering a Motor Vehicle.

81. That after arresting . . . [d]efendant, Officer Allen advised . . . [d]efendant of his Miranda rights.

82. That . . . [d]efendant indicated to Officer Allen on June 30, 2002 that he did not speak English after being advised of his Miranda rights (in English).

83. That as Officer Allen was transporting . . . [d]efendant to jail for processing, . . . [d]efendant apologized for what he had done in English.

84. That on July 22, 2002, less than three weeks from the August 7, 2002 interview, . . . [d]efendant appeared in Wake County District Court and entered a plea of guilty to felony Breaking and Entering a Motor Vehicle.

85. That on July 22, 2002, . . . [d]efendant was represented by a court appointed attorney.

86. That the District Court Judge specifically found on July 22, 2002 that . . . [d]efendant's plea was the informed choice of . . . [d]efendant and that it was made freely, voluntarily and understandingly.

At trial, the State's evidence tended to show that Nguyen Truong (the victim) owned Brightwash Laundromat (the laundromat) in downtown Raleigh. Michael Boone (Boone) went to the laundromat at approximately 6:30 p.m. on 26 July 2002 and saw three Hispanic

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men standing outside the laundromat. Boone went inside and then came back out and sat down. One of the Hispanic men went inside the laundromat and the other two men remained outside. Boone later identified defendant as one of the two men who was outside the laundromat. Boone left the laundromat about 7:00 p.m.

Devaughn Cros (Cros) also passed by the laundromat at approximately 6:30 p.m. on 26 July 2002 and observed three “Mexican” males standing outside the laundromat. A short time later, Cros again passed by the laundromat and saw only two men outside the laundromat.

Later that evening, neighborhood children noticed the victim’s truck, with its lights on, in the parking lot of the laundromat. The inside of the laundromat was dark. One of the children looked inside the laundromat and yelled that the victim was dead. The children informed adults, who called 911.

When police and paramedics arrived at the laundromat on 26 July 2002, they found the victim lying inside the laundromat in a large pool of blood, with fifty-six “cutting type wounds” to his torso, head, and arms. There was blood and blood splatter in multiple places in the laundromat. Some of the blood was later identified as matching that of the victim and some was identified as coming from an unknown individual. Bloody shoe tracks were found throughout the laundromat, and a bloody palm print was found on a cooler inside the laundromat. The palm print was later identified as defendant’s print. A warrant was issued for defendant’s arrest on 2 August 2002 and he was arrested on 7 August 2002.

Detective Montague testified that he conducted an interrogation of defendant. During the interrogation, defendant admitted he was at the laundromat when the victim was killed but denied participating in the actual murder. Defendant said he met two Mexican men earlier that day, and that one of the men suggested they rob the “Chinese man.” Defendant said they did not plan the robbery, but talked about the robbery for three or four minutes before entering the laundromat. No one discussed murdering the victim. Defendant also admitted that after he saw one of the men stabbing the victim, defendant grabbed the victim’s wallet and watch. Defendant jumped over the counter to look for money, but found none; instead, defendant stole some cigarettes. The three men then tried to steal the victim’s truck but were unable to operate it, and fled on foot. Defendant threw the wallet in a

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dumpster and kept the watch. During defendant's interview, when asked about the watch, defendant reached into his pocket and produced the watch.

The State's evidence further showed that between 7:00 p.m. and 8:00 p.m., on 26 July 2002, two Hispanic males approached Emily Watkins (Watkins) and three other people, who were sitting on the porch of her father's home, which was located within walking distance of the laundromat. One of the men tried to sell Watkins a gold necklace. However, Watkins saw blood on the necklace and gave it back to the man. Watkins also noticed blood on the man's shirt, shorts, and hand. Watkins later identified a necklace worn by the victim in a photograph as being the same necklace that the man had tried to sell to her. Watkins identified Gonzalo Garcia as the man who had approached her with the necklace.

Crystal Evans (Evans) also testified that she was on the porch with Watkins on 26 July 2002 when two Hispanic males approached and tried to sell them a necklace. Evans testified that the necklace had blood on it and that Watkins told the men to leave. Evans testified the Hispanic males took the necklace and left. Evans further testified that on 4 September 2003, she talked with her brother, Adam Horton (Horton), who was then in custody at the Wake County Detention Center on charges unrelated to the present case. Evans testified that she told Horton she had been subpoenaed to testify in a "murder trial between a Mexican and a Chinese man," about a murder that had occurred at the laundromat. Evans testified that Horton indicated he had information about the murder.

During defendant's opening statement, defendant's counsel presented a theory of defense that the evidence would prove that someone other than defendant killed the victim. Horton testified for the State that in September 2003, while he and defendant were incarcerated on the ninth floor of the Wake County Detention Center, defendant told Horton that defendant had stabbed the victim "mucho times" in the face and had taken a chain from the victim's neck. Horton testified that defendant told him this information one night after midnight. Because Horton did not tell the State that he had relevant information until 9 October 2003, defendant was not notified of Horton's intent to testify until mid-trial. Defendant filed a motion for mistrial on 13 October 2003. The trial court denied the motion.

Defendant presented evidence at trial. Watkins, who had testified for the State, testified that she did not recognize defendant as one of

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the two men who had walked up to her father's house with a necklace on 26 July 2002.

William Hensley (Hensley) testified that he owned a forensics company, and was a retired crime scene agent for CCBI. Hensley testified that in deaths involving multiple stab wounds, it was very common for an assailant to cut himself and thereby become a secondary bleeder. Hensley further testified that in the present case, there was an unidentified secondary bleeder.

Wanda Strickland (Strickland) testified that she was an administrative officer at the Wake County Detention Center. Strickland testified that records indicated Horton had been transferred to the ninth floor of the Wake County Detention Center between 2:00 p.m. and 3:00 p.m. on 4 September 2003. Strickland also testified there was no way Horton could have slept on the ninth floor on the evening of 3 September 2003 or in the early morning hours of 4 September 2003. On cross-examination, Strickland testified that Horton would have slept on the ninth floor of the Wake County Detention Center after 2:00 p.m. on 4 September 2003. Strickland also testified that defendant was in the same location as Horton as of 2:00 p.m. on 4 September 2003, and that defendant had been in that location since 27 August 2003.

Defendant was convicted of first-degree murder on 22 October 2003, based on the felony murder rule. Because the jury could not reach a unanimous decision as to whether defendant was mentally retarded, the trial court entered judgment for first-degree murder and sentenced defendant to life imprisonment without parole on 31 October 2003. Defendant appeals.

I.

Defendant first argues the trial court erred in denying his motion to suppress his statements because: (1) defendant was not adequately advised of his *Miranda* rights and (2) defendant did not knowingly and intelligently waive his *Miranda* rights. Defendant also contends the trial court failed to make findings which resolved disputed material facts concerning a waiver.

Our standard of review of an order granting or denying a motion to suppress is "strictly limited to determining whether the trial [court's] underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the [trial court's] ulti-

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mate conclusions of law.” *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). A trial court’s conclusions concerning the voluntariness of a defendant’s statement are reviewable *de novo* on appeal. *State v. Hardy*, 339 N.C. 207, 222, 451 S.E.2d 600, 608 (1994). When a defendant’s waiver of *Miranda* rights arises under the same circumstances as the making of his statement, the voluntariness issues may be evaluated as a single matter. *State v. Mahatha*, 157 N.C. App. 183, 194, 578 S.E.2d 617, 624, *disc. review denied*, 357 N.C. 466, 586 S.E.2d 773 (2003).

A. Adequacy of Defendant’s *Miranda* Warnings

[1] The Fifth Amendment of the United States Constitution prohibits compelling any person in a criminal case to incriminate himself or herself. U.S. Const. amend. V. In *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966), the United States Supreme Court articulated warnings to protect this constitutional right. Prior to custodial interrogations, a person must be advised that he

has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

Id. at 479, 16 L. Ed. 2d at 726. Without these warnings, any statement made by a defendant during a custodial interrogation may not be admissible at trial. *Id.*

In the present case, defendant challenges the adequacy of his *Miranda* warnings. Specifically, defendant argues that the Spanish translation of the *Miranda* warning read to him was “inadequate to convey to [defendant] the substance of his *Miranda* rights.” Defendant contends that a phrase used, “corte de ley,” has no meaning in Spanish and takes issue with the use of it for a translation of the phrase, “court of law.” Defendant contends the proper translation for “court” would be “tribunal de justicia.” Defendant also states that the Spanish translation read to him used the word “interrogatorio” for the word “questioning.” Defendant contends “interrogatorio” refers to a “formal proceeding, such as a court trial.” Finally, defendant claims that the Spanish translation of the *Miranda* rights read to him did not properly convey the right of an indigent defendant to have counsel appointed before questioning. Although the Spanish translation of *Miranda* warnings used by the Raleigh Police Department in this case contained grammatical errors, we do not find these errors ren-

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dered defendant's *Miranda* warnings inadequate. The United States Supreme Court has never required *Miranda* warnings to "be given in the exact form described in that decision." *Duckworth v. Eagan*, 492 U.S. 195, 202, 106 L. Ed. 2d 166, 176 (1989). When reviewing the adequacy of *Miranda* warnings, an appellate court asks "simply whether the warnings reasonably 'conve[y] to [a suspect] his rights as required by [*Miranda*].'" *Id.* at 203, 106 L. Ed. 2d at 177 (quoting *California v. Prysock*, 453 U.S. 355, 361, 69 L. Ed. 2d 696, 702 (1981)).

In the present case, the warnings read to defendant in Spanish reasonably conveyed to defendant his *Miranda* rights and were therefore adequate. While defendant argues the term "corte de ley" has no meaning in Spanish, when defendant was asked in Spanish whether he understood his rights, defendant answered in the affirmative and signed the bottom of the waiver form. Moreover, a material part of the *Miranda* warning given—that anything defendant said could be used against him—was preserved in the translation.

Defendant also argues the term "interrogatorio" signifies a more formal proceeding than the word "questioning." Defendant's witness, Ms. Trabing, testified that the term "interrogatorio" implie[d] something very formal and usually where the party that [was] asking the questions [was] in a position of authority." In *Miranda*, the Supreme Court defined "custodial interrogation" as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda*, 384 U.S. at 444, 16 L. Ed. 2d at 706. This definition is very similar to the definition of "interrogatorio" provided by Ms. Trabing. Defendant was clearly subjected to custodial interrogation because defendant was: (1) arrested, handcuffed, and brought into the Raleigh Police Department in a police vehicle; (2) read his *Miranda* rights in Spanish; and (3) questioned in a room with three officers present. While "interrogatorio" may be an imprecise translation of "questioning," it does not render defendant's *Miranda* warning inadequate.

Finally, defendant challenges the Spanish translation of his final *Miranda* right, which reads as follows: "If you want a lawyer and cannot get one, for you one will be named for you so that for you he can represent you during the interrogatory." Defendant argues that because he was not informed that the "naming" of an attorney could come without cost to him, the warning was inadequate. We disagree.

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Defendant relies upon *United States v. Perez-Lopez*, 348 F.3d 839 (9th Cir. 2003). In *Perez-Lopez*, the defendant was advised of his *Miranda* rights in Spanish. *Id.* at 843. Translated into English, the defendant received the following warning: “[Y]ou have the right to solicit the court for an attorney if you have no funds.” *Id.* at 847. The Ninth Circuit held that the warning was constitutionally inadequate because it did not inform the defendant that the government had an obligation to appoint an attorney for him if he was indigent. *Id.* at 848. The *Perez-Lopez* court further explained that “[t]o be required to ‘solicit’ the court, in the words of [the] warning, implies the possibility of rejection.” *Id.*

In the present case, the warning given to defendant did not imply that defendant’s request for an attorney could be rejected. The warning given to defendant was broader than the warning in *Perez-Lopez*, providing that a lawyer would be named for defendant if he could not get one for any reason. Thus, the translation reasonably conveyed to defendant his right to have counsel named for him. Because the warnings given to defendant were sufficient to reasonably convey to defendant each of his *Miranda* rights, we find no error.

B. Defendant’s Waiver of his *Miranda* Rights

[2] Defendant argues that the evidence presented at the suppression hearing did not support the trial court’s conclusion that defendant freely, knowingly, intelligently, and voluntarily waived his *Miranda* rights. Defendant further contends the trial court erred by failing to make findings of fact resolving disputed issues concerning defendant’s waiver of his *Miranda* rights. We disagree.

A defendant may choose to waive his *Miranda* rights. *Miranda*, 384 U.S. at 479, 16 L. Ed. 2d at 726. However, “unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against [a defendant].” *Id.* The State has the burden of proving that a defendant’s waiver of his *Miranda* rights was knowing and intelligent. *State v. Simpson*, 314 N.C. 359, 367, 334 S.E.2d 53, 59 (1985). “Whether a waiver is knowingly and intelligently made depends on the specific facts and circumstances of each case, including the background, experience, and conduct of the accused.” *Id.* In considering the totality of the circumstances, we examine the following: (1) a defendant’s familiarity with the criminal justice system, (2) the length of a defendant’s interrogation, (3) the amount of time a defendant was without sleep, (4) whether a defendant was held incommunicado, (5) whether

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threats of violence were made against a defendant, (6) whether promises were made to a defendant to obtain a statement, (7) whether a defendant was deprived of food, and (8) a defendant's age and mental condition. *State v. Kemmerlin*, 356 N.C. 446, 458, 573 S.E.2d 870, 880-81 (2002). "The presence or absence of any one of these factors is not determinative." *Id.*

"When there is a *material* conflict in the evidence on *voir dire*, the [trial court] *must* make findings of fact resolving any such material conflict." *State v. Lang*, 309 N.C. 512, 520, 308 S.E.2d 317, 321 (1983). However, these findings of fact need not summarize all of the evidence presented at the suppression hearing. *State v. Dunlap*, 298 N.C. 725, 730-31, 259 S.E.2d 893, 896 (1979).

Defendant specifically argues that the trial court failed to make findings of fact resolving disputed issues surrounding defendant's level of intelligence and defendant's capacity to understand and waive his *Miranda* rights. However, there was not a material conflict regarding defendant's level of intelligence. The trial court found that defendant was of "borderline intellectual or low average functioning" if not "mildly mentally retarded." In evaluating whether a waiver was knowing and intelligent in a case involving a mentally retarded defendant, we must look to the totality of the circumstances, paying particular attention to the defendant's personal characteristics and the details of the interrogation. *State v. Fincher*, 309 N.C. 1, 19, 305 S.E.2d 685, 696-97 (1983). "[A] defendant's subnormal mental capacity is a factor to be considered when determining whether a knowing and intelligent waiver of rights has been made. Such lack of intelligence does not, however, standing alone, render an in-custody statement incompetent if it is in all other respects voluntary and understandingly made." *Id.* at 8, 305 S.E.2d at 690 (internal citations omitted).

In the present case, the trial court's unchallenged findings of fact support the trial court's conclusion that defendant made a knowing, intelligent, and voluntary waiver of his *Miranda* rights. The trial court found that defendant was read his *Miranda* rights in Spanish. The trial court found that defendant said he understood his rights and wanted to give a statement to the officers. Defendant's testing showed he had an IQ ranging from 55 to 77, classifying him as mildly mentally retarded to borderline intellectual or low average functioning. However, as stated above, defendant's IQ alone does not mean defendant could not make a voluntary, knowing and intelligent waiver of his *Miranda* rights. See *Fincher*, 309 N.C. at 8, 305 S.E.2d at 690.

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Defendant had previous experience in the criminal justice system, having been arrested on 30 June 2002 on a charge of breaking into and stealing from a car. In the prior case, defendant was read his *Miranda* rights in English. He responded in Spanish that he did not understand English. However, ultimately defendant entered a plea of guilty to felony breaking and entering a motor vehicle and the trial court found defendant made the plea freely, voluntarily and understandingly.

In the present case, the unchallenged findings of fact also demonstrate that the length of the interrogation was not unusual or excessive. Defendant was not deprived of sleep, nor were there any threats of violence. When defendant indicated he was hungry, he was given food and drink. When defendant was addressed in Spanish, he did not indicate that he was confused or that he did not understand what was happening. Rather, defendant appeared to understand the questions asked and gave reasonable and appropriate answers. There were no long pauses between the questions asked and defendant's responses. We conclude that the trial court's findings adequately support the trial court's conclusions:

4. That the statement made by . . . [d]efendant to Officer Perez, Inspector Montague and Inspector Miller on August 7, 2002, was made freely, voluntarily, and understandingly.
5. That . . . [d]efendant was in full understanding of his Constitutional right to remain silent and right to counsel, and all other rights.
6. That . . . [d]efendant freely, knowingly, intelligently, and voluntarily waived each of those rights and thereupon made the statement to the officers above-mentioned.

We overrule defendant's assignments of error grouped under this argument.

II.

[3] Defendant argues the trial court abused its discretion by denying defendant's motion for a mistrial. Horton came forward in the middle of defendant's trial, claiming to have information related to defendant's case. Horton said he and defendant were incarcerated together during September 2003. During that time, defendant told Horton that defendant and the other Hispanic males robbed the victim, and that when the robbery went wrong, defendant stabbed the victim "mucho times." When defendant learned of Horton's intended testimony, defendant moved for a mistrial on the basis that Horton's testimony

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conflicted with defendant's opening statement and thus resulted in substantial and irreparable prejudice to defendant's case. The trial court denied defendant's motion for a mistrial.

Under N.C. Gen. Stat. § 15A-1061 (2005), a trial court "must declare a mistrial upon the defendant's motion if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case." The decision to grant or deny a motion for mistrial is within the sound discretion of the trial court, and the motion will be granted "only when there are such serious improprieties as would make it impossible to attain a fair and impartial verdict under the law." *State v. Calloway*, 305 N.C. 747, 754, 291 S.E.2d 622, 627 (1982).

Defendant does not argue that the State violated any discovery requirements because the State did not learn that Horton had potentially relevant information until mid-trial. Rather, defendant alleges that the admission of Horton's testimony contradicted the theory of defense staked out by defense counsel in defendant's opening statement.

Defendant relies upon *State v. Moorman*, 320 N.C. 387, 358 S.E.2d 502 (1987), in which our Supreme Court held that the defendant received ineffective assistance of counsel. *Id.* at 402, 358 S.E.2d at 511-12. Our Supreme Court recognized that "[a] cardinal tenet of successful advocacy is that the advocate be unquestionably credible. If the fact finder loses confidence in the credibility of the advocate, it loses confidence in the credibility of the advocate's cause." *Id.* at 400, 358 S.E.2d at 510. However, *Moorman* is distinguishable from the case before us. In *Moorman*, during the defendant's opening statement to the trial court, defense counsel promised to "prove that [the] defendant was physically and psychologically incapable of rape[.]" *Id.* at 393, 358 S.E.2d at 506. However, no such evidence was ever presented. *Id.* In addition, defense counsel in *Moorman* was found to have committed several other egregious acts during the course of the trial, such as failing to prepare for trial, appearing disheveled and ruffled, having mood swings, using and abusing multiple drugs, and falling asleep during the defendant's testimony. *Id.* at 394-96, 358 S.E.2d at 507-08. No such acts by counsel are alleged here.

In the present case, defense counsel conceded during defendant's opening statement that defendant was present at the laundromat during the killing, but argued that defendant only removed property

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and took no part in the murder. Specifically, defense counsel stated that “the physical evidence in this case shows you that it was another man and not [defendant] who stabbed [the victim].” The physical evidence alluded to in this statement—evidence of a third person’s blood found in the laundry, on the victim’s truck, and behind an abandoned building—was introduced at trial. Thus, although Horton’s testimony contradicted defendant’s assertion that defendant did not murder the victim, defense counsel kept its “promise” to the jury that the physical evidence would point to another, unidentified person as the actual killer.

In addition, during defendant’s opening statement, defense counsel stated that “there’s going to be significant evidence that [defendant] told police that he never agreed with these other men to commit a robbery. You are not going to hear anything that says he planned or agreed to a killing, or that he had any idea that that would take place.” Once again, the evidence introduced at trial corroborated defendant’s opening statement. There was evidence introduced that defendant’s statement to police did not indicate a plan to rob the victim and there was no evidence introduced that defendant had planned to kill the victim. However, defense counsel never stated there would be no evidence at all that defendant had not planned to rob the victim. Thus, Horton’s information did not cause defense counsel to break counsel’s “promise” to the jury.

Moreover, defendant was not convicted of first-degree murder on a theory of premeditation or deliberation. Rather, defendant was convicted under the felony murder rule. Although defendant told police that he and the other men had not planned the robbery, defendant also said they had talked about the robbery for three or four minutes before entering the laundromat. Defendant admitted stealing several items from the laundromat and defendant’s palm print was found inside the laundromat. There was overwhelming evidence of defendant’s guilt on a theory of felony murder.

Horton’s statements concerning defendant, although materially adverse to defendant’s case, did not cause “substantial and irreparable prejudice” to defendant’s case. We conclude the trial court did not abuse its discretion in denying defendant’s motion for mistrial, and we therefore overrule this assignment of error.

Defendant did not set forth arguments pertaining to his remaining assignments of error and we deem them abandoned pursuant to N.C.R. App. P. 28(b)(6).

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No error.

Judges BRYANT and CALABRIA concur.

ANN N. SQUIRES, PLAINTIFF v. J. RALPH SQUIRES, DEFENDANT

No. COA05-938

(Filed 5 July 2006)

1. Divorce— postseparation support findings—incorporation of tax return

A trial court order for postseparation support was supported by a finding that incorporated by reference defendant's income numbers from his tax return.

2. Divorce— postseparation support findings—incorporation of financial standing affidavit

Postseparation support involves a relatively brief examination of the parties' needs and assets and the court may base its award on a verified pleading, affidavit, or other competent evidence. The trial court here made an appropriate finding supported by the evidence by incorporating by reference defendant's financial standing affidavit.

3. Divorce— equitable distribution—real estate development company—appraisal

An appraisal of defendant's real estate company was properly admitted in an equitable distribution action.

4. Divorce— equitable distribution—past and future tax losses—testimony from accountants—not speculative

Findings in a divorce and equitable distribution action concerning defendant's net operating loss deductions for future and past tax years, and for capital gains eliminated using the loss carrybacks, were supported by testimony from defendant's accountants and were not speculative.

5. Divorce— equitable distribution—decreased value of company—defendant's role

Findings in a divorce and equitable distribution action that a decrease in the value of defendant's real estate development

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business was attributable to the actions of defendant were not erroneous. Although defendant's son had become president of the company and defendant limited his role, other findings indicate that defendant continued to play an important role in the company.

6. Divorce— equitable distribution—assets existing at separation but not at trial—proceeds from liquidation—findings

The trial court did not err in an divorce and equitable distribution action by finding that defendant had received the proceeds from the sale of several assets and distributions. Although defendant asserted that these assets no longer existed at the time of trial and had gone to preserve defendant's company and support the parties, the assets existed at the date of separation and the proceeds were used to pay for spending and loans incurred by defendant after the separation.

7. Divorce— equitable distribution—distribution of assets—business and automobile

There was no error in a divorce and equitable distribution action where defendant contended that the court found the distribution of an asset to be divisible, but in fact the finding determined that the asset was defendant's separate property. Furthermore, the court properly classified a car leased by defendant but driven by plaintiff as marital and distributed it to plaintiff at the value agreed to by both parties (\$0).

8. Divorce— equitable distribution—valuation of country club membership—opinion of plaintiff

The trial court did not err in a divorce and equitable distribution action in valuing a country club membership. The subjective opinions of the owner of property as to its value are admissible and competent.

9. Divorce— equitable distribution—marital home—debts and tax payments

The trial court did not err in its findings concerning the marital home in a divorce and equitable distribution action. Defendant failed to present any evidence of principal reduction, the payments made were ordered as part of defendant's support of his dependent spouse, and defendant did not introduce

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evidence to support the contention that he should have had a credit for paying plaintiff's tax liability, which was a lien on the marital home.

10. Divorce— equitable distribution—distribution of stock—capital gains

The trial court did not err in a divorce and equitable distribution action by distributing stock to plaintiff without taking into account defendant's capital gains liability. Defendant's accountant testified that defendant would have no tax after consideration of other losses.

11. Divorce— equitable distribution—company controlled by defendant—payment of debts

There was no abuse of discretion in an equitable distribution action in requiring defendant to pay the debt and tax liability which accrued to a company during the time after separation in which he had sole control of the company.

12. Divorce— equitable distribution—marital debts—found but not listed

The trial court erred in a divorce and equitable distribution action by finding certain debts to be marital but not listing them in Table A. Although remand was for other reasons, correction was ordered.

13. Divorce— equitable distribution—wife's inheritance—use to purchase husband's business

The trial court did not err in an equitable distribution action by finding that the wife's inheritance was used for the acquisition of the husband's business.

14. Divorce— equitable distribution—assets liquidated and found to be distributed—postseparation conversion of those assets—distribution factor

The trial court did not err in an equitable distribution action by finding that proceeds from the sale of an asset and the liquidation of an IRA were distributed to defendant and then considering defendant's postseparation conversion of those assets as a distributional factor.

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15. Divorce— equitable distribution—ability to earn—finding supported by tax returns

The trial court did not err by finding that defendant had the ability to earn large sums where his tax returns and financial statement supported that finding.

16. Divorce— equitable distribution—distributional factor—eligibility for social security benefits

The trial court did not err in an equitable distribution action by finding as a distributional factor that defendant will be entitled to receive social security benefits and that plaintiff will not. Plaintiff produced defendant's W-2 statement, showing social security withholding, and neither party produced evidence that plaintiff was entitled to social security benefits.

17. Divorce— equitable distribution—distributional factors—findings

The trial court in an equitable distribution action made the required findings about distributional factors.

18. Divorce— alimony—monthly income of real estate developer—evidence supporting findings

The evidence supported findings in an alimony order about defendant's continued monthly income. Defendant, a real estate developer, had income plus a complex and constant turnover of properties; although he alleged that some assets were included twice, the evidence supports the court's findings.

19. Divorce— alimony—findings about duration

An alimony order was remanded for further findings concerning the reason for the duration of alimony payments. Findings that plaintiff had no income after thirty-eight years of marriage were not sufficient.

20. Divorce— alimony—tax rate—findings

A finding in an alimony order about defendant's tax rate was supported by the evidence.

21. Divorce— alimony—findings

The trial court made sufficient findings in an alimony order about defendant's age, past health concerns, and gross and after-tax income as required by N.C.G.S. § 50-16.3A(b).

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22. Divorce— alimony—order not binding on heirs

A finding that an alimony order would be binding on defendant's heirs was erroneous and without effect, as such a term is barred by N.C.G.S. § 50-16.9(b).

23. Divorce— alimony—attorney fees

The findings of fact in an alimony action were sufficient for the award of attorney fees.

24. Divorce— equitable distribution—distributive award—findings—sufficiency of assets

A distributive award in an equitable distribution action was remanded for additional findings on whether defendant had sufficient liquid assets to pay the award.

Appeal by defendant from orders entered 12 March 2004 and 1 September 2004 by Judge Regan A. Miller, an order entered 11 April 2003 by Judge Catherine C. Stevens, and an order entered 7 April 2004 by Judge Lisa C. Bell in the District Court in Mecklenburg County. Heard in the Court of Appeals 22 February 2006.

Davis & Harwell, P.A., by Joslin Davis, Loretta C. Biggs and Mark Hoppe, for plaintiff-appellee.

Justice, Eve & Edwards, P.A., by R. Michael Eve, Jr., for defendant-appellant.

HUDSON, Judge.

On 9 January 2003, plaintiff Ann N. Squires filed a complaint seeking *inter alia*, postseparation support, alimony and equitable distribution of marital property. Following a hearing on 18-19 March 2003, the court entered an order for postseparation support and requiring that sales proceeds from a marital asset be held in a joint account until further order. After a hearing on 27-28 April and 3-6 May 2004, the court entered an equitable distribution and alimony judgment and order on 1 September 2004, which the court revised *sua sponte* on 30 March and 3 June 2005. Defendant J. Ralph Squires appeals. As discussed below, we affirm in part, reverse in part, vacate in part, and remand.

The evidence tended to show the following: The parties married on 17 April 1965, separated on 26 December 2000, and were divorced 5 June 2003. At the time of trial, defendant was 64 years old and

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claimed that he had several health problems, though no medical testimony was introduced in support of this contention. Plaintiff was 58 years old and in good health. During the marriage, she was primarily a homemaker. Defendant was in the construction business until 1987 when he sold his company for approximately \$7 million. Defendant used the proceeds of the sale to begin a real estate development business, Squires Enterprises, Inc., (“SEI”). Prior to 2000, SEI purchased undeveloped lots, obtained loans to finance the purchase and initial development of the land, and contracted with construction companies for the purchase of developed residential lots. During the marriage, defendant earned income primarily through capital gains and distributions from various investments, partnerships and S-corporations. In the years 1999 through 2001, defendant’s income ranged from \$627,540 to \$1,042,475. Defendant’s 2002 tax return showed an income of \$1,933,013. In the equitable distribution and alimony judgment, the court awarded defendant 58 percent of the net marital and divisible estate, or \$4,545,769, and awarded plaintiff 42 percent, or \$3,332,330.

The standard of review of the percentage division of marital property in equitable distribution cases is for an abuse of discretion. *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

It is well established that where matters are left to the discretion of the trial court, appellate review is limited to a determination of whether there was a clear abuse of discretion. A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason. A ruling committed to a trial court’s discretion is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision.

Id. Further, “[i]t is well established that a trial court’s conclusions of law must be supported by its findings of fact.” *Robertson v. Robertson*, 167 N.C. App. 567, 574, 605 S.E.2d 667, 671 (2004).

[1] Defendant first argues that the trial court’s findings do not support its order for postseparation support. We do not agree.

Defendant contends that the court erred in failing to find that he had a present employment income or other recurring earnings. Courts are to base their postseparation support awards

on the financial needs of the parties, considering the parties’ accustomed standard of living, *the present employment income*

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and other recurring earnings of each party from any source, their income-earning abilities, the separate and marital debt service obligations, those expenses reasonably necessary to support each of the parties, and each party's respective legal obligations to support any other persons.

N.C. Gen. Stat. § 50-16.2A(b) (2005) (emphasis supplied). Here, evidence from defendant's tax returns showed that, while his W-2 income decreased from \$106,100 to zero from 1999 through 2001, his income from interest, dividends, capital gains and partnerships was fairly consistent and averaged \$622,136 per year, or \$51,845 monthly, during those years. The court, in finding 15, incorporated by reference the income numbers from defendant's tax return. This finding supports the court's order for postseparation support.

[2] Defendant also contends that the court erred in failing to make findings about defendant's expenses. Because postseparation support involves a relatively brief examination of the parties' needs and assets, "the court may base its award on a verified pleading, affidavit, or other competent evidence." *Wells v. Wells*, 132 N.C. App. 401, 410, 512 S.E.2d 468, 474, *disc. review denied*, 350 N.C. 599, 537 S.E.2d 495 (1999) (quoting N.C. Gen. Stat. § 50-16.8). Finding 21 incorporates by reference defendant's financial standing affidavit, which details defendant's monthly expenses. This finding provides that "[a]fter considering [defendant's] reasonable and necessary living expenses, [defendant] has sufficient income to pay the postseparation support as hereinafter ordered." The court made an appropriate finding supported by the evidence about defendant's expenses. Defendant has shown no abuse of discretion by the trial court.

[3] Defendant next argues that the trial court's distribution of marital property is not equitable and not supported by competent evidence, valid findings or proper conclusions. We disagree.

Defendant contends that the trial court erred in admitting into evidence and adopting Kevin P. Walker's appraisal of SEI. The court found that SEI had a fair market value of \$2,331,000 on 26 December 2000 and of \$1,712,000 as of 31 December 2003. "Absent a clear showing of legal error in utilizing [an approach to valuation], this Court is not inclined to second guess the expert and the trial court, which accepted and approved this determination." *Sharp v. Sharp*, 116 N.C. App. 513, 529, 449 S.E.2d 39, 47, *disc. review denied*, 338 N.C. 669, 453 S.E.2d 181 (1994). The same method was used for both valua-

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tions, but defendant challenges only the 31 December 2003 valuation. We overrule this assignment of error.

[4] Defendant also contends that the court erred in making finding 14 that defendant individually would be entitled to specific net operating loss deductions applicable to future and past tax years because such a finding was speculative and hypothetical. The court found that SEI losses could be carried forward and backward to reduce defendant's 2002 and 2003 state and federal income taxes. The finding was supported by the testimony of one of defendant's experts and his accountant. Defendant also asserts that the trial court abused its discretion in findings 26 and 27 which concern capital gains which defendant could eliminate using the SEI loss carry-backs. Both of these findings are supported by testimony from defendant's accountants.

[5] Defendant next contends that the court erred in stating in finding 25 that the decrease in the value of SEI between the date of separation and 31 December 2003 was attributable to the actions of defendant. Defendant draws our attention to finding 10 which notes that in 2000, the parties' son Gil Squires became president of SEI and defendant "limited himself to arranging the financing for each project." Defendant asserts that this finding and others mentioning defendant's reliance on Gil Squires and his staff in making decisions regarding SEI indicate that the court abused its discretion in making finding 25 given its other findings. However, other findings indicate that defendant continued to play an important role at SEI and we see no abuse of discretion.

[6] Defendant also contends that the court erred in finding that defendant received all of the proceeds from the sale of Cheshire Joint Venture, Park Meridian Stock, his IRA and Dover Mortgage Corporation distributions. Defendant asserts that these assets no longer existed at the time of trial, and that the court should have credited him with using these assets to preserve SEI and support the parties. The assets in question existed at the date of separation and defendant controlled and liquidated them after the date of separation. Findings 72, 73, and 76 provide that the proceeds from the sale of the Regions stock and liquidation of defendant's IRA went to pay post-date of separation loans or for other spending by defendant. In the final pretrial order, the parties agreed that defendant had received over \$600,000 in distributions from Dover after separation. Plaintiff testified that defendant used these funds for his own purposes without her knowledge. Finding 26 states that defendant loaned \$250,000 to SEI after

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liquidating Cheshire and spending the remaining proceeds. No substantive evidence showed that any of the funds went to support plaintiff. The evidence supports these findings, and the court did not abuse its discretion. These arguments are without merit.

[7] Defendant also contends that the court erred in distributing OS Partners, LLC, to defendant at a value of \$48,980. Defendant argues that the court found his interest in OC Partners to be divisible; however, finding 33 determines that this interest is defendant's separate property and Table A of the judgment does not list the interest as either marital or divisible.

Defendant contends that the court erred in awarding the Escalade automobile to plaintiff and assigning it no value. The Escalade was leased by defendant but driven exclusively by plaintiff. Both parties listed the lease value of the car as \$0 on schedule E of the pretrial order. The trial court properly classified the lease as marital and distributed to plaintiff at the value agreed to by both parties. This assignment of error is without merit.

[8] Defendant also contends that the court erred in finding that the Old North State Country Club membership had a value on the date of separation of \$10,000. Plaintiff valued the membership at \$10,000, and "[t]he subjective opinions of the owner of property as to its value are admissible and competent." *Patterson v. Patterson*, 81 N.C. App. 255, 261, 343 S.E.2d 595, 600 (1986). We overrule this assignment of error.

[9] Defendant next contends that the court erred in distributing existing assets to plaintiff and requiring that defendant pay taxes and debts related to those assets. Defendant also asserts that amended finding 35, which assigned the equity in the marital home a value of \$657,202 and assigning it to plaintiff, conflicts with finding 93, which states that the equity line on the marital home is a marital debt to "be distributed equally to the parties." Finding 93 also orders defendant to pay the monthly service on this debt until the home is sold, as required by the court's alimony order. Defendant contends that the court erred in failing to credit him with any principal reduction. We see no conflict in these findings, where defendant failed to present any evidence of principal reduction and where the payments are ordered as part of defendant's support of his dependant spouse.

The appropriate treatment of post-separation payments made by one spouse toward marital debt will vary depending upon the facts of the particular case. . . . The trial court is in the best posi-

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tion to determine the most equitable treatment of post-separation payments toward marital debt; therefore, the determination is left to the discretion of the trial court.

Edwards v. Edwards, 110 N.C. App. 1, 13, 428 S.E.2d 834, 840, *disc. review denied*, 335 N.C. 172, 436 S.E.2d 374 (1993). The court also required defendant to pay all of plaintiff's 2002 individual state income tax liability, which was a lien on the marital home, without giving him credit. Defendant claims that the liability resulted from the sale of assets which benefitted plaintiff, but he presented no evidence to quantify any tax burden.

[10] The court also distributed to plaintiff FNB Corp. stock worth \$1,089,850, which was part of the consideration received for the sale of Dover. Defendant asserts that he will be required to pay capital gains on the stock, and that the court failed to give him credit for any tax liability. Defendant's accountant testified that he would have no tax after taking into account the SEI losses and again he failed to present evidence quantifying any tax burden.

[11] In finding 31, the court valued Little River Highway, LLC, shares at \$110,000 at the date of separation and distributed them to plaintiff, but in the decretal portion of the judgment the court required that defendant pay "all debt and tax liability associated with this asset." Defendant contends that this requirement is inequitable and an abuse of discretion. Defendant had sole control over Little River Highway for two and one-half years after the date of separation. We conclude that there was no abuse of discretion in requiring defendant to pay for debt accruing during the time he had control of this asset.

[12] Defendant also contends that the court erred in the distribution of Regions Financial Corporation stock pledged to secure marital loans and in failing to list and consider as marital debts loans which were secured by the stock. The trial court found that \$500,000 owed to Regions Bank was marital, but failed to list it in Table A. The parties agreed that a \$75,000 debt to W.G. Squires and secured by a pledge of 6000 shares of Park Meridian was marital debt, and the court so found in finding 102. However, the court erred in failing to list this debt in Table A, as plaintiff conceded at oral argument. On remand which is necessary for other reasons, the trial court should make the necessary correction here.

[13] Defendant also contends that the court erred in its consideration of factors for an unequal distribution. Defendant asserts

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that finding 108 that “[w]ife’s separate inheritance was used for the acquisition of husband’s business” was not supported by any evidence and should not have been given any weight in considering an unequal distribution. Plaintiff testified that these funds went into defendant’s business although she admitted that she had not traced any separate funds into the business. Defendant could not recall whether such funds went into his business. The court’s finding was not erroneous.

[14] Defendant also contends that the court erred in finding that proceeds from the sale of Cheshire and liquidation of defendant’s IRA were distributed to defendant and also considered as a distributional factor against defendant. “Post-separation payments may . . . be treated as a distributional factor.” *Khajanchi v. Khajanchi*, 140 N.C. App. 552, 564, 537 S.E.2d 845, 853 (2000). “A trial court may also give the payor a dollar for dollar credit in the division of the property, or require that the non-payor spouse reimburse the payor for an appropriate amount.” *Hay v. Hay*, 148 N.C. App. 649, 655, 559 S.E.2d 268, 273 (2002). While these are alternative options, here the court did not count the value of these assets twice as defendant alleges. Rather, the court distributed the assets to defendant and also weighed his post-separation conversion of these assets in considering the equitable distribution.

[15] Defendant also asserts that the court erred in making finding 111 that defendant “earns and has the ability to earn large and substantial sums.” However, defendant’s answer, tax returns from 1997 through 2002 and his financial statement all support this finding.

[16] Defendant also contends that the court erred in finding 112 by considering as a distributional factor that defendant will be entitled to receive social security benefits in the future and that plaintiff will not. Although defendant refused to produce his social security statement at trial after being subpoenaed, plaintiff did introduce his Form W-2 showing that social security taxes were being withheld from defendant’s SEI salary. Neither party produced evidence showing that plaintiff was entitled to receive any social security benefits.

[17] Defendant contends that the court erred in failing to consider evidence of other distributional factors. “[W]hen a party presents evidence which would allow the trial court to determine that an equal distribution of the marital assets would be inequitable, the trial court must then consider all of the distributional factors listed in G.S. 50-20(c), *Smith v. Smith*, 314 N.C. 80, 331 S.E.2d 682 (1985), and

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must make sufficient findings as to each statutory factor on which evidence was offered.” *Locklear v. Locklear*, 92 N.C. App. 299, 305-6, 374 S.E.2d 406, 410 (1988). N.C. Gen. Stat. § 50-20(c) lists the factors to be considered:

- (1) The income, property, and liabilities of each party at the time the division of property is to become effective.
- (2) Any obligation for support arising out of a prior marriage.
- (3) The duration of the marriage and the age and physical and mental health of both parties.
- (4) The need of a parent with custody of a child or children of the marriage to occupy or own the marital residence and to use or own its household effects.
- (5) The expectation of pension, retirement, or other deferred compensation rights that are not marital property.
- (6) Any equitable claim to, interest in, or direct or indirect contribution made to the acquisition of such marital property by the party not having title, including joint efforts or expenditures and contributions and services, or lack thereof, as a spouse, parent, wage earner or homemaker.
- (7) Any direct or indirect contribution made by one spouse to help educate or develop the career potential of the other spouse.
- (8) Any direct contribution to an increase in value of separate property which occurs during the course of the marriage.
- (9) The liquid or nonliquid character of all marital property and divisible property.
- (10) The difficulty of evaluating any component asset or any interest in a business, corporation or profession, and the economic desirability of retaining such asset or interest, intact and free from any claim or interference by the other party.
- (11) The tax consequences to each party, including those federal and State tax consequences that would have been incurred if the marital and divisible property had been sold or liquidated on the date of valuation. The trial court may, however, in its discretion, consider whether or when such tax consequences are reasonably likely to occur in determining the equitable value deemed appropriate for this factor.

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(11a) Acts of either party to maintain, preserve, develop, or expand; or to waste, neglect, devalue or convert the marital property or divisible property, or both, during the period after separation of the parties and before the time of distribution.

(12) Any other factor which the court finds to be just and proper.

N.C. Gen. Stat. § 50-20 (2003). Here, the court made the required findings. Defendant again draws our attention to his lack of an earned income, arguing that it should have been considered by the court as a distributional factor. As discussed *supra*, the court found that defendant had substantial income. In addition, defendant contends the court should have considered his age and health, and his liquidated IRA as distributional factors. The court found that his age and any health problems defendant had did not prevent him from earning income. Defendant also asserts that the court should have considered the lack of liquidity of the parties' marital assets and defendant's tax liabilities. Testimony from defendant's accountants supported the court's findings that any tax liabilities would likely be eliminated by carrying his SEI losses back or forward.

Defendant next argues that the alimony order is not supported by proper conclusions, valid findings or competent evidence. We do not agree.

[18] Defendant contends that the evidence failed to support finding 122 that defendant's monthly income will continue to exceed \$14,000 per month from earnings from sale of lots of the Riverfront and Colony Road Partnership projects, or finding 142 that defendant will have a monthly income of at least \$15,000. Defendant asserts that the value of these assets had already been included in the value of SEI and that using them in the alimony award constituted inappropriate "double dipping." However, defendant's own evidence regarding SEI's average profitability indicated that he could expect to earn over \$20,000 per month. In addition, the court heard evidence of the complex and constant turnover of properties through defendant's real estate companies, and we see no error in its findings here.

[19] Defendant also contends that the court erred in not making findings regarding its reasons for the duration of the alimony. "[A] trial court's failure to make any findings regarding the reasons for the amount, duration, and the manner of payment of alimony violates N.C. Gen. Stat. § 50-16.3(A)(c)." *Fitzgerald v. Fitzgerald*, 161 N.C.

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App. 414, 421, 588 S.E.2d 517, 522-23 (2003). The court ordered that alimony continue until the death of one of the parties, or plaintiff's remarriage or cohabitation, but failed to make any finding about the reasons for this duration. Plaintiff asserts that the findings that she had no income after thirty-eight years of marriage are sufficient. We do not agree. We remand for further findings of fact concerning the duration of the alimony award.

[20] Defendant also contends that finding 144, that plaintiff's combined tax rate would be 15%, was unsupported by the evidence. "While it is true that the express language of G.S. § 50-16.5(a) does not include the income tax consequences of an award of alimony as a factor to be weighed in the balance in determining the proper amount of the award, we are of the opinion that such would be a proper consideration in making that determination." *Clark v. Clark*, 301 N.C. 123, 132-33, 271 S.E.2d 58, 65-66 (1980). Plaintiff's expert, Mr. Walker, testified that the 15% combined tax rate was appropriate and that he knew of no rate changes; defendant failed to offer any controverting evidence regarding tax rate. The court did not abuse its discretion in making this finding.

[21] Defendant contends that the court erred in failing to make findings concerning the factors listed in N.C. Gen. Stat. § 50-16.3A(b), specifically defendant's age, health, lack of earned income and tax liabilities. Finding 7 notes defendant's age and past health concerns. Findings 116 through 121 note defendant's gross and after-tax income between 1997 and 2002. This assignment of error is without merit.

[22] Defendant next contends that the court erred in continuing certain terms of the postseparation award and in making the alimony judgment binding on his heirs. Any finding purporting to make alimony binding on defendant's heirs is error, but is without effect as such a term is barred by statute. N.C. Gen. Stat. § 50-16.9(b) (2005) ("Postseparation support or alimony shall terminate upon the death of either the supporting or the dependent spouse.") We vacate this portion of the judgment.

[23] Defendant also argues that the court erred in awarding attorney's fees to plaintiff based on these findings. Because we believe the findings are sufficient, we disagree.

"At any time that a dependent spouse would be entitled to alimony . . . the court may . . . enter an order for reasonable counsel fees for the benefit of such spouse, to be paid and secured by the

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supporting spouse” N.C. Gen. Stat. § 50-16.4 (2005). To recover attorneys’ fees pursuant to this statute in an action for alimony, the requesting spouse must be entitled to the relief demanded, must be a dependent spouse, and must have insufficient means to subsist during the prosecution of the suit and to defray the expenses thereof. *Caldwell v. Caldwell*, 86 N.C. App. 225, 227, 356 S.E.2d 821, 822-23, *cert. denied*, 320 N.C. 791, 361 S.E.2d 72 (1987). In addition, “attorneys’ fees are not recoverable in an action for equitable distribution so that, in a combined action, the fees awarded must be attributable to work by the attorneys on the divorce, alimony and child support actions.” *Patterson v. Patterson*, 81 N.C. App. 255, 262, 343 S.E.2d 595, 600 (1986). Thus, the trial court must “make findings of fact as to the nature and scope of legal services rendered, the skill and the time required upon which a determination of reasonableness of the fees can be based.” *Williamson v. Williamson*, 140 N.C. App. 362, 365, 536 S.E.2d 337, 339 (2000).

Here, the judgment contains the following pertinent findings:

123. Wife is currently 58 years old and the course of the parties 38-year marriage has been primarily a homemaker and mother, although she does currently own and operate an antique business known as Lillie [sic] Antiques & collectibles Inc. Wife works approximately 5-6 hours per week at said business, which has not made a profit over the past several years.

126. Wife has been and continues to be actually and substantially dependent on Husband for her maintenance and support and substantially in need of maintenance and support from Husband in order to maintain her accustomed standard of living. Wife is the dependant spouse and Husband is the supporting spouse of the parties’ marriage.

143. Wife’s total reasonable monthly needs and expenses are \$6,139 as previously found herein. Will have no mortgage payments upon the sale of the Winged Bourne residence and her receipt of all the proceeds from such sale. The Court makes the reasonable assumption that these proceeds will be used to purchase a new residence. The sum of \$500 per month is a reasonable allocation for the expenses of taxes and insurance on the new residence. *Wife’s total employment income and other recur-*

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ring earnings from all sources are zero per month as found herein. Wife will receive dividends of \$2,354 per month from the FNB stock. Wife has paid federal income tax at an effective rate of approximately 8% and no state income tax when she has had taxable income since the parties separated as Lillie's Antique's [sic] has reported a loss over the past few years. After subtracting Wife's net income \$2,334, Wife needs \$3,805 per month in order to meet her reasonable monthly needs based upon her accustomed standard of living during the course of the marriage and in consideration of her income and earning abilities.

146. Wife is substantially in need of a financial contribution from Husband in order to maintain her accustomed standard of living.

147. Wife is a "dependant spouse" of her marriage to Husband as that term is defined in N.C. Gen. Stat. § 50-16.2A(2).

149. Considering all the facts and circumstances of this case, including the factors set out in N.C. Gen. Stat. § 50-16.2A, the resources of Wife are not adequate to meet her reasonable needs for support.

(Emphasis supplied.) The court also made two findings denominated 153 which detail the reasonable attorneys' fees plaintiff incurred regarding the alimony portion of the litigation. These findings are sufficient to support the court's award of attorneys' fees. We overrule this assignment of error.

[24] Defendant also contends the court erred in failing to distribute the property in kind, in ordering a distributive award, and in failing to give him credit for an interim distribution to plaintiff. N.C. Gen. Stat. § 50-20 states, in pertinent part:

(e) Subject to the presumption of subsection (c) of this section that an equal division is equitable, it shall be presumed in every action that an in-kind distribution of marital or divisible property is equitable. This presumption may be rebutted by the greater weight of the evidence, or by evidence that the property is a closely held business entity or is otherwise not susceptible of division in-kind. In any action in which the presumption is rebutted, the court in lieu of in-kind distribution shall provide for a distributive award in order to achieve equity

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between the parties. The court may provide for a distributive award to facilitate, effectuate or supplement a distribution of marital or divisible property. The court may provide that any distributive award payable over a period of time be secured by a lien on specific property.

N.C. Gen. Stat. § 50-20(e) (2003). “[I]n equitable distribution cases, if the trial court determines that the presumption of an in-kind distribution has been rebutted, it must make findings of fact and conclusions of law in support of that determination.” *Urciolo v. Urciolo*, 166 N.C. App. 504, 507, 601 S.E.2d 905, 908 (2004). Here, the distributive award was necessary in order to preserve SEI and distribute it to defendant in its entirety. However, the court failed to make the required findings that defendant had sufficient liquid assets from which to pay the distributive award. “Although defendant may in fact be able to pay the distributive award, defendant’s evidence is sufficient to raise the question of where defendant will obtain the funds to fulfill this obligation.” *Id.* (quoting *Embler v. Embler*, 159 N.C. App. 186, 188, 582 S.E.2d 628, 630 (2003)). We reverse the trial court on this assignment of error, and remand for additional findings of fact on whether defendant has sufficient liquid assets to pay the distributive award to plaintiff, consistent with this opinion.

Affirmed in part, reversed in part, vacated in part and remanded.

Judges HUNTER and BRYANT concur.

IN THE MATTER OF THE WILL OF: MARY M. YELVERTON, DECEASED

No. COA05-771

No. COA05-772

(Filed 5 July 2006)

1. Appeal and Error— preservation of issues—failure to cite authority

Caveator’s appeal in a contested will case from the trial court’s 17 December 2004 ruling that caveator could not retain possession of the testator’s real property pending appeal of the caveat proceeding is dismissed, because caveator failed to cite any statutes, case law, or other authority in support of his argu-

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ments as to why the order was erroneous as required by N.C. R. App. P. 28(b)(6).

2. Appeal and Error— appealability—denial of summary judgment

Although caveator contends the trial court erred in a contested will case by denying his motion for summary judgment with respect to the judgment probating the will, the trial court's denial of summary judgment cannot constitute reversible error when the issues in this case were decided following a trial on the merits.

3. Evidence— unavailable witness—denial of motion for continuance—abuse of discretion standard

The trial court did not abuse its discretion in a contested will case by denying caveator's motion for a continuance made at the close of propounder's evidence after propounder's notary witness had informed him at the last minute that she was unavailable to testify, because: (1) caveator's motion for a continuance was made in the middle of trial after the case had been set peremptorily ahead of time based on propounder being stationed overseas; (2) caveator knew he could not compel the witness to testify by service of a subpoena due to her relocation to Maryland, and he made no attempt to secure her testimony through a deposition *de bene esse*; and (3) a hardship would have resulted from a continuance in addition to caveator's failure to exhaust reasonable methods of securing the witness's testimony.

4. Evidence— order concerning notary—failure to lay proper foundation

The trial court did not err in a contested will case by excluding evidence of an order from the North Carolina Secretary of State regarding propounder's notary witness and testimony from caveator relating to this order, because: (1) caveator failed to lay a proper foundation for the evidence's admission; (2) caveator made no showing that he has personal nonhearsay knowledge such that he could testify that the pertinent order refers to his mother's will; and (3) nothing on the fact of the order indicated that the Secretary of State's order has anything at all to do with this case, and caveator's offer of proof does not establish that he could offer admissible testimony supplying the necessary connection.

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5. Evidence— Dead Man’s Statute—sentimental interest— facts based on independent knowledge

The trial court did not err in a contested will case by allowing propounder and his mother to testify during trial about statements made to them by the testatrix, because: (1) the Dead Man’s Statute did not bar propounder’s mother from testifying merely based on the fact that she was aligned with propounder since her son was above the age of majority, and caveator failed to identify any legal or pecuniary interest of the mother other than a mere sentimental interest; (2) it is questionable whether propounder’s assertion that his grandmother told him what was in an envelope, without any testimony as to what the testator actually said, violated N.C.G.S. § 8C-1, Rule 601(c); and (3) assuming arguendo that propounder’s testimony was inadmissible, caveator failed to demonstrate that any resulting error was prejudicial.

6. Judges— partiality—questioning witnesses directly

The trial court in a contested will case did not display partiality by questioning two witnesses directly, and caveator is not entitled to a new trial on this basis, because: (1) the judge’s questions were neither biased toward one party nor were they geared toward eliciting particular answers from the witnesses; and (2) the probable effect the exchanges had on the jury was clarification.

7. Appeal and Error— preservation of issues—motion for directed verdict—motion for judgment notwithstanding verdict—waiver

Although caveator contends the trial court erred in a contested will case by denying his motion for a directed verdict at the close of propounder’s evidence and motion for judgment notwithstanding the verdict (JNOV), caveator’s arguments were not properly preserved because: (1) although caveator moved for directed verdict at the close of propounder’s evidence, he did not renew his motion at the close of all the evidence and thus waived his directed verdict motion; and (2) caveator’s waiver of the motion for a directed verdict also precludes a review of his motion for JNOV.

8. Wills— motion for new trial—sufficiency of evidence—self-proved will—attesting witnesses

The trial court did not err by denying caveator’s motion for a new trial based on insufficiency of the evidence, because: (1) pro-

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pounder offered both evidence of a self-proved will and evidence from attesting witnesses regarding the circumstances surrounding the execution and witnessing of the will; and (2) caveator failed to show the trial court abused its discretion.

Appeal by caveator from judgment entered 16 December 2004 and orders entered 17 December 2004 and 17 February 2005 by Judge Jerry Braswell in Wayne County Superior Court. Heard in the Court of Appeals 12 January 2006.

Robert E. Fuller, Jr. for caveator-appellant.

Baddour, Parker & Hine, PC, by Philip A. Baddour, Jr., for propounder-appellee.

GEER, Judge.

Caveator Mansel Yelverton has brought two separate appeals arising out of his challenge to the will of the testator, Mary M. Yelverton. As the issues presented in the appeals involve common questions of law, we have consolidated the appeals for purposes of decision.

In COA05-771, caveator appeals from an order instructing him to vacate his mother's real property and allow his nephew, propounder Kelvin Artis, to take possession. We dismiss this appeal because caveator has cited no authority in support of his arguments.

In COA05-772, caveator appeals from a judgment probating his mother's will and an order denying his motion for judgment notwithstanding the verdict or, in the alternative, a new trial. Based upon our review of the record, we find no reversible error and, therefore, affirm the judgment and order of the trial court.

The North Carolina General Statutes set forth the following requirements for attested written wills:

(a) An attested written will is a written will signed by the testator and attested by at least two competent witnesses as provided by this section.

(b) The testator must, with intent to sign the will, do so by signing the will himself or by having someone else in the testator's presence and at his direction sign the testator's name thereon.

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(c) The testator must signify to the attesting witnesses that the instrument is his instrument by signing it in their presence or by acknowledging to them his signature previously affixed thereto, either of which may be done before the attesting witnesses separately.

(d) The attesting witnesses must sign the will in the presence of the testator but need not sign in the presence of each other.

N.C. Gen. Stat. § 31-3.3 (2005). As the statute indicates, proof of the proper execution of a will “ordinarily requires the testimony of two attesting witnesses.” *In re Will of McCauley*, 356 N.C. 91, 95, 565 S.E.2d 88, 92 (2002).

Alternatively, an attested written will may be probated if it is “self-proving”—that is, if it includes proper affidavits from the attesting witnesses. N.C. Gen. Stat. § 31-18.1(a)(4) (2005); *Will of McCauley*, 356 N.C. at 95, 565 S.E.2d at 92. In order to make a will self-proving, there must be a notary’s verification that (1) the testator signed the will in the notary’s presence and declared it to be his or her last will and testament and (2) two persons witnessed the testator sign the will. *See* N.C. Gen. Stat. § 31-11.6 (2005) (providing the notarial forms necessary to simultaneously execute a will, attest it, and make it self-proving).

Facts

The testator had four children: Mary Yelverton Moore, James C. Yelverton, Lillie Mae Simmons, and caveator. The testator also had a number of grandchildren, among them propounder, who is the son of Mary Yelverton Moore. Propounder lived with the testator and her husband for much of his childhood, until he joined the Marine Corps following graduation from high school. The testator’s husband died in 1994. In 1999, caveator moved in with the testator, his mother, where he remained through her death in 2003.

The testator’s will was executed on 5 February 1994 and purports on its face to meet the requirements for a valid self-proved will under N.C. Gen. Stat. §§ 31-11.6 and 31-18.1(a)(4). In addition to the testator’s signature, three witnesses appear to have signed it: Roberta Moore, Franklin Greenfield, and Mary Yelverton Moore. Additionally, the four signatures appear to have been notarized on 5 February 1994 by Teri L. Hamilton.

The evidence at trial tended to show that Roberta Moore and Franklin Greenfield signed the will on 5 February 1994 at the

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Hamilton Funeral Home in the presence of the testator and Teri Hamilton. Neither Franklin Greenfield nor Roberta Moore had ever met the testator before 5 February 1994. They happened to be present at the funeral home when witnesses were needed for the testator's will. Greenfield and Moore signed the will at the request of Hamilton, a notary working at the funeral home. Mary Yelverton Moore witnessed the will several days later at the Wayne Memorial Hospital in the presence of the testator, but not in the presence of Hamilton or any other notary.

The will provided that propounder would receive the testator's estate. Propounder presented the will to the clerk of court on 14 October 2003, following the death of the testator. On 16 December 2003, caveator—the testator's son and propounder's uncle—instituted a caveat proceeding seeking to invalidate the will. On 14 December 2004, a jury entered a verdict finding that the document purporting to be the testator's will was, in fact, her will and that the will had been properly executed. On 16 December 2004, the trial court entered a judgment probating the will.

The next day, 17 December 2004, the trial court entered an order finding that the testator's will had been probated in common form; that propounder, as executor, had advanced \$17,482.16 of his own money to pay the debts and cost of administration of the estate; that the money advanced had become a lien on the assets of the estate; and that in order to preserve the real property of the testator, it would be necessary for the executor to pay the taxes due on the property and to insure the property. Based on these findings, the court concluded that “[i]t is in the best interest of the estate for Kelvin M. Artis, Executor, to take possession, custody and control over the real property owned by Mary M. Yelverton at the time of her death in order to preserve the property of the estate until the conclusion of the caveat proceeding.” The court (1) ordered that propounder take possession of the testator's real property; (2) authorized him to rent the property in order to generate funds to pay taxes, insurance, and debts of the estate; and (3) ordered that caveator vacate the real property unless he executed a written lease agreement with propounder. Caveator was also ordered to refrain from removing any of the testator's personal property upon vacating the premises.

On 22 December 2004, caveator made a motion for judgment N.O.V. or, in the alternative, a new trial. The trial court denied this motion in an order entered 17 February 2005. Caveator filed a timely

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appeal from the order of 17 December 2004 (case COA05-771) and a separate timely appeal from the judgment of 16 December 2004 and the order of 17 February 2005 (case COA05-772).

I

[1] We begin our discussion with caveator's appeal from the 17 December 2004 ruling that caveator could not retain possession of the testator's real property pending appeal of the caveat proceeding. Caveator claims that propounder was seeking to take possession of the property "not out of a desire to preserve the property (for who better than a relative who had been living there), but out of revenge for the filing of this caveat proceeding." Caveator further contends that the amount spent by the executor "far exceeds the amount necessary to preserve the property of the estate."

Caveator, however, cites no statutes, case law, or other authority in support of his arguments as to why the 17 December 2004 order was erroneous. We, therefore, deem his assignment of error in this case to be abandoned. 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."). Caveator's appeal in case COA05-771 is dismissed.

II

[2] With respect to the judgment probating the will, caveator first argues that the trial court erred in denying his motion for summary judgment. Our Supreme Court has previously held:

The purpose of summary judgment is to bring litigation to an early decision on the merits without the delay and expense of a trial when no material facts are at issue. After there has been a trial, this purpose cannot be served. *Improper denial of a motion for summary judgment is not reversible error when the case has proceeded to trial and has been determined on the merits by the trier of the facts, either judge or jury.*

Harris v. Walden, 314 N.C. 284, 286, 333 S.E.2d 254, 256 (1985) (emphasis added) (internal citation omitted).

Under *Harris*, since the issues in this case were decided following a trial on the merits, the trial court's denial of summary judgment cannot constitute reversible error. We, therefore, overrule this assignment of error.

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III

[3] Caveator next contends that the trial court erred in denying his motion for a continuance, made at the close of propounder's evidence, when one of his witnesses, the notary Teri Hamilton (now Teri Mickens), had at the last minute informed him she was unavailable to testify. Caveator contends that Ms. Mickens' testimony was critical to his case because, as her summary judgment affidavit stated, she would have denied having witnessed the signatures of Roberta Moore and Franklin Greenfield on 5 February 1994 despite the will's having indicated otherwise.

Denial of a motion for a continuance is reviewable on appeal only for abuse of discretion. *In re Will of Maynard*, 64 N.C. App. 211, 221, 307 S.E.2d 416, 424 (1983), *disc. review denied*, 310 N.C. 477, 312 S.E.2d 885 (1984). This Court has previously held that a trial court did not abuse its discretion in denying a defendant's motion for continuance when the motion was made after the case had already been called for trial and three of the defendant's witnesses were absent, but the defendant had not served the witnesses with enforceable subpoenas in order to ensure their presence at trial. *State v. Chambers*, 53 N.C. App. 358, 360, 280 S.E.2d 636, 638, *cert. denied*, 304 N.C. 197, 285 S.E.2d 103 (1981). *See also State v. Oden*, 44 N.C. App. 61, 62, 259 S.E.2d 795, 796 (1979) (trial court did not abuse its discretion in denying motion for continuance after trial had started, when defendant had not obtained subpoena for witness whose absence was the reason for the motion), *appeal dismissed and disc. review denied*, 299 N.C. 333, 265 S.E.2d 401 (1980).

Similarly, we conclude that the trial court in this case did not abuse its discretion. Caveator's motion for a continuance was made in the middle of the trial, after the case had been set peremptorily far ahead of time because propounder was stationed overseas. Caveator knew he could not compel Ms. Mickens to testify by service of a subpoena due to her relocation to Maryland. Nevertheless, he made no attempt to secure her testimony through a deposition *de bene esse*. *See* N.C.R. Evid. 804(b)(1) (providing that "[t]estimony given . . . in a deposition taken in compliance with law in the course of the same or another proceeding" is not excluded by the hearsay rule if the declarant is unavailable as a witness). In light of the hardship that would have resulted from a continuance, coupled with caveator's failure to exhaust reasonable methods of securing Ms. Mickens' testimony, we hold the trial court did not abuse its discretion in denying caveator's motion for a continuance.

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IV

[4] The next issue raised by caveator on appeal also relates to Ms. Mickens. Caveator contends he should have been allowed to introduce into evidence (1) an order from the North Carolina Secretary of State regarding Ms. Mickens; and (2) testimony from caveator relating to this order.

The order—dated 18 November 2004, more than nine years after the execution of the testator’s will—states that Ms. Mickens’ notary commission was revoked effective immediately because “the Secretary of State has determined that Teri L. Mickens notarized a will without the person before her and notarized the signature of a witness that was not before her.” Other than this statement, the order contains no dates or other information that would tend to identify the will that was the subject of the Secretary of State’s investigation. In his offer of proof at trial, caveator’s counsel stated that caveator “would have testified that he had [the notarization of his mother’s will] investigated, and as a result of that investigation received a letter from the Secretary of State . . . revoking the notary [sic] of Terry [sic] Hamilton, now Mickens”

We hold that the trial court did not err in excluding the order and caveator’s testimony because caveator failed to lay a proper foundation for the evidence’s admission. Although the order references an instance where Ms. Mickens “notarized a will without the person before her” and possibly a separate instance where she “notarized the signature of a witness that was not before her,” caveator has offered only his own testimony to tie this order to the will at issue in this case. N.C.R. Evid. 602, however, states that a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Caveator has made no showing that he has personal, non-hearsay knowledge such that he could testify that the order refers to his mother’s will.

In sum, nothing on the face of the order indicates that the Secretary of State’s order has anything at all to do with this case, and caveator’s offer of proof does not establish that he could offer admissible testimony supplying the necessary connection. Without admissible evidence laying a foundation that the order related to the will in this case, caveator failed to demonstrate that the order was relevant. Accordingly, the trial court did not err in excluding the order and caveator’s related testimony.

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V

[5] Caveator also argues that the trial court improperly allowed propounder and his mother, Mary Yelverton Moore, to testify during trial about statements made to them by the testator. Caveator bases his argument solely on our State’s Dead Man’s Statute, codified as N.C.R. Evid. 601(c):

(c) *Disqualification of interested persons.*—Upon the trial of an action, . . . a party or a person interested in the event . . . shall not be examined as a witness in his own behalf . . . concerning any oral communication between the witness and the deceased person

The Dead Man’s Statute “is applicable only to oral communications between the party interested in the event and the deceased.” *In re Will of Lamparter*, 348 N.C. 45, 49, 497 S.E.2d 692, 694 (1998). Generally speaking, both propounders and caveators are parties “interested in the event” within the meaning of the statute. *Id.*

A. Mary Yelverton Moore’s Testimony

With respect to Mary Yelverton Moore, caveator challenges testimony of Moore describing a conversation with her mother, the testator, in which she asked Moore to witness her will at the Wayne Memorial Hospital “sometime in February 1994”:

A And [the testator] said that she wanted me to sign her will.

. . . .

A And I told her I couldn’t because there was no notary there [at the hospital].

. . . .

A She said that she already had it notarized and had two witnesses’ signatures on it, and there was a place for a third witness that she wanted me to sign.

. . . .

A And I read it and I saw that there was a seal on it, that there was two other witnesses’ names on it. And I asked her who were the witnesses. She said she didn’t know. She had it notarized at Hamilton’s Funeral Home and the witnesses were there.

. . . .

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Q . . . Did you sign the will at this time?

A Yes, I did. She showed me where she signed it at.

Q She said that she had signed it?

A Yes.

Q And did you sign it in front of her?

A Yes.

Our Supreme Court has interpreted Rule 601(c) as follows:

Although a “person interested in the event” of the action is disqualified, his interest must be a “direct legal or pecuniary interest” in the outcome of the litigation. “The key word in this phrase is ‘legal,’ the cases as a whole showing that the ultimate test is whether the *legal rights* of the witness will be affected one way or the other by the judgment in the case. The witness may have a very large pecuniary interest *in fact*—as the interest of a wife in an important law suit to which her husband is a party—and still be competent, while a comparatively slight *legal* interest will disqualify the witness.”

Rape v. Lyerty, 287 N.C. 601, 622, 215 S.E.2d 737, 750 (1975) (quoting 1 Dale F. Stansbury, *Stansbury's North Carolina Evidence*, § 69, at 211 (Brandis rev. ed. 1973)). See also *In re Will of Hester*, 84 N.C. App. 585, 595-96, 353 S.E.2d 643, 650-51 (holding that testimony of will's executor was not barred by Dead Man's Statute even though executor served on board of deacons at church named as beneficiary of will), *rev'd on other grounds*, 320 N.C. 738, 360 S.E.2d 801 (1987). Our Supreme Court has stressed that “[t]he interest which determines the competency of a witness under the [Dead Man's S]tatute is a present direct pecuniary interest. . . . A mere sentimental interest or consideration or preference for one party as against the other, not based on some direct pecuniary interest of value, will not affect the question of the qualification of the witness.” *Sanderson v. Paul*, 235 N.C. 56, 61, 69 S.E.2d 156, 160 (1952).

Caveator argues that the Dead Man's Statute bars Moore's testimony because Moore was “aligned” with propounder. At most, any such interest of Moore regarding the outcome of the litigation can be characterized only as “sentimental,” since her son is above the age of majority. Indeed, Moore's testimony was actually against her pecuniary interest as she would share in the estate in the absence of the

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will. Thus, we hold that because caveator has identified no direct legal or pecuniary interest of Ms. Moore, her testimony was not disqualified under Rule 601(c).

B. Propounder's Testimony

Before trial, the trial court denied caveator's motion in limine requesting that the court exclude all evidence of oral communications between propounder and the testator. Propounder testified that after his grandmother handed him an envelope, "she told me what it was—because I wondered what she was giving me and she told me, and then I actually took them out and looked at them, and they were two wills." On appeal, caveator challenges the trial court's admission of this testimony.

After examining the record, we can see no reason why the trial court's admission of the challenged statement by propounder entitles caveator to a new trial. It is questionable whether propounder's assertion that his grandmother told him what was in the envelope, without any testimony as to what the testator actually said, violates Rule 601(c). *In re Will of Simmons*, 43 N.C. App. 123, 129, 258 S.E.2d 466, 470 (1979) (holding that the Dead Man's Statute does not operate to prevent "a witness from testifying as to the acts and conduct of the deceased where the witness is merely an observer and is testifying to facts based upon independent knowledge"), *disc. review denied*, 299 N.C. 121, 262 S.E.2d 9 (1980). Even assuming, however, that propounder's testimony was inadmissible, caveator has failed to demonstrate that any resulting error was prejudicial.

The caveat proceeding was instituted on the grounds that the will was improperly executed and/or the result of "undue and improper influence and duress." The challenged testimony by propounder does not appear to pertain directly to either ground. Moreover, as we have already discussed, Moore's testimony—that the testator characterized the document as her will—was properly admitted, and any similar statement by propounder would thus be merely duplicative. Caveator's assignment of error pertaining to his motion in limine is overruled.

VI

[6] In his next argument, caveator contends that the trial judge improperly displayed partiality by questioning two of the witnesses directly. We disagree.

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The first witness was Franklin Greenfield, one of the signatories from the funeral home. The court's questioning of Mr. Greenfield took place after both parties stated they had nothing further to ask him. When the trial judge asked why Mr. Greenfield was at the funeral home on the day he signed the will, Mr. Greenfield stated that it was because a relative had died. The judge also verified that Mr. Greenfield remembered signing one or two documents, but that he did not know what he was signing or why he was signing it.

The second witness was John Keller, an attorney from Legal Aid who testified about Legal Aid's normal estate planning practices in response to evidence suggesting that Legal Aid may have prepared the testator's will. Mr. Keller testified on direct examination that his office had no record of having ever prepared a will for the testator. He then testified on cross-examination that the form language of the testator's will did resemble the language employed by Legal Aid. Once the parties had finished their questions, the trial judge questioned Mr. Keller further as to Legal Aid's client intake procedures and whether the jacket of the testator's will bore any indication that it had been prepared by Legal Aid.

As caveator concedes, "[a] trial judge has undoubted power to interrogate a witness for the purpose of clarifying matters material to the issues." *In re Will of Bartlett*, 235 N.C. 489, 493, 70 S.E.2d 482, 486 (1952). Whether a breach of the judge's impartiality has occurred is determined by "the probable effect on the jury of the improper comments and not the motive of the court in making such statements." *State v. Johnson*, 20 N.C. App. 699, 701, 202 S.E.2d 479, 481 (1974).

In this case, our review of the challenged exchanges between the judge and the two witnesses indicates that the judge's questions were neither biased towards one party nor were they geared towards eliciting particular answers from the witnesses. The probable effect that the exchanges had on the jury was clarification. Mr. Keller's testimony in response to the attorneys' direct and cross-examination may have been somewhat too technical for the jury, whereas Mr. Greenfield's initial testimony was somewhat unresponsive. We therefore hold that caveator is not entitled to a new trial on the basis of these exchanges.

VII

[7] Caveator next argues the trial court erred in denying his motion for a directed verdict at the close of propounder's evidence and

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motion for judgment N.O.V. Caveator's arguments were not, however, properly preserved for appellate review. Although caveator moved for a directed verdict at the close of propounder's evidence, he did not renew his motion at the close of all the evidence and thus waived his directed verdict motion. *Woodard v. Marshall*, 14 N.C. App. 67, 68, 187 S.E.2d 430, 431 (1972) (noting that, by offering evidence, defendants waived their motion for directed verdict made at close of plaintiff's evidence).

Moreover, caveator's waiver of the motion for a directed verdict also precludes us from reviewing his motion for judgment N.O.V. *Jansen v. Collins*, 92 N.C. App. 516, 517, 374 S.E.2d 641, 643 (1988) ("A motion for directed verdict at the close of all evidence is an absolute prerequisite to the post verdict motion for judgment notwithstanding the verdict."); *cf.* N.C.R. Civ. P. 50(b)(1) (providing that a party who has unsuccessfully moved for a directed verdict may make a motion for judgment notwithstanding the verdict). These assignments of error are, therefore, overruled.

[8] Alternatively, caveator challenges the trial court's denial of his motion for a new trial, which was based on (1) insufficiency of the evidence; (2) violations of the Dead Man's Statute; (3) the judge's alleged failure to show impartiality; and (4) denial of caveator's motion for continuance. Since we have already addressed the second, third, and fourth grounds, we are left with only the first ground, namely, the insufficiency of the evidence. In a will caveat proceeding, the standard of review for the denial of a new trial motion based on insufficiency of the evidence is " 'simply whether the record affirmatively demonstrates an abuse of discretion by the trial court in doing so.' " *In re Will of McDonald*, 156 N.C. App. 220, 228, 577 S.E.2d 131, 137 (2003) (quoting *In re Will of Buck*, 350 N.C. 621, 629, 516 S.E.2d 858, 863 (1999)).

It is well-settled that "[i]n an ordinary case, due execution is proven by the testimony of the attesting witnesses or by a self-proved will pursuant to N.C.G.S. § 31-11.6." *Will of McCauley*, 356 N.C. at 95, 565 S.E.2d at 92 (internal citation omitted). Here, propounder offered both evidence of a self-proved will and evidence from attesting witnesses regarding the circumstances surrounding the execution and witnessing of the will. Based upon our review of the evidence, caveator has failed to show the trial court abused its discretion in determining not to grant a new trial due to insufficient evidence of either a self-proving will or attesting witnesses. *See*,

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e.g., *Will of McDonald*, 156 N.C. App. at 232, 577 S.E.2d at 139 (holding that caveator, the non-movant, had presented “substantial evidence of the circumstances leading up to the execution of the will,” and no abuse of discretion was evident in refusing to grant a new trial). Accordingly, we uphold the denial of caveator’s motion for a new trial.

Case No. COA05-771—Dismissed.

Case No. COA05-772—No error in part; affirmed in part.

Judges HUDSON and TYSON concur.

STATE OF NORTH CAROLINA v. CHARLES T. MEWBORN

No. COA05-1127

(Filed 5 July 2006)

**1. Evidence— cross-examination—prior crimes or bad acts—
prior convictions—status as drug dealer**

The trial court did not err in a trafficking in cocaine by possession, transportation, and sale case by allowing the State to cross-examine defendant about his prior convictions and his status as a drug dealer, because: (1) by defendant’s own admission, N.C.G.S. § 8C-1, Rule 608 is inapplicable to the contested questioning about defendant’s status as a drug dealer since it was neither a reference to a specific act nor probative of defendant’s truthfulness; (2) evidence which would otherwise be inadmissible may be permissible on cross-examination to correct inaccuracies or misleading omissions in defendant’s testimony or to dispel favorable inferences arising from them, and defendant’s testimony on cross-examination that his 1995 conviction for possession of cocaine should have been for possession of paraphernalia tended to mislead the jury as to defendant’s prior record; (3) defendant’s unsolicited testimony about the search of his home seemed to imply that he was framed by the officers who recovered evidence leading to his probation revocation and second conviction, and the State did not exceed the scope of cross-examination under N.C.G.S. § 8C-1, Rule 609(a) by suggesting the

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reason police officers searched defendant's home was based on the fact that they knew defendant had been convicted of selling drugs; (4) assuming arguendo the cross-examination was improper under N.C.G.S. § 8C-1, Rule 404(a), defendant failed to show he was unduly prejudiced by the State's characterization of him as a drug dealer in light of the uncontested evidence of defendant's prior drug convictions; and (5) although defendant contends *State v. Wilkerson*, 356 N.C. 418 (2002), establishes that the State's cross-examination violated Rule 404(b), the present case is distinguishable since defendant in this case testified on his own behalf.

2. Evidence—cross-examination—prior crimes or bad acts of witness—sexual misconduct—plain error analysis

The trial court did not commit plain error in a trafficking in cocaine by possession, transportation, and sale case by allowing the State to cross-examine a defense witness about an alleged incident of sexual misconduct under N.C.G.S. § 8C-1, Rule 608(b), because: (1) defendant failed to show the jury probably would have reached a different result had the contested cross-examination not been admitted when the witness was neither an eyewitness nor an expert; (2) the witness testified that in his lay opinion the truck in the surveillance video was not defendant's truck based on a comparison between photographs and the image of the truck appearing in a surveillance video, and the jury could have made this comparison without the witness's testimony; and (3) given the insignificance of the witness's testimony, any harm to the witness's credibility caused by the cross-examination was also insignificant and did not have a probable impact on the jury's decision.

3. Drugs—instruction—witness with immunity or quasi-immunity

The trial court did not abuse its discretion in a trafficking in cocaine by possession, transportation, and sale case by failing to instruct the jury regarding a police informant's testimony according to the pattern jury instruction for testimony of a witness with immunity or quasi-immunity, because: (1) although the requested instruction was correct in law, it was not supported by the evidence when no evidence was presented at trial that the informant testified under an agreement for a charge reduction or an agreement for a sentencing concession; (2) the trial court's instruction that the jury should review the informant's testimony with care

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and caution substantively reflected the concept defendant wished to convey to the jury; (3) defendant had the opportunity to cross-examine the informant about any alleged agreement and to argue to the jury regarding the impact of any alleged agreement upon the informant's credibility; and (4) given that the jury had before it evidence of the informant's arrest, the charges pending against him, his cooperation with police, his plea agreement, and his pending sentencing hearing, defendant failed to show there was a reasonable probability that the jurors would have reached a different result if the trial court had instructed them to view the informant's testimony with great care and caution rather than with care and caution.

4. Sentencing— no right to new sentencing hearing—defendant's exercise of right to appeal a prior matter

The trial court in a trafficking in cocaine by possession, transportation, and sale case did not improperly base defendant's sentence on defendant's exercise of his right to appeal a prior matter when it commented that defendant should have been required to wear shirts identifying him as a convicted drug dealer as part of his probation for a prior drug conviction in front of the same judge seven years prior, because: (1) the trial court had statutory authority to impose consecutive sentences of the length given; (2) the facts of the present case reveal no intent on the part of the trial court to punish defendant for exercising his statutory right; and (3) the trial court's comment may indicate disagreement with the Court of Appeals' appellate decision to overturn the probationary condition, but it did not reveal evidence of retaliation against defendant for having exercised his right to appeal the prior sentence.

Appeal by defendant from judgment entered 17 August 2004 by Judge W. Russell Duke, Jr. in Superior Court, Pitt County. Heard in the Court of Appeals 19 April 2006.

Attorney General Roy Cooper, by Special Deputy Attorney General Gary R. Govert, for the State.

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

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McGEE, Judge.

Charles T. Mewborn (defendant) was convicted on 17 August 2004 of trafficking in cocaine by possession, transportation, and sale, in violation of N.C. Gen. Stat. § 90-95(h)(3). Defendant was sentenced to three consecutive prison terms of thirty-five to forty-two months. Defendant appeals.

The State's evidence at trial tended to show that in January 2003, Detective Carter Adkins (Detective Adkins) of the Pitt County Sheriff's Department arrested Willard Taylor (Taylor) for conspiracy to traffic in cocaine. Taylor told Detective Adkins he had purchased cocaine from defendant in the past, and that he could arrange to again buy cocaine from defendant. Detective Adkins instructed Taylor to arrange to buy two ounces of cocaine from defendant in the parking lot of a Food Lion on 11 February 2003.

Prior to the scheduled cocaine purchase, Detective Eddie Eubanks (Detective Eubanks) of the Lenoir County Sheriff's Department drove by defendant's home to identify any vehicles defendant might drive. Detective Eubanks saw "an older model" Ford pick-up truck parked in defendant's backyard. Detective Eubanks described the truck as being red and silver with "clearance lights on the top." At approximately 6:10 p.m. on 11 February 2003, Detectives Adkins and Eubanks met Taylor at a shop near the Food Lion. They searched Taylor and his truck and placed a repeater device in the truck to monitor Taylor's conversation during the cocaine buy. Detectives Adkins and Eubanks sat with a third detective in a surveillance van in the Food Lion parking lot about seventy-five yards from Taylor's truck. The surveillance van was equipped with a radio, a tape recorder, and a camcorder. The detectives saw a pick-up truck enter the parking lot and park next to Taylor's truck so that the drivers' doors were facing each other. Detective Eubanks described the pick-up truck as being the same Ford truck he had seen at defendant's home. The detectives did not see who was driving the pick-up truck, and they did not have independent knowledge of the voice they heard talking to Taylor through the repeater. After the pick-up truck left the Food Lion, the detectives followed Taylor to a predetermined location, searched him, and recovered a substance that was later identified as 54.5 grams of cocaine. Upon returning to the police station, Detective Adkins ran the license plate of the pick-up truck and determined it belonged to a 1989 Ford pick-up truck registered to defendant's mother. The detectives did not attempt to arrest the driver of the pick-up truck.

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In May 2004, approximately fifteen months after the arranged cocaine purchase, Taylor entered into a plea agreement with the State that resolved numerous narcotics charges pending against him. In exchange for Taylor's guilty plea to one count of trafficking in cocaine by possession, the State agreed to dismiss nine other charges. At the time of defendant's trial in August 2004, Taylor had not yet been sentenced for the trafficking conviction.

At trial, defendant denied selling Taylor cocaine on 11 February 2003, or on any other date. Defendant testified he did not drive his pick-up truck on the night of 11 February 2003. Gary Pastor (Pastor), a licensed private investigator, testified he had seen defendant's truck and had viewed the surveillance video. Pastor testified that, in his opinion, defendant's truck was not the truck in the surveillance video. Pastor pointed out three differences between the two trucks: (1) the width of a stripe painted on the trucks, (2) the rims of the wheels, and (3) the truck in the video had a tailgate, which defendant's truck did not have. Danny Arnette, a mechanic who had worked on defendant's truck, corroborated Pastor's testimony that defendant's truck had no tailgate.

At the jury instruction conference, defendant requested that the trial court instruct the jury as to Taylor's testimony pursuant to North Carolina Pattern Jury Instruction 104.21, which addresses testimony of witnesses with immunity or quasi-immunity. The trial court denied defendant's request and instructed the jury pursuant to Pattern Jury Instructions 104.20 and 104.30, which address testimony of interested witnesses and informers. The jury returned verdicts of guilty on all three charges. The trial court sentenced defendant to three consecutive sentences. Defendant appeals.

[1] Defendant first argues the trial court erred by allowing the State to improperly cross-examine defendant about defendant's prior convictions and defendant's status as a drug dealer. Defendant concedes that the State's cross-examination began with permissible inquiry into defendant's prior felony convictions. However, defendant contends the State "crossed the line" into impermissible questioning during the following portion of its cross-examination of defendant:

Q [W]hat about December 8th of 1995, case 95-CRS-12911, possession of cocaine?

A . . . It wasn't a cocaine, it was a paraphernalia charge that I was on.

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Q But you were convicted of possession of cocaine.

A That's what they put down. That was my first case[.]

. . . .

Q You received a probationary sentence, right?

A Yes, sir.

Q And then you didn't follow through with that and actually went to prison.

A No. You're wrong. I did follow through with it.

Q Well, when was it that you went to Goldsboro Correctional Center?

A When they came to my house in Winterville and searched my house for three hours, three hours tops my house, four hours for my car. Then the officer said, "Well, can I go back in the house and check again? I forgot a place to check." That's when he comes out with 2.5 grams. But you must know the whole story. That's when they—

. . . .

A Then that's when they put the charge on me that I broke the probation. But ever since then—I was going to my probation officer. . . . I ain't never try to hide nothing from nobody.

Q So you think all these people were picking on you.

A I didn't say nothing about picking. You said picking, I didn't.

. . . .

Q Because they knew you were a drug dealer, didn't they?

A That's what they said I was.

Q Your record indicates that as well, doesn't it?

A My record—

Q Possession of cocaine; possession with intent to sell and deliver cocaine; maintaining a vehicle, dwelling or place for controlled substances—

A It's the same thing. It's one case. Y'all are making it sound like it's more than—several events. It wasn't several events, it was just one event.

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. . . .

Q Two events, a year apart.

A A year apart.

Q So I'm not putting them all in one, several events, it's two events.

A It's two events.

Defendant did not object at trial to the State's cross-examination. Rule 10(b)(1) of the North Carolina Rules of Appellate Procedure states, in part, that "[i]n order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion[.]" N.C.R. App. P. 10(b)(1). Where a defendant does not object at trial, this Court's review of the issue is limited to plain error. N.C.R. App. P. 10(c)(4). "To prevail under a plain error analysis, a defendant must establish not only that the trial court committed error, but that absent the error, the jury probably would have reached a different result." *State v. Jones*, 137 N.C. App. 221, 226, 527 S.E.2d 700, 704, *disc. review denied*, 352 N.C. 153, 544 S.E.2d 235 (2000).

On appeal, defendant argues the cross-examination was improper under N.C. Gen. Stat. § 8C-1, Rules 608, 609, and 404. Rule 608(b) provides that, for the purpose of attacking or supporting a witness's credibility, "specific instances" of the conduct of a witness may be inquired into on cross-examination of the witness, so long as those specific instances concern the witness's character for truthfulness or untruthfulness. N.C. Gen. Stat. § 8C-1, Rule 608(b) (2005). Defendant argues that the State's questioning of defendant about his status as a drug dealer was neither a reference to a specific act, nor probative of defendant's truthfulness. Defendant contends, therefore, that the questioning was error under Rule 608. We agree with defendant's characterization of the State's questioning, but disagree with his contention of error. We find that, by defendant's own admission, Rule 608 is inapplicable to the contested questioning because the questioning was neither a reference to a specific act, nor probative of defendant's truthfulness. Accordingly, we find no error under Rule 608.

Under Rule 609, "[f]or the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a felony . . . shall be admitted if elicited from the witness or established by public record during cross-examination or thereafter." N.C. Gen.

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Stat. § 8C-1, Rule 609(a) (2005). “The permissible scope of inquiry into prior convictions for impeachment purposes is restricted, however, to the 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). Our Supreme Court has emphasized that, under Rule 609, “it is important to remember that the only legitimate purpose for introducing evidence of past convictions is to *impeach the witness’s credibility*.” *State v. Ross*, 329 N.C. 108, 119, 405 S.E.2d 158, 165 (1991) (citation omitted).

Defendant argues that although the State was permitted under Rule 609(a) to inquire about the fact of defendant’s prior convictions, the State was not permitted to call defendant a drug dealer, suggest the police investigated defendant because he was a drug dealer, or argue that defendant’s prior record showed defendant was a drug dealer. However, our Supreme Court has held that “evidence which would otherwise be inadmissible [under Rule 609(a)] may be permissible on cross-examination ‘to correct inaccuracies or misleading omissions in the defendant’s testimony or to dispel favorable inferences arising therefrom.’” *State v. Braxton*, 352 N.C. 158, 193, 531 S.E.2d 428, 448 (2000) (quoting *Lynch*, 334 N.C. at 412, 432 S.E.2d at 354), *cert. denied*, 531 U.S. 1130, 148 L. Ed. 2d 797 (2001). We find this rule of law applicable to the present case. Here, defendant’s testimony on cross-examination that his 1995 conviction for possession of cocaine should have been for possession of paraphernalia tended to mislead the jury as to defendant’s prior record. Defendant’s unsolicited testimony about the search of his home seemed to imply that he was framed by the officers who recovered evidence leading to his probation revocation and second conviction. Considering defendant’s testimony about his prior record and the police search, we conclude the State did not exceed the scope of proper cross-examination under Rule 609(a) when, in response to defendant’s testimony, the State suggested the reason police officers searched defendant’s home was because they knew defendant had been convicted of selling drugs.

Defendant also argues the State’s cross-examination questions violated Rule 404. Rule 404(a) provides that “[e]vidence of a person’s character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion[.]” N.C. Gen. Stat. § 8C-1, Rule 404(a) (2005). Rule 404(b) continues:

(b) *Other crimes, wrongs, or acts.*—Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a per-

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son 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 has held that “such evidence must be excluded 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. Berry*, 356 N.C. 490, 505, 573 S.E.2d 132, 143 (2002).

In *State v. McBride*, our Court held that testimony that a defendant’s associates had reputations for drug use and drug dealing was inadmissible under Rule 404(a) because the only purpose of the testimony was to show that the associates acted in conformity with their reputations while with the defendant. *State v. McBride*, 173 N.C. App. 101, 104-05, 618 S.E.2d 754, 757, *disc. review denied*, 360 N.C. 179, 626 S.E.2d 835 (2005). However, our Court went on to hold that the erroneous admission of the testimony was harmless error. Our Court noted there was other admissible evidence that an associate, characterized as a drug user, had, in fact, used drugs, and there was “ample evidence” to convict the defendant without evidence of the associate’s reputation for drug sales. *Id.* at 105, 618 S.E.2d 758. In the present case, defendant testified on direct examination that in February 2003 he was on probation for “selling drugs.” Further, Detectives Adkins and Eubanks testified, without objection, that defendant was on probation “[f]or controlled substances” and for “selling cocaine.” In light of this uncontested evidence of defendant’s prior drug convictions, defendant has not shown that, assuming *arguendo* the cross-examination was improper under Rule 404(a), defendant was unduly prejudiced by the State’s characterization of him as a drug dealer.

Citing *State v. Wilkerson*, 356 N.C. 418, 571 S.E.2d 583 (2002), defendant argues the State’s cross-examination violated Rule 404(b). In *Wilkerson*, our Supreme Court adopted Judge Wynn’s dissenting opinion *per curiam* in reversing this Court’s decision. *Id.* However, *Wilkerson* is distinguishable from the present case. The 404(b) evidence at issue in *Wilkerson* was testimony of a witness, not testimony by the defendant. The defendant in *Wilkerson* did not testify at trial, and the State elicited the fact of the defendant’s prior convictions through testimony of a deputy clerk of the Rockingham County Superior Court. *State v. Wilkerson*, 148 N.C. App. 310, 320, 559 S.E.2d 5, 11 (2002). Because the defendant did not testify, the State could not

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use Rule 609 to elicit evidence of his prior convictions, and, Judge Wynn maintained, “the trial court committed prejudicial error in allowing [the clerk’s] testimony of [the] defendant’s prior convictions under Rule 404(b).” *Id.* at 319, 559 S.E.2d at 11. In the present case, defendant testified on his own behalf and, as we held above, the State’s cross-examination of defendant was permissible under Rule 609. *Cf. State v. McCoy*, 174 N.C. App. 105, 110-11, 620 S.E.2d 863, 868 (2005) (holding, under *Wilkerson*, that the trial court erred in admitting the bare fact of a “non-testifying defendant’s” prior conviction under Rule 404(b)). This assignment of error is overruled.

[2] Defendant next argues that, pursuant to Rule 608(b), the trial court should not have allowed the State to cross-examine defense witness Pastor about an alleged incident of sexual misconduct. On cross-examination, the State questioned Pastor as follows:

Q In fact, your employment with the Greenville Police Department didn’t end cordially, did it?

A Not necessarily.

Q In fact, you were under a sexual assault investigation, is that correct?

A No, sir. There was no sexual assault investigation.

Q All right. You were under investigation for some type of sexual advances, is that correct?

A That is correct.

Our Supreme Court in *State v. Shane*, 304 N.C. 643, 285 S.E.2d 813 (1982), held that the State’s cross-examination of a defendant about his resignation from a police department because of allegations of “sexual improprieties” was error because the State’s questions failed to identify a particular act of misconduct, as required by Rule 608(b). *Shane* at 651, 285 S.E.2d at 818. In the present case, as in *Shane*, the State impermissibly framed its questions in terms of allegations of prior misconduct, rather than asking about a specific act of misconduct. *See id.* at 651-52, 285 S.E.2d at 818-19. However, since defendant did not object to the cross-examination of Pastor at trial, our standard of review is plain error. *See* N.C.R. App. P. 10(b)(1),(c)(4). Even assuming *arguendo* that the cross-examination of Pastor should not have been permitted, defendant has failed to show that the jury probably would have reached a different result had the contested cross-examination not been admitted. Pastor was neither an eyewitness nor

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an expert. Pastor testified that, in his lay opinion, the truck in the surveillance video was not defendant's truck. This testimony was based on a comparison between photographs Pastor had recently taken of defendant's truck and the image of the truck appearing in the surveillance video. The jury could have made this comparison without Pastor's testimony. Given the insignificance of Pastor's testimony, any harm to Pastor's credibility caused by the cross-examination was also insignificant and did not have a probable impact on the jury's decision. We overrule this assignment of error.

[3] Defendant next argues the trial court erred when it did not instruct the jury regarding Taylor's testimony according to the pattern jury instruction for testimony of a witness with immunity or quasi-immunity. At the charge conference, defendant orally requested that the trial court instruct the jury pursuant to North Carolina Pattern Jury Instruction 104.21, Testimony of Witness with Immunity or Quasi-immunity. This instruction provides:

There is evidence which tends to show that a witness was testifying [under a grant of immunity][under an agreement with the prosecutor for a charge reduction in exchange for the testimony][under an agreement with the prosecutor for a recommendation for sentence concession in exchange for the testimony]. If you find that the witness testified in whole or in part for this reason you should examine this testimony with *great care and caution* in deciding whether or not to believe it[.]

N.C.P.I.—Crim. 104.21 (2005) (emphasis added). The trial court denied defendant's request to instruct the jury pursuant to this instruction. Instead, the trial court instructed the jury on testimony of interested witnesses and informers, as follows:

You may find that a witness is interested in the outcome of this trial. In deciding whether or not to believe such a witness, you may take that witness's interest into account.

You may also find from the evidence that a State's witness is interested in the outcome of this case because of his activities as an informer. If so, you should examine such testimony *with care and caution* in light of that interest.

(emphasis added).

A request for special instructions to a jury must be: "(1) In writing, (2) Entitled in the cause, and (3) Signed by counsel submitting

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them.” N.C. Gen. Stat. § 1-181(a) (2005). “Where a requested instruction is not submitted in writing and signed pursuant to [N.C.] G.S. [§] 1-181, it is within the discretion of the [trial] court to give or refuse such instruction.” *State v. Harris*, 67 N.C. App. 97, 102, 312 S.E.2d 541, 544, *disc. review denied*, 311 N.C. 307, 317 S.E.2d 905 (1984). Defendant does not contest that his request for a special instruction was made orally; accordingly, our standard of review is abuse of discretion. If we find the trial court abused its discretion, defendant is entitled to a new trial only if there is a reasonable probability that, had the abuse of discretion not occurred, a different result would have been reached at trial. *See* N.C. Gen. Stat. § 15A-1443(a) (2005). For the following reasons, we find no error warranting a new trial.

It is well settled that “‘if a request be made for a special instruction, which is correct in itself and supported by evidence, the court must give the instruction at least in substance.’” *State v. Lamb*, 321 N.C. 633, 644, 365 S.E.2d 600, 605-06 (1988) (quoting *State v. Hooker*, 243 N.C. 429, 431, 90 S.E.2d 690, 691 (1956)). In the present case, although the requested instruction was correct in law, it was not supported by the evidence. Contrary to defendant’s assertions on appeal, no evidence was presented at trial that Taylor testified under an agreement for a charge reduction or an agreement for a sentencing concession. Detective Adkins testified that three of Taylor’s charges were dismissed pursuant to a plea agreement with the State, but that there was no agreement between Detective Adkins and Taylor that resulted in the dismissals. Detective Adkins testified he advised Taylor that “it would look better if he . . . cooperated with the police, that way [Detective Adkins] could go to court and tell the judge that [Taylor] [had] done wrong but [also] had done things to try to help himself out[.]” At the time of defendant’s trial, Taylor had not yet been sentenced for his conviction, and there was no evidence of a sentencing concession. Taylor testified that no one made promises to him in exchange for his testimony. Given the lack of evidence that Taylor had been granted immunity or quasi-immunity for his testimony against defendant, defendant has not shown that the trial court abused its discretion in denying defendant’s requested special jury instruction.

Moreover, we are satisfied that the trial court’s instruction that the jury should review Taylor’s testimony “with care and caution,” “substantively reflected the concept defendant wished to convey to the jury.” *State v. Augustine*, 359 N.C. 709, 730, 616 S.E.2d 515, 530 (2005) (quotation omitted) (holding a jury instruction sufficient

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where the defendant orally requested a special instruction as to a witness's potential habitual felon status, but the trial court instead gave a pattern instruction on interested witnesses). In addition, defendant had the opportunity to cross-examine Taylor about any alleged agreement and to argue to the jury regarding the impact of any alleged agreement upon Taylor's credibility. *See State v. Williams*, 305 N.C. 656, 676-80, 292 S.E.2d 243, 256-58, *cert. denied*, 459 U.S. 1056, 74 L. Ed. 2d 622 (1982) (finding no error where, although the trial court did not instruct on immunity or quasi-immunity, the defendant cross-examined the accomplices and argued their interest to the jury), *abrogated in part on other grounds by State v. Jones*, 146 N.C. App. 394, 399, 553 S.E.2d 79, 82 (2001). Given that the jury had before it evidence of Taylor's arrest, the charges pending against Taylor, his cooperation with police, his plea agreement, and his pending sentencing hearing, defendant has failed to show there was a reasonable probability that the jurors would have reached a different result if the trial court had instructed them to view Taylor's testimony "with great care and caution" rather than "with care and caution." This assignment of error is overruled.

[4] Defendant's final argument is that he is entitled to a new sentencing hearing because the trial court based its sentence on defendant's exercise of his right to appeal a prior matter. Defendant's argument hinges on a comment made by the trial court at sentencing. Seven years prior to defendant's sentencing in the present case, defendant appeared before the same trial judge and received a probationary sentence for a drug conviction. As part of his probation, defendant was required to buy and wear shirts identifying him as a convicted drug dealer. That portion of defendant's sentence was vacated by this Court in 1998. *See State v. Mewborn*, 131 N.C. App. 495, 507 S.E.2d 906 (1998) (unpublished). In the present case, before sentencing defendant, the trial court stated: "Now, you know, I'm convinced—I'm not sure those judges are, but I'm convinced that had you [worn 'drug dealer' shirts] it would've helped you stay out of business and it would've saved you from spending more time in jail." Thereafter, the trial court sentenced defendant to three consecutive sentences of thirty-five to forty-two months for each of his three trafficking convictions.

Generally, consecutive sentences within the presumptive range are presumed regular and valid. *State v. Gantt*, 161 N.C. App. 265, 271, 588 S.E.2d 893, 897 (2003). It is also well settled that a defendant cannot be punished for exercising his statutory right to appeal. *See State*

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v. Stafford, 274 N.C. 519, 525, 164 S.E.2d 371, 375 (1968). In *State v. Boone*, 293 N.C. 702, 239 S.E.2d 459 (1977), our Supreme Court remanded for a new sentencing where it appeared from the record that the trial court stated in open court that it would give the defendant an active sentence because the defendant had pleaded not guilty. *Id.* at 712, 239 S.E.2d at 465. Our Supreme Court held that the trial court's statement "indicated that the sentence imposed was in part induced by [the] defendant's exercise of his constitutional right to plead not guilty and demand a trial by jury." *Id.* In *State v. Cannon*, 326 N.C. 37, 387 S.E.2d 450 (1990), our Supreme Court awarded a new trial to a defendant where the Court found it could "reasonably be inferred from the language of the trial [court] that the sentence was imposed at least in part because defendant . . . insisted on a trial by jury." *Id.* at 39, 387 S.E.2d at 451. The facts of *Cannon* were that, upon learning that the defendants demanded a jury trial, the trial court told counsel "in no uncertain terms" he would give them the maximum sentence if convicted. *Id.* at 38, 387 S.E.2d at 451.

In the present case, the trial court had statutory authority to impose consecutive sentences of the length given. N.C. Gen. Stat. § 90-95(h)(3) (2005) provides that a person convicted of trafficking in cocaine by possession, transportation, or sale of between 28 and 200 grams of cocaine shall be punished as a Class G felon and sentenced to a term of thirty-five to forty-two months. N.C. Gen. Stat. § 90-95(h)(6) (2005) specifies that "[s]entences imposed pursuant to this subsection shall run consecutively with and shall commence at the expiration of any sentence being served by the person sentenced hereunder." Moreover, in contrast to *Boone* and *Cannon*, the facts of the present case reveal no intent on the part of the trial court to punish defendant for exercising his statutory right. *See Cannon*, 326 N.C. at 39, 387 S.E.2d at 451; *Boone*, 293 N.C. at 712, 239 S.E.2d at 465. The trial court's comment may indicate disagreement with this Court's appellate decision, but we do not find it evidence of retaliation against defendant for having exercised his right to appeal the prior sentence. This assignment of error is overruled.

No prejudicial error.

Judges HUNTER and STEPHENS concur.

IN RE L.A.B.

[178 N.C. App. 295 (2006)]

IN THE MATTER OF L.A.B., MINOR CHILD

No. COA05-1316

(Filed 5 July 2006)

1. Appeal and Error; Termination of Parental Rights— preservation of issues—no argument in brief—failure to provide a safe home—findings supported

Assignments of error concerning findings that a parent lacked the ability or willingness to establish a safe home were deemed abandoned where her brief contained no arguments challenging the findings. Furthermore, the transient state of the mother's housing at all times since the child's birth, along with her untreated hygiene issues, her failure to adequately supervise the child during visitation, and her failure to complete parenting classes all supported the trial court's determination that the mother lacked the ability or willingness to establish a safe home.

2. Termination of Parental Rights— guardian ad litem for parent—not appointed at initial adjudication hearing

The trial court's failure to appoint a guardian ad litem for respondent mother for an initial adjudication hearing did not undermine the legitimacy of the trial court's findings with respect to the mother's ability or willingness to establish a safe home in a later termination of parental rights order.

3. Termination of Parental Rights— grounds—only one required—no consideration on appeal for further grounds

The trial court need only find that one statutory ground for termination of parental rights exists in order to proceed to the dispositional phase. Arguments on appeal regarding further grounds were not reached.

4. Termination of Parental Rights— best interest of child—polar star

The trial court did not abuse its discretion in a termination of parental rights case by concluding that termination was in the child's best interests. While there is sympathy for the mother's mental health issues, particularly in light of a nightmarish childhood, the best interest of the child is the polar star.

Appeal by respondent from order entered 19 April 2005 by Judge James T. Hill in Durham County District Court. Heard in the Court of Appeals 19 April 2006.

IN RE L.A.B.

[178 N.C. App. 295 (2006)]

Cathy L. Moore, Assistant County Attorney, for petitioner-appellee.

Richard Croutharmel for respondent-appellant.

Wendy C. Sotolongo for guardian ad litem-appellee.

GEER, Judge.

Respondent mother D.B. appeals from an order terminating her parental rights with respect to her child L.A.B. The bulk of respondent mother's appellate arguments are based on her contention that the trial court erred by failing to appoint a guardian *ad litem* ("GAL") to represent her at the time of the initial adjudication hearing, and instead appointing one only after the filing of the motion to terminate her parental rights. Respondent mother has not, however, properly preserved the issue for appellate review. In any event, the argument is foreclosed by *In re O.C.*, 171 N.C. App. 457, 615 S.E.2d 391, *disc. review denied*, 360 N.C. 64, 623 S.E.2d 587 (2005), and reflects a misunderstanding of the role of a GAL appointed for an adult parent.

Further, we hold that the trial court's findings of fact, which have not been materially contested on appeal, are sufficient to support the trial court's termination of parental rights under N.C. Gen. Stat. § 7B-1111(a)(9) (2005). Because respondent mother has failed to demonstrate any abuse of discretion by the trial court in determining that it was in L.A.B.'s best interest to terminate respondent mother's parental rights, we affirm the trial court's order.

Factual and Procedural History

Respondent mother gave birth to L.A.B. in August 2003.¹ When the child was four days old, he was taken into the custody of the Durham County Department of Social Services ("DSS"), and he has remained in foster care up to the present time. In October 2003, following a psychological assessment, respondent mother was diagnosed with post-traumatic stress disorder arising from sexual abuse that she had endured as a child, attention deficit/hyperactivity disorder, mood disorder, and personality disorder. On a Global Assessment of Functioning, respondent mother scored a rating of 43 on a scale of 1 to 100, indicating significant impairment in interpersonal, occupational, and community functioning. Based on this assessment, it was recommended that she attend individual therapy once a week, attend

1. The child's father, A.G., has signed relinquishment papers with respect to the child and is not a party to this appeal.

IN RE L.A.B.

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group therapy three times a week, complete a course of parenting classes, and take certain prescribed medication.

Previously, respondent mother's parental rights had been terminated with respect to an older child, K.C.B., on 30 June 1992. Reports in the record indicate that K.C.B. was born when respondent mother was 13 years old. The pregnancy resulted from sexual abuse of respondent mother by her stepfather.

L.A.B. was adjudicated dependent on 3 December 2003. The court found that respondent mother suffered from mental illness, did not maintain her own hygiene, did not maintain a clean home, and was unable to care for a newborn child. The court also found that she did not have any relatives who were able to care for the child. While custody of L.A.B. remained with DSS, respondent mother was allowed supervised visitation with him twice weekly. Because reunification of the child and his mother remained the eventual goal, the court ordered respondent mother to follow the recommendations of her psychological evaluation, to attend and complete a parenting program, and to maintain stable housing.

At a review hearing in March 2004, DSS reported that respondent mother had not complied with the December order or with her DSS case plan. Specifically, she had failed to keep appointments with the Durham Center for Mental Health Services, failed to appear at parenting classes, rejected DSS' attempts to assist her with finding housing, and was living in a homeless shelter. She had also failed to keep appointments with DSS to assist her with basic skills such as budgeting and housekeeping. Respondent mother's lack of personal hygiene and grooming also remained a problem, causing L.A.B. to become fussy during his visits with respondent mother and making it difficult for staff to sit in and monitor the visits due to the odor.

At a subsequent review hearing in August 2004, the court heard evidence that respondent mother continued to miss her recommended appointments, failed to follow through on referrals, and did not obtain or maintain stable housing. Based on this evidence, the child's permanent plan was changed from reunification to adoption. DSS filed a motion for termination of respondent mother's parental rights on 29 September 2004.

The motion alleged the following three statutory grounds for termination: (1) under N.C. Gen. Stat. § 7B-1111(a)(2), respondent mother willfully left the child in foster care for more than 12 months

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without showing that reasonable progress under the circumstances had been made in correcting those conditions which led to the removal of the juvenile; (2) under N.C. Gen. Stat. § 7B-1111(a)(6), respondent mother was incapable of providing for the proper care or supervision of the child, and there was a reasonable probability that such incapability would continue for the foreseeable future, due to substance abuse, mental retardation, mental illness, organic brain syndrome, or a similar cause or condition; and (3) under N.C. Gen. Stat. § 7B-1111(a)(9), respondent mother's parental rights had been terminated involuntarily with respect to another child, and respondent mother lacked the ability or willingness to establish a safe home. Following the filing of DSS' motion, on 22 November 2004, the trial court appointed a GAL for respondent mother.

On 19 April 2005, the Durham County District Court entered an order terminating respondent mother's parental rights on the grounds set forth in § 7B-1111(a)(2) and (a)(9). The court specifically declined to find that grounds existed under § 7B-1111(a)(6). Respondent mother filed a timely appeal.

A termination of parental rights proceeding involves two separate analytical phases: an adjudicatory stage and a dispositional stage. *In re Blackburn*, 142 N.C. App. 607, 610, 543 S.E.2d 906, 908 (2001). A different standard of review applies to each step.

At the adjudicatory stage, "the party petitioning for the termination must show by clear, cogent, and convincing evidence that grounds authorizing the termination of parental rights exist." *In re Young*, 346 N.C. 244, 247, 485 S.E.2d 612, 614 (1997). If the trial court concludes that the petitioner has proven grounds for termination, this Court must determine on appeal whether "the court's findings of fact are based upon clear, cogent and convincing evidence and [whether] the findings support the conclusions of law." *In re Allred*, 122 N.C. App. 561, 565, 471 S.E.2d 84, 86 (1996). Factual findings that are supported by the evidence are binding on appeal, even though there may be evidence to the contrary. *In re Williamson*, 91 N.C. App. 668, 674, 373 S.E.2d 317, 321 (1988). "Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal." *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991).

Under N.C. Gen. Stat. § 7B-1111(a), the trial court need only find that one statutory ground for termination exists in order to proceed

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to the dispositional phase and decide if termination is in the child's best interests. *In re Shermer*, 156 N.C. App. 281, 285, 576 S.E.2d 403, 407 (2003). If the trial court concludes that the petitioner has met its burden of proving at least one ground for termination, the trial court proceeds to the dispositional phase and decides whether termination is in the best interests of the child. N.C. Gen. Stat. § 7B-1110(a) (2005); *Blackburn*, 142 N.C. App. at 610, 543 S.E.2d at 908. This Court reviews that decision under an abuse of discretion standard. *In re Nesbitt*, 147 N.C. App. 349, 352, 555 S.E.2d 659, 662 (2001).

Adjudicatory Stage

[1] With respect to the adjudicatory stage, respondent mother challenges the trial court's determination that grounds existed to terminate her parental rights under § 7B-1111(a)(2) and (a)(9). We first address her arguments under § 7B-1111(a)(9). This subsection provides for termination of parental rights when "[t]he parental rights of the parent with respect to another child of the parent have been terminated involuntarily by a court of competent jurisdiction and the parent lacks the ability or willingness to establish a safe home." Termination under § 7B-1111(a)(9) thus necessitates findings regarding two separate elements: (1) involuntary termination of parental rights as to another child, and (2) inability or unwillingness to establish a safe home.

In this case, respondent mother concedes that she "does not question the sufficiency of the evidence establishing that a court of competent jurisdiction terminated her parental rights to a previous child." As to the second element, the trial court made the following pertinent findings of fact:

11. On December 3, 2003, March 2, 2004, April 27, 2004, August[] 16, 2004, and February 8, 2005, the mother was ordered to . . . maintain stable housing. The mother failed to comply with these orders.

12. With respect to compliance with psychological recommendations, the mother is not currently seeking treatment. The mother is aware of the recommendations for treatment, but she believes she needs no treatment for ADHD, and only possibly needs treatment for PTSD. Numerous appointments and referrals for individual therapy were set up by her case manager at the Durham Center, Cleriece Pressley, and Durham DSS. However, approximately half the time the mother missed these appoint-

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ments, and on those occasions when she did attend, failed to follow-up on subsequent appointments. Sometimes the mother would be out of contact with her case manager for one to two months. The mother took medication for only one month, then failed to meet with a doctor to get a refill of the prescription. This inability to keep appointments and follow-through on recommendations negatively impacted her treatment.

. . . .

14. With respect to parenting classes, the mother did complete one parenting program at the Health Department, but was recommended for more parenting instruction, which she did not complete. In addition, the mother received referrals from Durham DSS to two other parenting programs, but she completed neither.

15. With respect to stable housing, Durham DSS provided monthly financial assistance, and provided technical assistance on two occasions, to help [respondent mother] find and maintain stable housing. Nonetheless, the mother has lived in nine different locations since the child has been in foster care, including a rooming house, a homeless shelter, a Budget Inn, and the homes of friends.

16. The mother attends visitation with the child. However, she has not progressed beyond supervised visitation because of concerns about her not paying adequate attention to the child. She rarely asks questions about the child or his development.

17. The mother has significant hygiene problems. Community-based services with a para-professional were offered by her case manager at the Durham Center to address this issue, but the mother did not take advantage of these services.

Respondent mother specifically assigned error to each of these findings of fact, but her brief contains no argument challenging any of them. We, therefore, deem these assignments of error to be abandoned. N.C.R. App. P. 28(a) (“Questions raised by assignments of error in appeals from trial tribunals but not then presented and discussed in a party’s brief, are deemed abandoned.”)

We further hold that these findings of fact are sufficient to support the second element of § 7B-1111(a)(9). The transient state of respondent mother’s housing at all times since L.A.B.’s birth, along

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with her untreated hygiene issues, failure to adequately supervise L.A.B. during visitation, and failure to complete the classes necessary for her to learn how to effectively parent L.A.B., all support the trial court's determination that respondent mother lacks the ability or willingness to establish a safe home in which L.A.B. could spend his childhood. *See In re V.L.B.*, 168 N.C. App. 679, 683, 608 S.E.2d 787, 791 (undisputed finding of previous termination of parental rights with respect to another child, coupled with chronic and severe mental health problems on the part of both parents, supported the trial court's conclusion that grounds to terminate parental rights existed under § 7B-1111(a)(9)), *disc. review denied*, 359 N.C. 633, 614 S.E.2d 924 (2005).

[2] Respondent mother argues, however, that the trial court's decision to terminate her parental rights under § 7B-1111(a)(9) was tainted by the court's failure to appoint her a GAL until after the filing of the motion to terminate her parental rights. She states in her brief:

[T]he trial court's ability to assess Respondent-Mother's ability or willingness to establish a safe home was hindered by its failure to provide Respondent-Mother with a GAL to help her navigate the legal proceedings. Had the trial court helped her, through the appointment of a GAL, to get her mental health problems under control[,] the trial court would have had better evidence to know that Respondent-Mother was aware of what constituted a safe home for the child.

The facts that Respondent-Mother lived in several different places and failed to keep her social workers informed of her whereabouts may simply have been the result of her mental health infirmities. We cannot positively know since she was not appointed a GAL early on in her case and the DSS social workers assigned to her case were not necessarily looking out for her best interests.

We begin our analysis by observing that respondent mother's argument that the trial court erred by failing to appoint her a GAL earlier in the proceedings has not been properly preserved for appeal because the issue was not the subject of any of her assignments of error. *See* N.C.R. App. P. 10(a) ("[T]he scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal . . ."). We are, therefore, precluded from reviewing this issue. *See Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610

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S.E.2d 360, 361 (2005) (holding that appeal should be dismissed in part because the arguments in appellant's brief did not match the substance of the assignments of error).

Even assuming *arguendo* that the trial court committed error by its failure to appoint a GAL for respondent mother for the initial adjudication hearing, this Court has recently held that such an error does not "bear[] a legal relationship with the validity of the later order on termination." *O.C.*, 171 N.C. App. at 462, 615 S.E.2d at 394-95 (overruling parent's assignment of error, in an appeal from an order terminating parental rights, pertaining to the trial court's failure to appoint the parent a GAL at the initial adjudication hearing). Respondent mother urges this panel not to follow the holding of *O.C.* It is, however, well-established that "[w]here a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." *In re Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). We are, therefore, bound by our previous opinion in *O.C.*

We note additionally that respondent mother's argument reflects a fundamental misunderstanding of the role of a GAL with respect to an adult parent. Specifically, it appears respondent mother has confused the GAL with the more expansive "guardian of the person." Duties of the latter include making "provision for the ward's care, comfort, and maintenance," as well as for the ward's "training, education, employment, rehabilitation, or habilitation." N.C. Gen. Stat. § 35A-1241(a)(1) (2005). Guardians of the person are also charged with, among other things, arranging the ward's "place of abode." N.C. Gen. Stat. § 35A-1241(a)(2).

A court's appointment of a GAL, by contrast, "is for the purpose of protecting and ensuring, at the very least, the procedural due process rights of a parent who may be later adjudicated as 'incapable.'" *In re D.S.C.*, 168 N.C. App. 168, 171, 607 S.E.2d 43, 46 (2005). See also *In re Shepard*, 162 N.C. App. 215, 227, 591 S.E.2d 1, 9 (2004) (noting that the role of the GAL is as a "guardian of procedural due process for [the] parent, to assist in explaining and executing her rights"). In *Shepard*, this Court, although acknowledging that there "are no specifics as to the proper conduct of the GAL," *id.* at 228, 591 S.E.2d at 10, pointed to the GAL's role as a spokesperson for the parent and the GAL's duty to protect the parent's interests in the course of the legal proceedings, including working with the parent to under-

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stand the gravity of the proceedings. *Id.* at 228, 229-30, 591 S.E.2d at 9, 10. *See also In re J.A.A.*, 175 N.C. App. 66, 71, 623 S.E.2d 45, 48 (2005) (“The trial court should always keep in mind that the appointment of a guardian *ad litem* will divest the parent of their fundamental right to conduct his or her litigation according to their own judgment and inclination.”).

We have found no authority, and respondent mother has cited none, suggesting that a GAL serves as a type of social worker for the parent. Thus, even if the trial court had appointed a GAL at the adjudication stage, it would not have been that GAL’s duty to assist respondent mother with “get[ting] her mental health problems under control.” Accordingly, we cannot conceive of how the trial court’s failure to appoint a GAL for respondent mother for the initial adjudication hearing undermines the legitimacy of the trial court’s findings of fact with respect to N.C. Gen. Stat. § 7B-1111(a)(9).

[3] In sum, we hold that the trial court did not err in its conclusion that grounds to terminate respondent mother’s parental rights exist under § 7B-1111(a)(9). Further, because the trial court need only find that one statutory ground for termination exists in order to proceed to the dispositional phase and decide if termination is in the child’s best interests, *Shermer*, 156 N.C. App. at 285, 576 S.E.2d at 407, we need not reach respondent mother’s arguments regarding N.C. Gen. Stat. § 7B-1111(a)(2). *In re B.S.D.S.*, 163 N.C. App. 540, 546, 594 S.E.2d 89, 93-94 (2004) (“Having concluded that at least one ground for termination of parental rights existed, we need not address the additional ground of neglect found by the trial court.”).

Dispositional Stage

[4] We next turn to respondent mother’s argument that the trial court abused its discretion in concluding during the dispositional stage that the termination of respondent mother’s parental rights was in L.A.B.’s best interests. The trial court is not required to automatically terminate parental rights in every case in which statutory grounds exist. *Nesbitt*, 147 N.C. App. at 352, 555 S.E.2d at 662. Here, in arguing that the trial court abused its discretion, respondent mother first repeats her argument regarding the trial court’s failure to appoint a GAL earlier. Respondent mother also points to the bond she formed with the child during their twice weekly visits and contends that “DSS never let Respondent-Mother care for this child outside of the hospital he was born in” and “made up its mind when this child was born that he would not be raised by his mother.”

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While we are sympathetic to respondent mother's severe mental health issues, particularly in light of what was, by all accounts, a nightmarish childhood, we also stress that "[t]he best interest of the child[] is the polar star by which the discretion of the court is guided." *Bost v. Van Nortwick*, 117 N.C. App. 1, 8, 449 S.E.2d 911, 915 (1994) (internal quotation marks omitted), *appeal dismissed*, 340 N.C. 109, 458 S.E.2d 183 (1995). In this case, the record shows that respondent mother's psychological assessments repeatedly indicate an above average intellectual functioning coupled with mood and personality disorder issues that, in the words of one psychologist, "contribute to the likelihood of stormy interpersonal relationships which in turn lead to considerable distress." Other therapists whose opinions are included in the record have noted that respondent mother exhibits symptoms characteristic of untreated schizophrenia. The trial court's findings indicate that respondent mother has consistently refused to acknowledge that she suffers from these mental disorders and has shown poor compliance with recommendations for needed medication and therapy.

Perhaps most importantly, between the time of L.A.B.'s birth and the time her parental rights were terminated, respondent mother demonstrated no ability to establish a safe and stable home for L.A.B., despite repeated offers of funding and logistical assistance from DSS. In such circumstances, we cannot conclude that the trial court's disposition was manifestly unreasonable. *See Shipman v. Shipman*, 357 N.C. 471, 475, 586 S.E.2d 250, 254 (2003) (recognizing that parent's frequent moves and dependence on others for housing had a self-evident effect on child's welfare); *Flanders v. Gabriel*, 110 N.C. App. 438, 441, 429 S.E.2d 611, 613 (recognizing the importance of "a stable and continuous environment" to a child's best interests), *aff'd per curiam*, 335 N.C. 234, 436 S.E.2d 588 (1993). In light of these considerations, we conclude that the trial court did not abuse its discretion in finding that it was in L.A.B.'s best interests for respondent mother's parental rights to be terminated.

Affirmed.

Judges TYSON and JACKSON concur.

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CITY OF LUMBERTON, PLAINTIFF-APPELLEE v. UNITED STATES COLD STORAGE,
INC., DEFENDANT-APPELLANT

No. COA05-889

(Filed 5 July 2006)

1. Collateral Estoppel and Res Judicata—res judicata—sewer usage—federal action and subsequent state action

Defendant's claims regarding sewer usage are precluded by the doctrine of res judicata, because: (1) the issue of whether the City Code is applicable to and/or enforceable against defendant has already been litigated in a federal court action and thus constitutes a final decision; (2) a party may not file suit seeking relief for a wrong under one legal theory and then after that theory fails, seek relief for the same wrong under a different legal theory in a second legal proceeding; and (3) defendant failed to provide any explanation why it could not in the exercise of reasonable diligence have pursued this theory in the federal court action.

2. Utilities— city water—charges for well water use

The trial court's order granting summary judgment to plaintiff city regarding charges for well water use is reversed, and the case is remanded for a determination of the amount of city water consumed by defendant from 1 January 2002 to 30 June 2003 to be calculated based on the applicable rate for that time period, because no provision in the contract and no statutory authority, including Code § 23-2, existed enabling plaintiff to assess any fee for water defendant draws from its own well. The trial court's order permitting plaintiff to charge defendant for any well water subsequent to 30 June 2003 is also reversed.

3. Utilities— city water—historical usage billing method

The trial court's order granting summary judgment to plaintiff city regarding charges employing a historical usage billing method to well water use is reversed in part, because a portion of the judgment requiring defendant to pay \$208,067.02 was calculated from charges the Court of Appeals determined did not apply to defendant from well water use. The case is remanded for calculation of the utility fee less the amount of well water defendant used from February 1996 to January 2002.

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4. Utilities— city water—applicability of code sections

Although defendant contends plaintiff's application of Code § 23-22(d), as amended by Ordinance 1959, violates both N.C.G.S. § 160A-174 and the North Carolina Constitution, the Court of Appeals already determined that Code § 23-22(a) through (d) did not apply to defendant.

5. Utilities— tampering with public sanitary sewer system—sufficiency of findings of fact

The trial court's order granting summary judgment regarding defendant's alleged tampering with plaintiff's public sanitary sewer system in violation of Code § 23-1 is reversed, and the case is remanded for more findings of fact, because: (1) if findings of fact are necessary to resolve an issue of material fact, summary judgment is improper; and (2) although plaintiff's director of inspections inspected defendant's facility and determined the original feed connecting plaintiff's water to defendant's cooling tower had been disconnected, the director's deposition does not provide all the facts and requires findings of fact to determine the process for disconnecting the original feed.

Appeal by defendant from judgment and order entered 16 February 2005 by Judge Gary L. Locklear in Robeson County Superior Court. Heard in the Court of Appeals 21 February 2006.

Bailey & Dixon, L.L.P., by Charles F. McDarris for plaintiff-appellee.

The Brough Law Firm, by Robert E. Hornik, Jr. for defendant-appellant.

CALABRIA, Judge.

United States Cold Storage, Inc. ("defendant") appeals an order granting summary judgment for breach of contract and violation of the City of Lumberton's ("plaintiff") water and sewer regulations. We affirm in part and reverse and remand in part.

Defendant, a New Jersey corporation, owns one hundred and thirty two (132) acres of land in Robeson County, North Carolina, outside plaintiff's corporate limits where it built and operates a commercial cold storage/refrigeration facility for meat and produce. In June of 1987, the parties entered into a water and sanitary sewer service contract ("the contract"). Plaintiff agreed to install and provide

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water and sanitary sewer services to defendant. The plaintiff further agreed to reserve one hundred fifty thousand (150,000) gallons per day for defendant's water and sanitary sewer needs for a five-year period. Defendant agreed to pay plaintiff the applicable rate required by Chapter 23 of the City of Lumberton's Code of Ordinances ("Code") for water and sanitary sewer usage. The contract included a provision stating any modification of the contract must be in writing and signed by both parties.

Subsequent to the contract, disputes arose regarding the amount of water actually used versus the amount of water that evaporated during the refrigeration process, the applicable rates required by the Code, and the billing method used by the plaintiff. As a result of billing errors from 1988 to 1995, plaintiff's bill never included sewer service. The estimated total due was approximately \$250,000. As a result, the parties agreed new water meters were needed to measure the amount of water passing through the pipes to the cooling towers ("towers"). The meters were installed and the amount of water entering the towers was deducted from the total amount of water entering defendant's facility. The sewer rate was calculated on this reduced amount of water. This "negotiated" billing method proceeded from 1995 until 1999. In 1999, defendant drilled a well on its property to supply water to its towers. Afterwards, defendant applied for and was issued a permit. No well records exist from 1999 to December 2001.

On 4 February 2000, defendant filed suit in federal district court alleging, *inter alia*, plaintiff retaliated against defendant for exercising its First Amendment rights by threatening to discontinue water, sewer, and fire protection services and breached the contract by not calculating defendant's sewer bill in accordance with a "negotiated" billing method. Judge James C. Fox ("Judge Fox") determined plaintiff did not violate defendant's First Amendment rights and further, did not breach their "negotiated" billing method. The Fourth Circuit Court of Appeals affirmed.

On 1 February 2002, plaintiff filed a complaint in Robeson County Superior Court alleging breach of contract and violation of multiple Code ordinances. On 5 April 2002, defendant filed an answer asserting eight affirmative defenses as well as several counterclaims. On 3 May 2002, plaintiff filed a response to defendant's counterclaims. Both parties filed motions for summary judgment.

On 16 February 2005, the trial court granted plaintiff's motion for summary judgment and denied defendant's motion for summary judgment.

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ment. Specifically, the trial court ordered defendant to pay plaintiff the following: \$208,067.02 for unpaid utility fees from 1 February 1999 to 31 December 2001; \$51,888.96 for sewer usage and \$31,658.94 for water usage from 1 January 2002 to 30 June 2003 using the “water in/sewer out” formula. The court also ordered an undetermined amount for both water and sewer usage by applying a formula. Specifically, the court ordered “subsequent to June 30, 2003 and for all future billings” apply the water or sewer rate “to the cumulative total of the water supplied by [plaintiff] at the end of the monthly billing cycle plus [defendant’s] well water, as measured by the water meter reading maintained by [defendant].” Defendant appeals.

I. Summary Judgment Standard:

Summary judgment is appropriate and “shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” N.C. Gen. Stat. § 1A-1, Rule 56(c) (2005). “In deciding the motion, all inferences of fact . . . must be drawn against the movant and in favor of the party opposing the motion.” *Purvis v. Moses H. Cone Mem’l Hosp.*, 175 N.C. App. 474, 476, 624 S.E.2d 380, 383 (2006) (citations omitted). “The party moving for summary judgment has the burden of establishing the lack of any triable issue.” *Id.* The movant carries this burden “by proving that an essential element of the opposing party’s claim is nonexistent or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim.” *Zimmerman v. Hogg & Allen*, 286 N.C. 24, 29, 209 S.E.2d 795, 798 (1974). “A trial court’s ruling on a motion for summary judgment is reviewed *de novo* as the trial court rules only on questions of law.” *Coastal Plains Utils., Inc. v. New Hanover Cty.*, 166 N.C. App. 333, 340-41, 601 S.E.2d 915, 920 (2004).

II. Breach of Contract:

[1] Defendant first argues plaintiff breached the 1987 agreement and exceeded its statutory authority by charging defendant for water and sanitary sewer service plaintiff never furnished. Specifically, defendant contends plaintiff cannot charge defendant the following: any amount for water defendant draws from its well; tens of thousands of dollars for sewer service based upon a volume of water which evaporates rather than enters plaintiff’s sewer system; and, for water and sewer services based upon “historical use” rather than actual use.

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We first address plaintiff's assertion that the doctrine of *res judicata* in the federal court action prohibit defendant's appeal in state court. Plaintiff contends the issue of whether the City Code is applicable to and/or enforceable against defendant has already been litigated and thus constitutes a final decision. We agree to the extent applicable to defendant's claims regarding sewer usage.

"Under the doctrine of *res judicata*, a final judgment on the merits in a prior action in a court of competent jurisdiction precludes a second suit involving the *same claim* between the same parties or those in privity with them.'" *Nicholson v. Jackson Cty. Sch. Bd.*, 170 N.C. App. 650, 654, 614 S.E.2d 319, 322 (2005) (emphasis added) (quoting *Bockweg v. Anderson*, 333 N.C. 486, 491, 428 S.E.2d 157, 161 (1993)). *Res judicata* requires "(1) a final judgment on the merits in an earlier lawsuit; (2) an identity of the cause of action in the prior suit and the later suit; and (3) an identity of parties or their privies in both suits." *Id.* (citations omitted). "A final judgment [in a prior action] bars not only all matters actually determined or litigated in the prior proceeding, but also all relevant and material matters within the scope of the proceeding which the parties, in the exercise of reasonable diligence, could and should have brought forward for determination." *Skinner v. Quintiles Transnational Corp.*, 167 N.C. App. 478, 482, 606 S.E.2d 191, 193-94 (2004). This common law rule against claim-splitting is well-established in North Carolina and holds that "all damages incurred as the result of a single wrong must be recovered in one lawsuit." *Bockweg*, 333 N.C. at 492, 428 S.E.2d at 161 (emphasis omitted).

In short, a party may not file suit seeking relief for a wrong under one legal theory and, then, after that theory fails, seek relief for the same wrong under a different legal theory in a second legal proceeding. This is precisely what Cold Storage has done in this case with respect to the billing for sewage services.

Judge Fox's decision states: "In its second claim for relief, Cold Storage alleges that the City of Lumberton has breached its contract for water services by no longer calculating Cold Storage's sewer bill based on the methodology agreed to by the parties and employed by the City's utility billing department since September 1995." *United States Cold Storage, Inc. v. City of Lumberton*, 2001 WL 34149709 (E.D.N.C. August 29, 2001, at *15). Therefore, Cold Storage argued in federal court primarily that the parties had modified the terms of the 1987 Agreement; the rejection of this contention was the primary focus of Judge Fox's decision.

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In this lawsuit, Cold Storage again challenges the City's billing regarding sewage services under the same contract and for the same time period involved in the federal action, but instead relies upon a different legal theory: that the parties in the 1987 agreement did not intend to provide for a water in/sewer out billing method. Cold Storage has not, however, provided any explanation why it could not "in the exercise of reasonable diligence" have pursued this theory in the federal court action. *Skinner*, 167 N.C. App. at 482, 606 S.E.2d at 193. In fact, Judge Fox's quotation from Cold Storage's summary judgment brief filed in federal court suggests that Cold Storage at least asserted this theory: "Cold Storage states that it 'does not dispute what the language of the 1987 Agreement is' but '*does dispute what was intended by the parties in 1987*' and submits that Lumberton's conduct from 1988 when the Facility opened through March of 1999 reflected that Lumberton's intent during that period was other than what it now claims to be.'" *Cold Storage*, at *15-16 (emphasis added.)

We can perceive no reason why Cold Storage should be given two bites at the apple with respect to the question of sewage services billing. Judge Fox ultimately dismissed Cold Storage's claim for relief based on alleged improper billing for sewage services on the following basis: "Following seven years of no sewage bills at all and four years of a preferential billing arrangement in 1999, the City of Lumberton began billing Cold Storage according to the method set forth in the parties' written agreement which is the method required by city law. The City's decision to bill Cold Storage for sewage service according to the water in/sewer out method does not constitute a breach of the parties' agreement." *Id.* at *19. This final decision precludes Cold Storage's arguments in this case regarding the same billing. *Skinner*, 167 N.C. App. at 483, 606 S.E.2d at 194 (holding that a claim filed in state court was barred by *res judicata* arising from a judgment in federal court even though the plaintiff had "brought claims under two different statutes," when those "claims stem from the same relevant conduct by defendant"). Thus, we overrule all of defendant's assignments of error pertaining to sewer usage.

A. *Well-Water*:

[2] We next address whether plaintiff can charge defendant any amount for water defendant draws from its well. Defendant argues neither the contract nor any statutory command grants plaintiff such authority. We agree.

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“Statutory interpretation properly begins with an examination of the plain words of the statute.” *Three Guys Real Estate v. Harnett County*, 345 N.C. 468, 472, 480 S.E.2d 681, 683 (1997). Consequently, “[w]here the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must construe the statute using its plain meaning.” *Burgess v. Your House of Raleigh*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990); *see also In re Robinson*, 172 N.C. App. 272, 274, 615 S.E.2d 884, 886 (2005) (stating when statutory language is transparent “courts . . . are without power to interpolate, or superimpose, provisions and limitations not contained therein”). Consequently, the statute “must be given effect and its clear meaning may not be evaded by an administrative body or a court under the guise of construction.” *Utilities Comm. v. Edmisten*, 291 N.C. 451, 465, 232 S.E.2d 184, 192 (1977). Lastly, “[t]he canons of statutory construction apply to the interpretation of an ordinance. . . .” *Morris Communications Corp. v. Bd. of Adjust. of Gastonia*, 159 N.C. App. 598, 601, 583 S.E.2d 419, 421 (2003), *reh’g denied*, 358 N.C. 155, 592 S.E.2d 690 (2004) (quoting *Moore v. Bd. of Adjust. of City of Kinston*, 113 N.C. App. 181, 182, 437 S.E.2d 536, 537 (1993)).

N.C. Gen. Stat. § 160A-176 (2005) states “[a]ny city ordinance may be made effective on and to property and rights-of-way belonging to the city and located outside the corporate limits.” (emphasis added). Plaintiff’s Charter provides “[a]ny and all ordinances adopted by the city . . . shall apply to the territory within the corporate limits . . . and . . . shall also apply to the territory within one mile beyond said limits in every direction, unless in the ordinance it is otherwise provided.” Lumberton City Charter, art. II, § 8(b) (emphasis added). Code § 23-22(a) and (b) state, in pertinent part, “[a]n owner of a residence, place of business, or other improved property within this city shall connect his water system to the water system of the city[.]” (emphasis added). Further, Code § 23-22(d), as amended by Ordinance 1759, states “the provisions of this section shall allow the use of water from wells for industrial . . . purposes[.]” (emphasis added).

In the instant case and pursuant to the contract, defendant granted plaintiff certain easements and thus, through application of N.C. Gen. Stat. § 160A-176, *supra*, plaintiff’s Codes “may be made effective on rights of way,” provided the wording of the ordinance permits such an application. However, the plain meaning of Code § 23-22(a),(b), and (d) is that each provision is applicable and

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enforceable to a business as long as the business is within the city limits of Lumberton. Had plaintiff sought to extend the jurisdictional reach of these Code provisions beyond the city limits, simple language to that effect could have been written. Absent such necessary language, Code § 23-22(a), (b), and (d) are only enforceable against businesses located within the city limits of Lumberton. Defendant's facility is located outside the city limits and therefore, these Code provisions do not apply to defendant's business. Consequently, since no provision in the contract and moreover, no statutory authority, including Code § 23-22, exists enabling plaintiff to assess any fee for water defendant draws from its own well, we reverse that portion of the trial court's order charging defendant \$31,658.94 for the cumulative total of well and city water used from 1 January 2002 to 30 June 2003. Similarly, we reverse that part of the trial court's order permitting plaintiff to charge defendant for any well water subsequent to 30 June 2003. On remand, the trial court must determine the amount of city water consumed by defendant from 1 January 2002 to 30 June 2003 and calculate, based on the applicable rate for that time period, the correct amount defendant owes plaintiff.

B. *Historical Use:*

[3] We next address whether plaintiff may charge defendant for water usage under a "historical use" billing method from February 1999 to January 2002. Defendant argues neither the contract nor any statutory authority permits plaintiff to charge such an amount.

We already determined plaintiff cannot charge defendant for well water usage. Further, during this time period, a water usage charge could be assessed for any water furnished to defendant by plaintiff. The trial court found as fact that from 1 February 1999 to 31 December 2001 a portion of the \$208,067.02 unpaid utility fee due plaintiff was based upon "historical water usage." The trial court reasoned "[w]ith the absence of evidence from [defendant] to contradict that amount, the [c]ourt finds that method of calculation used by [plaintiff] is proper[.]" However, because this "historical water usage" billing method applied to both well and city water, and plaintiff incorrectly charged defendant for well water usage, a portion of the judgment for the \$208,067.02 utility fee based upon "historical use" is inaccurate. Therefore, we reverse that part of the judgment requiring defendant to pay \$208,067.02 since the total utility fee was calculated in part from charges this Court determined do not apply to the defendant. On remand, the trial court must calculate the utility fee

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less the amount of well water defendant used from February 1996 to January 2002.

III. *Ordinance 1759/Code 23-22(d)*:

[4] Defendant argues plaintiff's application of Code § 23-22(d), as amended by Ordinance 1759, violates both N.C. Gen. Stat. § 160A-174 and the North Carolina Constitution. Because we previously determined Code § 23-22(a) through (d) did not apply to defendant, we need not reach the merits of this question.

IV. *Other Violations of the Code*:

[5] Lastly, defendant argues there is no basis for determining any Code sections were violated. Specifically, defendant contends there is no evidence of tampering with plaintiff's public sanitary sewer system in violation of Code § 23-1 and plaintiff argues defendant "violated Code § 23-1 by illegally tampering with the water facilities and connections maintained by the City."

"It should be emphasized that in 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) (emphasis added). Thus, " '[i]f findings of fact are necessary to resolve an issue of material fact, summary judgment is improper.' " *Prior v. Pruett*, 143 N.C. App. 612, 617, 550 S.E.2d 166, 170 (2001)).

Code § 23-1 states "[n]o unauthorized person shall tamper with, obstruct, rearrange or interfere in any manner with any . . . water meter or water connection on which city water pressure is maintained, or with any sewer connection[.]" Jody Allen ("Allen"), plaintiff's Director of Inspections, inspected defendant's facility and determined the original feed connecting plaintiff's water to defendant's cooling tower had been disconnected. Allen's deposition, however, does not provide all the facts and requires findings of fact to determine the process for disconnecting the original feed. Genuine issues of material fact exist as to whether defendant violated Code § 23-1. Consequently, we remand to the trial court for more findings of fact regarding defendant's alleged breach of Code § 23-1. As to the other alleged Code violations, we previously determined Code § 23-22 was not applicable to defendant and thus, there can be no violation by defendant of its provisions. Further, we reviewed the record carefully and do not find defendant violated §§ 23-47, 67, or 82.

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V. Conclusion:

In sum, we reverse the trial court's order granting summary judgment to plaintiff regarding charges for well water use as well as employing a "historical usage" billing method to well water use, and defendant's violation of Code § 23-1. We affirm that part of the trial court order granting summary judgment to plaintiff regarding charges for water use (from the city only). Additionally, defendant's claims regarding sewer usage are precluded by the doctrine of *res judicata*.

Affirmed in part and reversed and remanded in part.

Judges MCGEE and GEER concur.

JOEL KENNEDY, PLAINTIFF-APPELLANT v. SPEEDWAY MOTORSPORTS INC., CHARLOTTE MOTOR SPEEDWAY, INC., DOING BUSINESS AS LOWE'S MOTOR SPEEDWAY OR LOWE'S HOME IMPROVEMENT WAREHOUSE MOTOR SPEEDWAY, AND CHARLOTTE MOTOR SPEEDWAY, LLC., DEFENDANTS-APPELLEES; DAVID AND DENISE PROSSER, PLAINTIFFS-APPELLANTS v. SPEEDWAY MOTORSPORTS INC., CHARLOTTE MOTOR SPEEDWAY, INC., DOING BUSINESS AS LOWE'S MOTOR SPEEDWAY OR LOWE'S HOME IMPROVEMENT WAREHOUSE MOTOR SPEEDWAY, AND CHARLOTTE MOTOR SPEEDWAY, LLC., DEFENDANTS-APPELLEES; MARK NASH, PLAINTIFF-APPELLANT v. SPEEDWAY MOTORSPORTS INC., CHARLOTTE MOTOR SPEEDWAY, INC., DOING BUSINESS AS LOWE'S MOTOR SPEEDWAY OR LOWE'S HOME IMPROVEMENT WAREHOUSE MOTOR SPEEDWAY, AND CHARLOTTE MOTOR SPEEDWAY, LLC., DEFENDANTS-APPELLEES; JERRY STEPHENS, PLAINTIFF-APPELLANT v. SPEEDWAY MOTORSPORTS INC., CHARLOTTE MOTOR SPEEDWAY, INC., DOING BUSINESS AS LOWE'S MOTOR SPEEDWAY OR LOWE'S HOME IMPROVEMENT WAREHOUSE MOTOR SPEEDWAY, AND CHARLOTTE MOTOR SPEEDWAY, LLC., DEFENDANTS-APPELLEES

No. COA05-1369

No. COA05-1370

No. COA05-1371

No. COA05-1372

(Filed 5 July 2006)

Statutes of Limitation and Repose— statute of repose—owner exception

The trial court did not err in a negligence and breach of contract action arising out of the collapse of a pedestrian walkway by dismissing plaintiffs' third-party beneficiary claims under N.C.G.S. § 1A-1, Rule 12(b)(6) based on the statute of repose

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under N.C.G.S. § 1-50(5) even though plaintiffs assert there is an applicable exception under N.C.G.S. § 1-50(a)(5)(d) where defendant as owner of the Speedway knew or ought reasonably to have known of the defect in the walkway, because: (1) plaintiffs cite no authority factually comparable to the present cases in which liability for acts and omissions is equated to imputation of knowledge as a matter of law; (2) defendant Speedway's liability for the acts and omissions of Tindall (the designer and manufacturer of the prestressed concrete double tees used to construct the walkway) do not necessarily translate into an imputation of Tindall's knowledge; and (3) defendant is not collaterally estopped from asserting the statute of repose since it is separate from the issue of liability, and defendant has not previously litigated the statute of repose.

Appeals by plaintiffs from orders entered 25 May 2005 by Judge W. Erwin Spainhour in Superior Court, Mecklenburg County. Heard in the Court of Appeals 12 April 2006. As the issues presented by plaintiffs' appeals involve common questions of law, we have consolidated the appeals for decision. N.C.R. App. P. 40.

Wilson & Iseman, LLP, by G. Gray Wilson, Kevin B. Cartledge and C. Shawn Christenbury, for plaintiffs-appellants.

Parker Poe Adams & Bernstein, L.L.P., by David N. Allen and Lori R. Keeton, for defendants-appellees.

McGEE, Judge.

A portion of a pedestrian walkway (walkway) at Lowe's Motor Speedway collapsed on 20 May 2000. As a result of the walkway collapse, approximately one hundred people filed suit against, *inter alios*, Speedway Motor Sports, Inc., Charlotte Motor Speedway, Inc., and Charlotte Motor Speedway, LLC (collectively the Speedway), and against Tindall Corporation (Tindall). *See In re Pedestrian Walkway Failure*, 173 N.C. App. 237, 240, 618 S.E.2d 819, 822 (2005). Pursuant to Rule 2.1 of the General Rules of Practice for the Superior and District Courts, each case related to the walkway collapse was designated an "exceptional" case, and each case was assigned to be heard by Superior Court Judge W. Erwin Spainhour (Judge Spainhour). *Id.*

Plaintiffs each filed suit on 20 May 2003 against the Speedway, Tindall, and Anti-Hydro International (Anti-Hydro). Thereafter, plaintiffs voluntarily dismissed their actions without prejudice in open

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court on or about 2 October 2003, and filed formal dismissals on 6 October 2003.

Plaintiffs re-filed their actions on 1 October 2004. Plaintiffs' new actions were filed against the Speedway only. Plaintiffs alleged that the Speedway was negligent and breached a contract of which plaintiffs were third-party beneficiaries. In its answers to plaintiffs' complaints, the Speedway pled "all applicable statutes of limitations and statutes of repose." The Speedway moved to dismiss plaintiffs' complaints pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6), asserting that plaintiffs' claims were time-barred. After receiving briefs and hearing arguments, Judge Spainhour granted the Speedway's motions to dismiss, finding that plaintiffs' claims were barred by the statute of repose set forth in N.C. Gen. Stat. § 1-50(5), and by the statute of limitations set forth in N.C. Gen. Stat. § 1-52. Plaintiffs appeal.

Standard of Review

In reviewing a trial court's dismissal pursuant to Rule 12(b)(6), the question before our Court is "whether, if all the plaintiff's allegations are taken as true, the plaintiff is entitled to recover under some legal theory." *Toomer v. Garrett*, 155 N.C. App. 462, 468, 574 S.E.2d 76, 83 (2002), *disc. review denied*, 357 N.C. 66, 579 S.E.2d 576 (2003). Rule 12(b)(6) "generally precludes dismissal except in those instances where the face of the complaint discloses some insurmountable bar to recovery." *Energy Investors Fund, L.P. v. Metric Constructors, Inc.*, 351 N.C. 331, 337, 525 S.E.2d 441, 445 (2000) (internal quotation and citation omitted).

Dismissal is proper, however, "when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim."

Newberne v. Department of Crime Control & Pub. Safety, 359 N.C. 782, 784, 618 S.E.2d 201, 204 (2005) (quoting *Wood v. Guilford Cty.*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002)).

Applying this standard of review, we treat the allegations in plaintiffs' complaints as true. These allegations include that in 1995, the Speedway caused the walkway to be constructed. The walkway extended from the Speedway parking lot to the Speedway race track, and crossed over U.S. Highway 29. The Speedway acted as general

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contractor for the construction of the 320-foot walkway, which was constructed of prestressed concrete poured over stretched steel cables. Since the walkway crossed over U.S. Highway 29, the Speedway entered into a “Right of Way Encroachment Agreement” (encroachment agreement) with the North Carolina Department of Transportation (DOT). In the encroachment agreement, the Speedway agreed to install and maintain the walkway in a safe and proper condition, and agreed that materials and workmanship for the walkway would conform to DOT’s standards and specifications. DOT entered into the encroachment agreement for the purpose of protecting pedestrians on the walkway, as well as persons and vehicles traveling underneath on U.S. Highway 29. Plaintiffs attended a NASCAR event at the Speedway on 20 May 2000. While plaintiffs were crossing the walkway to reach the parking lot after the event, an eighty-foot section of the walkway collapsed onto U.S. Highway 29, approximately twenty-five feet below. As a result of the collapse, plaintiffs suffered severe and painful injuries, some of which were permanent.

It is further uncontested that Tindall designed and manufactured the prestressed concrete double tees (tees) used to construct the walkway. Tindall added an Anti-Hydro product to the grout used to fill the “pushdown holes” in the tees. The Anti-Hydro product contained calcium chloride. Calcium chloride in the grout caused the steel in the tees to corrode and the walkway to collapse on 20 May 2000.

Prior rulings adopted by Judge Spainhour

The parties stipulated that “the verdict, and all other liability rulings, entered in the Arthur M. Taylor, et al. v. Speedway Motorsports, Inc., et al. action (01 CVS 12107, in the General Court of Justice, Superior Court Division, Mecklenburg County, North Carolina) [the Taylor case] were intended to be, and are adopted and applicable in [these cases].”

By order filed 8 September 2003, Judge Spainhour adopted all liability determinations rendered by the jury in the Taylor case. The following three liability determinations from the Taylor case are relevant to the present cases. In the Taylor case, the jury determined that the plaintiffs: (1) were not injured by the negligence of the Speedway, (2) were injured by the negligence of Tindall, and (3) as third-party beneficiaries of the encroachment agreement between the Speedway and DOT, were injured as a result of the Speedway’s breach of the encroachment agreement.

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In addition, prior to the Taylor case, Judge Spainhour adopted certain rulings and liability determinations from prior, consolidated walkway collapse cases, and made those rulings “binding on all similar claims, causes of action or defenses raised in any case which has been assigned to the undersigned Judge pursuant to Rule 2.1 . . . and is included within the consolidated litigation.” Because the Taylor case was assigned to Judge Spainhour pursuant to Rule 2.1 and included within the consolidated litigation, the following liability rulings were incorporated into the Taylor case and therefore are binding on the present cases: (1) Judge Spainhour’s ruling in case number 00-CVS-17519 (the Malesich case) that the Speedway was liable for the acts and omissions of Tindall with respect to the construction of the walkway; and (2) Judge Spainhour’s ruling as to the plaintiff’s Rule 56(d) motion in the Malesich case, in which Judge Spainhour established numerous and specific findings as to Tindall’s knowledge of the defect in the walkway resulting from the non-approved mixtures in the grout used to construct the walkway tees.

The parties in the present cases do not contest the applicability of the above rulings. On appeal, plaintiffs contest Judge Spainhour’s determination that plaintiffs’ claims against the Speedway were barred by the statute of repose and the statute of limitations. For the reasons below, we affirm Judge Spainhour’s orders dismissing plaintiffs’ claims.

Statute of Repose

The statute of repose applicable to actions for damages arising out of the defective or unsafe condition of an improvement to real property is set forth in N.C. Gen. Stat. § 1-50(5)(a) (2005), which provides:

No action to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property shall be brought more than six years from the later of the specific last act or omission of the defendant giving rise to the cause of action or substantial completion of the improvement.

Plaintiffs have the burden of showing that they brought their actions within six years of either (1) the substantial completion of the walkway or (2) the specific last act or omission of the Speedway giving rise to plaintiffs’ causes of action. *See Nolan v. Paramount Homes, Inc.*, 135 N.C. App. 73, 76, 518 S.E.2d 789, 791 (1999), *disc. review denied*, 351 N.C. 359, 542 S.E.2d 214 (2000).

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Plaintiffs contend that the Speedway cannot assert the six-year statute of repose because of the exception set forth in N.C. Gen. Stat. § 1-50(a)(5)(d) (2005), which provides:

The limitation prescribed by this subdivision shall not be asserted as a defense by any person in actual possession or control, as owner, tenant or otherwise, of the improvement at the time the defective or unsafe condition constitutes the proximate cause of the injury or death for which it is proposed to bring an action, in the event such person in actual possession or control either *knew, or ought reasonably to have known, of the defective or unsafe condition.*

(emphasis added). Plaintiffs argue the Speedway, as owner of the walkway, cannot assert the statute of repose as a defense because the Speedway knew, or ought reasonably to have known, of the defect in the walkway.

Plaintiffs argue that the Speedway is charged with any and all knowledge Tindall may have possessed with respect to the construction of the walkway because of the Speedway's judicially-determined liability for the acts and omissions of Tindall. However, plaintiffs offer no persuasive authority for the assertion that Tindall's knowledge was imputed to the Speedway as a matter of law. Plaintiffs cite cases that are factually dissimilar from the present cases, namely because the cited cases pertain to inherently dangerous activities. Plaintiffs cite *Woodson v. Rowland*, 329 N.C. 330, 352, 407 S.E.2d 222, 235 (1991), in which our Supreme Court addressed whether trenching was inherently dangerous; *Dockery v. Shows*, 264 N.C. 406, 142 S.E.2d 29 (1965), in which our Supreme Court held that the owner of an amusement park had a duty of reasonable care to a patron who was injured on a ride that was inherently dangerous; and *Evans v. Rockingham Homes, Inc.*, 220 N.C. 253, 17 S.E.2d 125 (1941), in which our Supreme Court held that maintaining an open trench in a heavily populated area was an inherently dangerous activity for which the landowner/employer could be held liable for the injuries of a child who fell into a trench negligently left open by the independent contractor. Plaintiffs cite no authority factually comparable to the present cases in which liability for acts and omissions is equated to imputation of knowledge as a matter of law.

Moreover, Judge Spainhour's Rule 56(d) findings are quite specific with respect to knowledge. Judge Spainhour specifically found that: (1) Tindall knew it was required to submit a written list of ma-

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terials to be used in the tees to DOT for review and approval, but did not include the Anti-Hydro product in its written list; (2) Tindall knew any product to be used in the manufacture of the tees was required to be on DOT's approved list of admixtures, but did not possess a copy of the current DOT list; and (3) Tindall employees knew that the use of a product containing calcium chloride in prestressed concrete structures such as the tees was prohibited by applicable industry standards. Judge Spainhour made no findings as to any knowledge on the part of the Speedway. This omission is significant because Judge Spainhour presided over numerous cases arising out of the same incident and was therefore intimately aware of the effect of the findings and determinations in each of his orders.

We draw a distinction between the Speedway's liability for the acts and omissions of Tindall and an imputation of Tindall's knowledge. This distinction is illustrated by Judge Spainhour's careful crafting of the discrete issues involved in the consolidated cases. First, in the 2002 Malesich case, Judge Spainhour made detailed findings concerning Tindall's acts, omissions, and knowledge regarding the construction of the walkway. In the same case, Judge Spainhour then determined that the Speedway was liable to the plaintiffs for the acts and omissions of Tindall, based on a theory of nondelegable duty. Next, in the 2003 Taylor case, Judge Spainhour presented the remaining issues of liability to the jury in terms of three separate issues: (1) the Speedway's negligence toward the plaintiffs; (2) Tindall's negligence toward the plaintiffs; and (3) the Speedway's breach of the encroachment agreement, for which the plaintiffs were third-party beneficiaries. The jury determined that the Speedway, which had a nondelegable duty to the plaintiffs, did not injure the plaintiffs by any negligent acts. Instead, the jury found that Tindall's negligence injured the plaintiffs, and that the Speedway's breach of the encroachment agreement injured the plaintiffs, who were third-party beneficiaries of the agreement.

Absent any persuasive authority to the contrary, we do not agree with plaintiffs that the Speedway's liability for the acts and omissions of Tindall necessarily translates into an imputation of Tindall's knowledge. We overrule this assignment of error.

Plaintiffs also argue the Speedway is collaterally estopped from asserting the statute of repose. Plaintiffs base this assertion on Judge Spainhour's order adopting all liability determinations rendered in the Taylor case. In his order, Judge Spainhour ruled that all parties to lit-

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igation arising from the walkway collapse were collaterally estopped from relitigating the issue of liability. Plaintiffs argue that by asserting the statute of repose, the Speedway is attempting to circumvent Judge Spainhour's order. We disagree.

A statute of repose is a condition precedent to an action and must be specially pled by a plaintiff. *Tipton & Young Construction Co. v. Blue Ridge Structure Co.*, 116 N.C. App. 115, 188, 446 S.E.2d 603, 605 (1994), *aff'd*, 340 N.C. 257, 456 S.E.2d 308 (1995). As a condition precedent, a statute of repose

establishes a time period in which suit must be brought in order for the cause of action to be recognized. If the action is not brought within the specified period, the plaintiff literally has *no* cause of action. The harm that has been done is *damnum absque injuria*—a wrong for which the law affords no redress.

Boudreau v. Baughman, 322 N.C. 331, 340-41, 368 S.E.2d 849, 857 (1988) (internal quotation omitted). Therefore, the issue of liability, on the one hand, and the issue of a statute of repose, on the other hand, are two separate and distinct legal doctrines. The Speedway has not previously litigated the issue of the statute of repose, and thus is not collaterally estopped from asserting the statute of repose. This assignment of error is overruled.

For the foregoing reasons, we hold Judge Spainhour did not err in determining that the statute of repose bars plaintiffs' claims. Because the statute of repose bars plaintiffs' claims, we do not address plaintiffs' remaining assignments of error regarding the applicability of the statute of limitations. *See, e.g., Wood v. BD&A Constr., L.L.C.*, 166 N.C. App. 216, 222, 601 S.E.2d 311, 315-16 (2004); *Bryant v. Don Galloway Homes, Inc.*, 147 N.C. App. 655, 660, 556 S.E.2d 597, 602 (2001).

Affirmed.

Judges McCULLOUGH and STEPHENS concur.

IN RE K.D.

[178 N.C. App. 322 (2006)]

IN THE MATTER OF: K.D., MINOR CHILD

No. COA05-1027

(Filed 5 July 2006)

1. Appeal and Error— preservation of issues—psychologist-patient privilege—failure to object on basis of privilege—waiver

Although respondent mother contends the trial court violated her psychologist-patient privilege in a child neglect case by considering evidence in the form of a letter and testimony of a psychologist, she failed to preserve this question for appellate review, because: (1) although respondent objected to various statements that the psychologist made during the hearing and to admission of the letter from the psychologist to respondent mother's social worker, she did not object on the basis of privilege but instead based on hearsay and expert qualifications; (2) respondent's failure to object to the psychologist's testimony on the basis of privilege amounted to a waiver of her right to claim the psychologist-client privilege on appeal; (3) the psychologist-patient privilege does not operate to exclude evidence regarding the abuse or neglect of a child; and (4) N.C.G.S. § 8-53.3 permits the trial judge to compel disclosure of otherwise privileged information if in his or her opinion disclosure is necessary to a proper administration of justice.

2. Child Abuse and Neglect— neglect—sufficiency of evidence

The trial court did not err by adjudicating a minor child as neglected, because: (1) although respondent mother assigned error to the adjudication order's first finding of fact, her brief failed to contain any argument challenging the first finding of fact which is thus deemed abandoned under N.C. R. App. P. 28(a); (2) as for the remaining assignments of error in the adjudication order, a single assignment of error generally challenging the sufficiency of evidence to support numerous findings of fact is broadside and ineffective; and (3) respondent's struggles with her parenting skills, domestic violence, and anger management, as well as her unstable housing situation, have the potential to significantly impact her ability to provide proper care, supervision, or discipline for the minor child.

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[178 N.C. App. 322 (2006)]

3. Child Abuse and Neglect—dependency—sufficiency of evidence—alternative child care arrangement

The trial court erred in a child abuse case by adjudicating the minor child as dependent, and the case is remanded for further findings as to whether the mother lacks an appropriate alternative child care arrangement for the child, where the mother had voluntarily placed the child with an aunt. N.C.G.S. § 7B-101(9).

Appeal by respondent mother from orders entered 1 March 2005 by Judge Resson Faircloth in Johnston County District Court. Heard in the Court of Appeals 7 March 2006.

Jennifer S. O'Connor for petitioner-appellee.

Leslie C. Rawls for respondent-appellant.

James D. Johnson, Jr. for guardian ad litem.

GEER, Judge.

Respondent mother appeals from the trial court's orders adjudicating her son K.D. to be neglected and dependent, placing him with an aunt, and relieving the Johnston County Department of Social Services ("DSS") of further efforts towards reunification. On appeal, respondent mother primarily argues that the trial court violated her psychologist-patient privilege by considering evidence from her psychologist. We hold that respondent mother waived any privilege, and, in any event, the evidence at issue was admissible since this proceeding involves the neglect of a child. With respect to respondent mother's challenge to the trial court's adjudication order, we (1) affirm the adjudication of K.D. as neglected because the trial court's unchallenged findings of fact support its conclusions of law on neglect, but (2) reverse and remand as to the adjudication of K.D. as dependent because the trial court failed to address whether respondent mother was able to provide a suitable alternative childcare arrangement within the meaning of N.C. Gen. Stat. § 7B-101(9) (2005).

Factual and Procedural History

Respondent mother gave birth to her son K.D. in 2002. The identity of the child's father is unknown. On 9 March 2004, the police brought respondent mother to the emergency room of the Johnston County Mental Health Center ("JCMHC"). While there, she was assessed by staff psychologist Cynthia Koempel, who found that she was showing verbal aggressiveness toward those around her and was

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threatening the police officer who had escorted her to the emergency room. Respondent mother was involuntarily committed to Holly Hill Hospital later that day because she was threatening to kill herself and was sleeping with knives under her pillow.

Respondent mother was discharged from Holly Hill on 17 March 2004, with a diagnosis of adjustment disorder with mixed depression and anxiety. Holly Hill recommended that she continue to receive treatment at JCMHC. Following a subsequent intake assessment at JCMHC, respondent mother was further diagnosed with intermittent explosive disorder, meaning that her inability to resist her aggressive impulses was liable to result in serious assaultive acts or destruction of property without warning. The JCMHC assessment also indicated that she had moderate mental retardation, with school records estimating her IQ to be in the 40 to 50 range. Following her intake assessment, respondent mother did not attend any of her subsequent recommended appointments at JCMHC. Although she initially claimed transportation problems, she later admitted that her social worker had offered to provide transportation to these and other appointments.

DSS began working with respondent mother in April 2004 when she was 17 years old and living with her mother, J.T. On 6 April 2004, DSS substantiated respondent mother's neglect of K.D. based on respondent mother's history of leaving K.D. at home without ensuring appropriate supervision or telling her family where she was going. After DSS became involved, respondent mother voluntarily placed K.D. with J.T. and moved in with her boyfriend.

Following a physical altercation between respondent mother and the boyfriend, in which the boyfriend sustained a large knife wound, respondent mother began living with other relatives, including, at various times, her maternal grandmother and her sister. Meanwhile, DSS substantiated neglect of K.D. by his grandmother J.T., after DSS became aware he was not being supplied with basic needs, such as adequate clothing, shoes, and hygiene, and after J.T. twice arrived in an intoxicated state to pick K.D. up from daycare. K.D. was subsequently placed back with respondent mother, who was then living with her sister.

On 5 May 2004 and 23 July 2004, DSS entered into a case plan with respondent mother in which she agreed to begin treatment at JCMHC; attend parenting classes; ensure proper supervision of K.D. at all times; meet K.D.'s basic food, clothing, and hygiene needs; and take

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K.D. to all necessary medical appointments. Because of respondent mother's mental disabilities and retardation, respondent mother's social worker provided her with a laminated list of emergency phone numbers and an appointment chart.

Respondent mother failed to comply with most of the requirements of the initial case plan, as well as a follow-up case plan. Specifically, she failed to attend mental health appointments at JCMHC, failed to attend scheduled parenting classes at DSS, and did not maintain stable housing. On the other hand, the court also found that during periods of time when respondent mother was living with relatives, she was able to make sure that K.D.'s basic needs were met and took him to all his medical appointments. The court found, however, that even though the child's basic needs were at times being met, respondent mother was not able to meet her own basic needs.

The court also found that respondent mother "does not recognize the inappropriateness of her relationship with her boyfriend that involves physical violence." A DSS worker described a meeting with respondent mother in which they discussed the possibility of respondent mother attending a support group for women who are victims of domestic violence. Respondent mother asked what domestic violence was, and when it was explained to her, she responded, "What's wrong with that?" Although the social worker attempted to explain the effects of domestic violence on young children, respondent mother repeated that she did not feel there was anything wrong with it.

At the end of August 2004, respondent mother agreed to place K.D. with an aunt. K.D.'s daycare reported that following his placement with the aunt, K.D. became "a completely different child" and began talking, eating better, and working towards potty training. K.D. has remained with the aunt.

In November 2004, DSS filed a petition alleging that K.D. was a neglected and dependent child. The case was heard on 5 January 2005, at which time respondent mother was about three months pregnant with a second child. After hearing all the evidence, the trial court found that K.D. was neglected and dependent. K.D.'s dispositional hearing was held on the same date, and at its conclusion, the court gave custody of K.D. to the aunt and relieved DSS of further efforts towards reunification with respondent mother. The adjudication and dispositional orders were entered on 1 March 2005. Respondent mother filed a timely notice of appeal.

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Psychologist-Patient Privilege

[1] Respondent mother contends that the trial court violated her psychologist-patient privilege by considering evidence—in the form of a letter and testimony—from Cynthia Koempel of JCMHC. The patient has the burden of establishing the existence of a privilege and of objecting to the disclosure of such privileged information. *Adams v. Lovette*, 105 N.C. App. 23, 28, 411 S.E.2d 620, 624, *aff'd per curiam*, 332 N.C. 659, 422 S.E.2d 575 (1992).

Respondent mother has not preserved this question for appellate review. Under N.C.R. App. P. 10(b)(1), “[i]n order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context.” Although respondent mother objected to various statements that Koempel made during the hearing and to admission of the letter from Koempel to respondent mother’s social worker, she did not object on the basis of privilege. Instead, her objections were based on hearsay and expert qualifications. A party may not assert at trial one basis for objection to the admission of evidence, but then rely upon a different basis on appeal. *See State v. Benson*, 323 N.C. 318, 322, 372 S.E.2d 517, 519 (1988) (“[Appellant] may not swap horses after trial in order to obtain a thoroughbred upon appeal.”).

Even apart from the Rules of Appellate Procedure, it is well-established that a failure to object to requested disclosure of privileged information constitutes a waiver of that privilege. *Adams*, 105 N.C. App. at 28, 411 S.E.2d at 624. In *Adams*, this Court held that “the defendant impliedly waived his alleged [physician-patient] privilege because he objected to the request, not on the grounds of privilege, but on the grounds of relevance.” *Id.* at 29, 411 S.E.2d at 624. Accordingly, here, respondent mother’s failure to object to Koempel’s testimony on the basis of privilege amounted to a waiver of her right to claim the psychologist-client privilege on appeal.

Finally, our General Assembly has stated repeatedly that the psychologist-patient privilege does not operate to exclude evidence regarding the abuse or neglect of a child. N.C. Gen. Stat. § 7B-310 (2005) (“No privilege, except the attorney-client privilege, shall be grounds for excluding evidence of abuse, neglect, or dependency in any judicial proceeding (civil, criminal, or juvenile) in which a juvenile’s abuse, neglect, or dependency is in issue”); N.C. Gen. Stat.

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§ 8-53.3 (2005) (“Notwithstanding the provisions of this section, the psychologist-client or patient privilege shall not be grounds for excluding evidence regarding the abuse or neglect of a child . . .”). See also *State v. Knight*, 93 N.C. App. 460, 466-67, 378 S.E.2d 424, 427 (under § 8-53.3, defendant’s statement to psychologist that he had been seduced by underage stepdaughter was not privileged because it related to abuse or neglect of child), *disc. review denied*, 325 N.C. 230, 381 S.E.2d 789 (1989).

Further, N.C. Gen. Stat. § 8-53.3 permits the trial judge to compel disclosure of otherwise privileged information “if in his or her opinion disclosure is necessary to a proper administration of justice.” No explicit finding is required since such a finding is implicit in the admission of the evidence. *State v. Williams*, 350 N.C. 1, 21, 510 S.E.2d 626, 640, *cert. denied*, 528 U.S. 880, 145 L. Ed. 2d 162, 120 S. Ct. 193 (1999). This assignment of error is, therefore, overruled.

Neglect

[2] Respondent mother next argues that the trial court erred by adjudicating K.D. a neglected child. In a non-jury adjudication of abuse, neglect, and dependency, “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). This Court reviews the trial court’s conclusions of law to determine whether they are supported by the findings of fact. *Id.*

Respondent mother specifically assigns error only to the adjudication order’s first and second findings of fact. Her brief, however, contains no arguments challenging the first finding of fact. We, therefore, deem that assignment of error abandoned. N.C.R. App. P. 28(a) (“Questions raised by assignments of error in appeals from trial tribunals but not then presented and discussed in a party’s brief, are deemed abandoned.”). As to the second finding of fact, the only argument in respondent mother’s brief that addresses this finding pertains to the admissibility of evidence from Koempel—an argument we have already rejected.

As for the remaining findings of fact in the adjudication order, respondent mother employs a single assignment of error to challenge all of them generally. It is well-established that “[a] single assignment generally challenging the sufficiency of the evidence to support numerous findings of fact . . . is broadside and ineffective.” *Wade v. Wade*, 72 N.C. App. 372, 375-76, 325 S.E.2d 260, 266, *disc. review*

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denied, 313 N.C. 612, 330 S.E.2d 616 (1985). Respondent mother's broadside assignment of error is, therefore, inadequate to preserve for review the sufficiency of the evidence to support the findings of fact. Accordingly, our review as to whether K.D. was correctly adjudicated to be neglected is limited to determining whether the trial court's findings of fact support its conclusions of law.

The Juvenile Code defines a neglected juvenile as:

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

N.C. Gen. Stat. § 7B-101(15). With respect to adjudications of neglect, this Court has explained that "the decision of the trial court must of necessity be predictive in nature, as the trial court must assess whether there is a substantial risk of future abuse or neglect of a child based on the historical facts of the case." *In re McLean*, 135 N.C. App. 387, 396, 521 S.E.2d 121, 127 (1999).

In this case, the trial court found that respondent mother had a history of leaving K.D. without ensuring he was properly supervised, without advising her family that she was leaving, and without making arrangements for his care. The court further found that (1) despite a history of mental illness, which resulted in hospitalization, respondent mother failed to follow through with needed mental health services; (2) respondent mother, who is mentally retarded, failed to attend parenting classes; (3) respondent mother had not attended domestic violence or anger management classes as suggested by DSS; and (4) respondent mother does not recognize the inappropriateness of physical violence in her relationships. Based on these specific findings, the court entered an ultimate finding that K.D. was neglected because he "is at substantial risk of harm of physical and emotional care as the mother has failed to address the protective issues identified during her involvement with the JCDSS including, but not limited to h[is] mother's mental health issues, domestic violence issues, anger management issues and parenting issues and lack of stable housing."

Respondent mother argues on appeal that these aspects of her life, cited by the trial court as reasons why her son was neglected, all

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pertain to her own functioning and not to the care provided to the child. We disagree. Respondent mother's struggles with parenting skills, domestic violence, and anger management, as well as her unstable housing situation, have the potential to significantly impact her ability to provide "proper care, supervision, or discipline" for K.D. See *In re M.J.G.*, 168 N.C. App. 638, 647, 608 S.E.2d 813, 818 (2005) (trial court properly adjudicated juvenile neglected based in part on mother's history of domestic violence, unstable housing, and failure to utilize services offered to her by DSS). We therefore conclude that the trial court properly adjudicated K.D. to be a neglected juvenile.

Dependency

[3] Respondent mother also argues that the trial court erred in adjudicating K.D. a dependent child. A dependent juvenile is one who is:

in need of assistance or placement because this juvenile has no parent, guardian, or custodian responsible for the juvenile's care or supervision or whose parent, guardian, or custodian is unable to provide for the care or supervision *and lacks an appropriate alternative child care arrangement.*

N.C. Gen. Stat. § 7B-101(9) (emphasis added). Here, the trial court found that K.D. was dependent because "the mother is not able to provide proper care and supervision for the juvenile." On appeal, respondent mother contends that she does not lack an appropriate alternative child care arrangement since she voluntarily placed K.D. with her aunt.

This Court has previously held that a trial court failed to make sufficient findings to support an adjudication of dependency when a relative had agreed to take custody of the child in order to prevent him from going into foster care. *In re P.M.*, 169 N.C. App. 423, 427-28, 610 S.E.2d 403, 406 (2005). In *P.M.*, the Court noted that, although the trial court entered findings that the mother was unable to provide for the child's care and supervision, the trial court "never addressed the second prong of the dependency definition. The trial court made no finding that respondent lacked 'an appropriate alternative child care arrangement.'" *Id.* at 428, 610 S.E.2d at 407. We are faced with the same situation here: the trial court's language in the adjudication order tracks the first prong of the definition of dependency, but ignores the second. We, therefore, reverse as to K.D.'s dependency, and remand to the trial court for further findings as to whether K.D. lacks "an appropriate alternative child care arrangement."

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Affirmed in part, reversed in part, and remanded.

Judges McGEE and CALABRIA concur.

STATE OF NORTH CAROLINA v. WESLEY TATE PICKARD, DEFENDANT

No. COA05-1414

(Filed 5 July 2006)

Search and Seizure—warrant—information not stale—items still useful to defendant—dates of sexual offenses against children

An affidavit is sufficient to support a search warrant if it establishes reasonable cause to believe that the proposed search will probably 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 affidavit here, supporting the warrant to search the house of a man eventually convicted of multiple sexual offenses against children, was not invalid as containing stale information.

Appeal by Defendant from judgments entered 27 April 2005 by Judge A. Leon Stanback in Superior Court, Alamance County. Heard in the Court of Appeals 6 June 2006.

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

Anne Bleyman for defendant-appellant.

WYNN, Judge.

Under North Carolina law, warrants must be based on probable cause which in turn must be supported by an affidavit “particularly setting forth the facts and circumstances establishing probable cause to believe that the items are in the places or in the possession of the individuals to be searched[.]”¹ In this case, Defendant argues that the affidavit supporting the warrant to search his house was invalid because it contained stale information. As events alleged in the affidavit show on-going criminal activity by Defendant, and the items to

1. N.C. Gen. Stat. § 15A-244(3) (2005).

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be seized were of continued utility to Defendant, we hold that a reasonably prudent magistrate could determine that probable cause existed to support the warrant to search Defendant's home.

On 1 September 2004, Sergeant Detective Pete Acosta applied for and received a search warrant to search Defendant's residence, along with any outbuildings on the curtilage and any vehicle. The warrant authorized seizure of, *inter alia*, any computers, computer equipment and accessories, any cassette videos or DVDs, video cameras, digital cameras, film cameras and accessories, and photographs or printed materials which could be consistent with the exploitation of a minor.

This warrant, executed on 1 September 2004, was supported by an affidavit tending to show the following facts: On 31 August 2004, Crystal Sharpe, a detective with the Graham Police Department, received a telephone call from a stepmother regarding inappropriate touching of her seven-year-old stepson by Defendant Wesley Tate Pickard. The seven-year-old child disclosed to Detective Sharpe that Defendant had rubbed his penis on top of his underwear on approximately six or seven occasions. He stated that Defendant would place him on the bed and lay him on his back and rub his genital area. Defendant instructed the seven-year-old child not to tell anyone. The seven-year-old child also told Detective Sharpe that Defendant had done the same thing to his friend, a six-year-old male, approximately four times. After the interview, the seven-year-old child's parents expressed concern about inappropriate digital photographs that Defendant had taken of some of their children.

The six-year-old male told Detective Sharpe that he had been in Defendant's home on several occasions and that Defendant had touched him. The six-year-old male remembered that Defendant would lie in bed with him and other children, all in their underwear, and watch television.

The three-year-old sister of the six-year-old male told Detective Sharpe that Defendant had taken pictures of her "in a costume that he had at his house." She also told the detective that Defendant took lots of pictures and videos and kept them under his bed "so no one can see them."

A fifteen-year-old female told Detective Sharpe that Defendant had penetrated her vagina with his finger and penis on several occasions. Defendant videotaped her in the shower without her knowledge, took photographs of her naked while she was sleeping, and sent

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them to people over the internet. The fifteen-year-old female knew Defendant used the Yahoo screen name “Wild Wild Wes.” She described Defendant’s penis as uncircumcised and told Detective Sharpe that these incidents took place two years prior when she was fourteen years old. She stated that Defendant had videos, photographs, and internet pictures of naked children in his bedroom, living room, and an outbuilding. He also had cameras on the three or four computers in the bedroom and living room. The fifteen-year-old female described Defendant’s house in detail and also told Detective Sharpe about Defendant’s firearms he kept in his house and vehicle. The fifteen-year-old female stopped going to Defendant’s home in January 2003.

Detective Sharpe also interviewed an eight-year-old male who disclosed that Defendant had touched him with his hand by rubbing him between his belly button and his private area. Defendant made him pose for pictures on his bed. The eight-year-old male said that Defendant’s camera was on a stand and when he took pictures they would appear on the computer screen.

The affidavit also contained information that Defendant had been investigated in August 2002 for inappropriate touching, and in 1992 he was charged with two counts of indecent liberties with a minor and carrying a concealed weapon.

On 8 September 2004, Sergeant Detective Acosta applied for and received another search warrant—this one to search the computers, CDs, and floppy disks seized during the search of Defendant’s home. The affidavit of probable cause to support the search warrant indicated that upon searching Defendant’s home, Sergeant Detective Acosta found computer and video equipment in the master bedroom. Sergeant Detective Acosta reviewed one of the 8mm videotapes seized from Defendant’s residence and observed Defendant moving the “web camera” around the body of a female child, approximately two to three years old. Another video showed Defendant using a computer in his bedroom while several children were being videotaped engaging in sexual activity on his bed.

On 14 September 2004, Sergeant Detective Acosta applied for and received a third search warrant—this one to search Defendant’s home, outbuildings, and vehicles in order to search for, *inter alia*, “[a]ny substance or item which could be used to intentionally intoxicate or sedate a juvenile victim for the purpose of extensively sexually assaulting them.” The affidavit to establish probable cause

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included facts from the first warrant, along with the following additional facts: On 10 September 2004, Sergeant Detective Acosta met with Dr. Dana Hagele with the Center for Child & Family Health. Dr. Hagele reviewed segments from videotapes seized from Defendant's residence in which Defendant forced his penis in the vagina of two female victims, ages two to three years old, while they appeared to be asleep. The video also showed Defendant inserting his finger into the anus of an approximately two-year-old female victim who appeared to be asleep. Dr. Hagele opined that "throughout the extensive, invasive, potentially painful assault depicted in the videos, neither girl was fully conscious, nor did the[y] demonstrate purposeful movement, vocalization, reflexive movement, or speech, and this was in her opinion consistent with [] intentional intoxication ("drugging")."

Defendant moved to suppress all evidence seized as a result of the three search warrants. After a hearing on the motion to suppress, the trial court denied Defendant's motion. Reserving his right to appeal the trial court's denial of his motion to suppress, Defendant pled guilty to ten counts of statutory sexual offense, two counts of attempted first-degree statutory sexual offense, thirty-eight counts of taking indecent liberties with a child, two counts of first-degree statutory rape, one count of attempted first-degree rape, and thirty-seven counts of first-degree sexual exploitation of a minor. One count of indecent liberties with a child and one count of first-degree sexual exploitation of a minor were dismissed. Defendant was sentenced to six consecutive terms of 288 to 355 months imprisonment.

On appeal from the denial of his motion to suppress, Defendant argues that the trial court erred in denying his motion to suppress the 1 September 2004 search warrant because the information supporting probable cause was stale.² We disagree.

"The standard of review in evaluating a trial court's ruling on a motion to suppress is that the trial court's findings of fact 'are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting.'" *State v. Smith*, 160 N.C. App. 107, 114, 584 S.E.2d 830, 835 (2003) (citation omitted). If the trial court's conclusions of law are supported by its factual findings, we will not disturb

2. Defendant assigns error to the denial of his motion to suppress with respect to evidence seized pursuant to all three search warrants; however, on appeal he only argues error with regard to the 1 September 2004 warrant. Therefore, his assignments of error relating to the 8 and 14 September 2004 search warrants are deemed abandoned. N.C. R. App. P. 28(b)(6).

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those conclusions on appeal. *State v. Logner*, 148 N.C. App. 135, 138, 557 S.E.2d 191, 193-94 (2001). Where an appellant fails to assign error to the trial court's findings of fact, the findings are "presumed to be correct." *Inspirational Network, Inc. v. Combs*, 131 N.C. App. 231, 235, 506 S.E.2d 754, 758 (1998). As Defendant failed to assign error to any findings of fact, our review is limited to the question of whether the trial court's findings of fact, which are presumed to be supported by competent evidence, support its conclusions of law and judgment. *State v. Downing*, 169 N.C. App. 790, 794, 613 S.E.2d 35, 38 (2005); *Okwara v. Dillard Dep't Stores, Inc.*, 136 N.C. App. 587, 591-92, 525 S.E.2d 481, 484 (2000). However, the trial court's conclusions of law are reviewed *de novo* and must be legally correct. *State v. Fernandez*, 346 N.C. 1, 11, 484 S.E.2d 350, 357 (1997).

The Fourth Amendment to the United States Constitution provides that no warrants shall be issued except upon probable cause. U.S. CONST. amend. IV. Moreover, section 15A-244(3) of the North Carolina General Statutes requires that statements of probable cause must be supported by an affidavit "particularly setting forth the facts and circumstances establishing probable cause to believe that the items are in the places or in the possession of the individuals to be searched[.]" N.C. Gen. Stat. § 15A-244(3) (2005).

When addressing whether a search warrant is supported by probable cause, a reviewing court must consider the "totality of the circumstances." *Illinois v. Gates*, 462 U.S. 213, 238, 76 L. Ed. 2d 527, 548 (1983); *State v. Arrington*, 311 N.C. 633, 641, 319 S.E.2d 254, 259 (1984). In applying the totality of the circumstances test, our Supreme Court has stated that an affidavit is sufficient if it establishes "reasonable cause to believe that the proposed search . . . 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. Probable cause does not mean actual and positive cause nor import absolute certainty." *Arrington*, 311 N.C. at 636, 319 S.E.2d at 256 (citations omitted). Thus, under the totality of the circumstances test, a reviewing court must determine "whether the evidence as a whole provides a substantial basis for concluding that probable cause exists." *State v. Beam*, 325 N.C. 217, 221, 381 S.E.2d 327, 329 (1989); *see also Gates*, 462 U.S. at 238-39, 76 L. Ed. 2d at 548 (concluding that "the duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis' to conclude that probable cause existed (citation omitted)). In adhering to this standard of review, we are cognizant that "great deference should be paid [to] a magistrate's deter-

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mination of probable cause and that after-the-fact scrutiny should not take the form of a *de novo* review.” *Arrington*, 311 N.C. at 638, 319 S.E.2d at 258.

“[I]t is well settled that whether probable cause has been established is based on factual and practical considerations of everyday life on which reasonable and prudent [persons], not legal technicians, act.” *State v. Sinapi*, 359 N.C. 394, 399, 610 S.E.2d 362, 365 (2005) (citations and internal quotation marks omitted). “Probable cause is a flexible, common-sense standard. It does not demand any showing that such a belief be correct or more likely true than false. A practical, nontechnical probability is all that is required.” *State v. Zuniga*, 312 N.C. 251, 262, 322 S.E.2d 140, 146 (1984).

Defendant argues that the information contained in the affidavit for probable cause was stale because the information provided by the fifteen-year-old female was eighteen to nineteen months old and other depictions of sexual conduct with minors did not have specific time references. When evidence of previous criminal activity is advanced to support a finding of probable cause, a further examination must be made to determine if the evidence of the prior activity is stale. *State v. McCoy*, 100 N.C. App. 574, 577, 397 S.E.2d 355, 358 (1990). “[W]here the affidavit properly recites facts indicating activity of a protracted and continuous nature, a course of conduct, the passage of time becomes less significant. The continuity of the offense may be the most important factor in determining whether the probable cause is valid or stale.” *Id.* (internal citations omitted).

North Carolina courts have repeatedly held that “young children cannot be expected to be exact regarding times and dates[.]” *State v. Wood*, 311 N.C. 739, 742, 319 S.E.2d 247, 249 (1984). Thus, although the fifteen-year-old and the other minors did not provide specific dates, their allegations of inappropriate sexual touching by Defendant allowed the magistrate to reasonably infer that Defendant’s criminal activity was protracted and continuing in nature. *See McCoy*, 100 N.C. App. at 577, 397 S.E.2d at 358.

Furthermore, common sense is the ultimate criterion in determining the degree of evaporation of probable cause. *State v. Jones*, 299 N.C. 298, 305, 261 S.E.2d 860, 865 (1980). “The significance of the length of time between the point probable cause arose and when the warrant issued depends largely upon the property’s nature, and should be contemplated in view of the practical consideration of everyday life.” *Id.* (citation omitted). Other variables to consider

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when determining staleness are the items to be seized and the character of the crime. *State v. Witherspoon*, 110 N.C. App. 413, 419, 429 S.E.2d 783, 786 (1993).

The items sought by the search warrant—computers, computer equipment and accessories, cassette videos or DVDs, video cameras, digital cameras, film cameras and accessories—were not particularly incriminating in themselves and were of enduring utility to Defendant. *See Jones*, 299 N.C. at 305, 261 S.E.2d at 865 (five months elapsed between the time the witness saw the defendant’s hatchet and gloves and when he told police; however, since the items were not incriminating in themselves and had utility to the defendant a reasonably prudent magistrate could have concluded that the items were still in the defendant’s home). The warrant also sought photographs or printed materials which could be consistent with the exploitation of a minor. Photographs are made for the purpose of preserving an image and to be kept. *See People v. Russo*, 439 Mich. 584, 601, 487 N.W.2d 698, 705 (1992) (“[P]hotographs guarantee that there will always be an image of the child at the age of sexual preference because the photograph preserves the child’s youth forever.”). There would be no reason to conclude that Defendant would have felt a necessity to dispose of such items. Indeed, a practical assessment of this information would lead a reasonably prudent magistrate to conclude that the computers, cameras, accessories, and photographs were probably located in Defendant’s home. *See, e.g., State v. Kirsch*, 139 N.H. 647, 662 A.2d 937 (1995) (probable cause not stale where the defendant’s most recent criminal activity and contact with the victims occurred six years prior to issuance of the warrant where the search warrant sought pornographic movies and nude photographs of the minor victims).

In sum, we conclude that the evidence as a whole provided the magistrate a substantial basis for concluding that probable cause existed at the time the search warrant was issued. *See Beam*, 325 N.C. at 221, 381 S.E.2d at 329; *see also Arrington*, 311 N.C. at 638, 319 S.E.2d at 258 (great deference paid to a magistrate’s determination of probable cause). Accordingly, we affirm the trial court’s denial of Defendant’s motion to suppress evidence obtained under the 1 September 2004 search warrant.

Affirmed.

Judges GEER and STEPHENS concur.

STATE v. LANEY

[178 N.C. App. 337 (2006)]

STATE OF NORTH CAROLINA v. RAMON C. LANEY

No. COA05-1201

(Filed 5 July 2006)

1. Indecent Liberties— two incidents of touching in one night—one act

Two incidents of touching in one night should have resulted in one indecent liberties conviction, not two, and defendant's motion to dismiss one of the cases should have been granted. The sole act was the touching, there was no temporal gap between the two incidents, and the two incidents combined for the purpose of arousing defendant's sexual desire.

2. Constitutional Law— effective assistance of counsel—supporting opening argument

There was no merit to defendant's argument that he was denied the effective assistance of counsel in that his attorney did not support his opening argument with evidence that he was voluntarily intoxicated. Defense counsel provided testimony that defendant drank beer and liquor, took Ecstasy, and was otherwise intoxicated on the night of the crime; there was other evidence that defendant had a prior conviction for possession of cocaine; and the trial court instructed the jury on the defense of voluntary intoxication.

3. Evidence— hearsay—statement against interest

A hearsay statement from an indecent liberties defendant to the mother of the child that he would "be guilty" in court was admissible under N.C.G.S. § 8C-1, Rule 801(d)(A) as a statement against interest.

Appeal by defendant from judgments entered 10 December 2004 by Judge David S. Cayer in Mecklenburg County Superior Court. Heard in the Court of Appeals 8 May 2006.

Attorney General Roy A. Cooper, III, by Assistant Attorney General David Gordon, for the State.

Appellate Defender Staples Hughes, by Assistant Public Defender Matthew D. Wunsche, for defendant-appellant.

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JACKSON, Judge.

Ramon C. Laney (“defendant”) appeals from the guilty verdict rendered after a jury trial 8 December 2004.

On the night of 21 January 2004, defendant was present at a pool hall where he drank beer, liquor, and took a tablet of Ecstasy. At around 2:00 a.m., two of defendant’s friends took him to Davonna Moses’ (“Davonna”) home. Defendant and Davonna had been friends for more than ten years, and defendant frequently spent the night asleep on her couch. On 21 January 2004, Davonna gave defendant permission to sleep on her couch, even though she would not be home that night. When defendant arrived at Davonna’s home, Davonna’s mother, Dana Moses (“Dana”) let defendant into the home. Defendant went to sleep on the couch in Davonna’s living room.

At around 5:00 a.m., defendant entered the room of Davonna’s daughter, N.M. (“the victim”), where she slept with her three sisters. At trial, the victim testified that she awoke when defendant pulled down the covers on her bed. Upon hearing a noise from Dana in the adjacent room, defendant left the room for ten to fifteen minutes, but returned again to pull down the covers on the victim’s bed, and touch the victim’s breasts over her shirt. The victim pushed defendant’s hand away, and he put his hand under the waistband of her pants. The victim rolled over in her bed to stop defendant, and defendant touched the victim over her pants. During this incident, the victim’s three sisters did not awaken.

On the morning of 22 January 2004, the victim began crying and told Dana that defendant had touched her. Defendant denied the accusation, and Dana sent the victim and her sisters to school. When the victim and her sisters arrived at school, one of the victim’s sisters told Adrienne Carruthers, a family friend who worked at the victim’s school, that defendant had touched the victim, and that she should talk to her. When Adrienne Carruthers spoke to the victim, she told Adrienne Carruthers that defendant touched her, and Adrienne Carruthers told Davonna about the incident. Davonna confronted defendant, who denied the incident. Davonna contacted the police to report the allegation.

In May or June 2004, Davonna saw defendant at a strip club, where he told her that he was sorry for what he did, and that when he went to court he would “be guilty.”

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On 22 March 2004, a grand jury indicted defendant for taking indecent liberties with a child in cases 04 CRS 209431 and 04 CRS 209432. The cases were joined for trial. On 8 December 2004, the Honorable David S. Cayer presided over defendant's trial in Mecklenburg County Superior Court. The jury found defendant guilty in both cases, and the trial court sentenced defendant to two consecutive terms of seventeen to twenty-one months. Defendant appeals to this Court.

On appeal, defendant argues three issues: (1) that the trial court erred when it denied defendant's motions to dismiss defendant's charges of indecent liberties, where both of the cases arose from a single transaction; (2) that defendant was denied effective assistance of counsel because his trial attorney failed to support his opening statement by presenting evidence that defendant was voluntarily intoxicated; and (3) that the trial court erred when it allowed Davonna to testify that defendant told her he would "be guilty" in court.

[1] First, defendant argues that the trial court erred when it denied defendant's motions to dismiss defendant's charges of indecent liberties, when both of the cases arose from a single transaction.

A motion to dismiss is properly denied by the trial court if there is substantial evidence of each essential element of the offense charged and that defendant is the perpetrator of the offense. *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). In making its determination of the sufficiency of the evidence, the trial court must consider the evidence in the light most favorable to the State. *Id.* at 99, 261 S.E.2d at 117. "[T]he State is entitled to every reasonable intentment and every reasonable inference to be drawn therefrom; contradictions and discrepancies are for the jury to resolve and do not warrant dismissal; and all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State is to be considered by the court in ruling on the motion." *Id.*

North Carolina General Statutes § 14-202.1 provides that indecent liberties with a minor is defined as follows:

- (a) A person is guilty of taking indecent liberties with children if, being 16 years of age or more and at least five years older than the child in question, he either: (1) Willfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire; or (2) Willfully commits or attempts to

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commit any lewd or lascivious act upon or with the body or any part or member of the body of any child of either sex under the age of 16 years.

N.C. Gen. Stat. § 14-202.1(a) (2005).

“[T]he crime of indecent liberties is a single offense which may be proved by evidence of the commission of any one of a number of acts.” *State v. Hartness*, 326 N.C. 561, 567, 391 S.E.2d 177, 180 (1990). “The evil the legislature sought to prevent in this context was the defendant’s performance of any immoral, improper, or indecent act in the presence of a child ‘for the purpose of arousing or gratifying sexual desire.’” *Id.* In *Hartness*, our Supreme Court reasoned that “[d]efendant’s purpose for committing such act is the gravamen of this offense; the particular act performed is immaterial.” *Id.* Thus, a single wrong, *i.e.*, the crime of indecent liberties, “is established by a finding of various alternative elements.” *Id.* at 566, 391 S.E.2d at 180. This Court has stated further that “although the statute sets out alternative acts that might establish an element of the offense, a single act can support only one conviction.” *State v. Jones*, 172 N.C. App. 308, 315, 616 S.E.2d 15, 20 (2005).

In *Lawrence*, our Supreme Court recently upheld three separate convictions of indecent liberties with a minor that occurred during three separate and distinct encounters. *State v. Lawrence*, 179 N.C. —, —, 627 S.E.2d 609, 616 (2006). The specific issue the Court addressed was whether a jury verdict may “be unanimous when a defendant [wa]s tried on five counts of statutory rape and three counts of indecent liberties with a minor, when the short-form indictments for each alleged crime [were] identically worded and lack specific details distinguishing one particular incident of a crime from another. *Id.* at —, 627 S.E.2d at 611.

In the case *sub judice*, defendant’s two indictments, 04 CRS 209431 and 04 CRS 209432 contain identical language:

The jurors for the State upon their oath present that on or about the 22nd day of January, 2004, in Mecklenburg County, Ramon C. Laney did unlawfully, willfully, and feloniously take and attempt to take immoral, improper, and indecent liberties with [the victim], who was under the age of sixteen (16) years at the time, for the purpose of arousing or gratifying sexual desire. At the time, the defendant was over sixteen (16) years of age and at least five (5) years older than that child.

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Here, defendant's acts of touching the victim's breasts and putting his hand inside the waistband of her pants were part of one transaction that occurred the night of 21 January 2004. The sole act involved was touching—not two distinct sexual acts. Furthermore, there was no gap in time between two incidents of touching, and the two acts combined were for the purpose of arousing or gratifying defendant's sexual desire. This case is distinguishable from *Lawrence* because the *Lawrence* defendant committed indecent liberties with a child during three separate and distinct encounters. We hold that the trial court did not err in denying defendant's motion to dismiss with respect to 04 CRS 209431, but that the trial court did err in denying defendant's motion to dismiss with regards to 04 CRS 209432 as "a single act can support only one conviction." *Jones*, 172 N.C. App. at 315, 616 S.E.2d at 20. Accordingly, we vacate the judgment referenced by 04 CRS 209432.

[2] Next, defendant argues that he was denied effective assistance of counsel because his trial attorney failed to support his opening statement by presenting evidence that defendant was voluntarily intoxicated.

"A defendant's right to counsel includes the right to the effective assistance of counsel." *State v. Braswell*, 312 N.C. 553, 561, 324 S.E.2d 241, 247 (1985) (citing *McMann v. Richardson*, 397 U.S. 759, 771, 25 L. Ed. 2d 763, 773 (1970)). "When a defendant attacks his conviction on the basis that counsel was ineffective, he must show that his counsel's conduct fell below an objective standard of reasonableness." *Id.* at 561-62, 324 S.E.2d at 248 (citing *Strickland v. Washington*, 466 U.S. 668, 688, 80 L. Ed. 2d 674, 693 (1984)). Defendant must satisfy a two part test in order to meet this burden:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, *a trial whose result is reliable*.

Id. at 562, 324 S.E.2d at 248 (emphasis in original). "[D]efendant must show that 'there is a reasonable probability that, but for counsel's ineffective performance, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to

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undermine confidence in the outcome.’ ” *State v. Moorman*, 320 N.C. 387, 399, 358 S.E.2d 502, 510 (1987) (citing *Strickland v. Washington*, 466 U.S. at 694, 80 L. Ed. 2d at 698). In *Moorman*, defense counsel stated in his opening statement that he would prove that the defendant was physically and psychologically incapable of rape. *Id.* at 400-01, 358 S.E.2d at 510-11. However, defense counsel failed to present evidence of physical or psychological incapability, and the State utilized defense counsel’s failure in their closing argument. *Id.* at 401, 358 S.E.2d at 511. Our Supreme Court set aside the defendant’s trial based upon its determination that defendant had received ineffective assistance of counsel based in part on counsel’s failure to produce evidence promised in the opening statement. *Id.* at 402, 358 S.E.2d at 511-12.

Here, defense counsel made the following remark in his opening statement:

[Defendant] has a record of having drug and alcohol problems. This isn’t a first-time event, and I think you will hear testimony to that effect, both from him and possibly from some of his family members. So this is somebody who, you will hear testimony, has a drug and alcohol problem.

Thereafter, during defendant’s trial, defense counsel provided testimony of the victim, defendant, Davonna, and Dana that defendant drank beer and liquor, took Ecstasy, and was otherwise intoxicated on the night of 21 January 2004. Moreover, the trial court admitted evidence that defendant had a prior felony conviction for possession of cocaine. In addition, the trial court instructed the jury on the defense of voluntary intoxication.

Therefore, defendant has failed to satisfy his burden that there is a reasonable probability that a different outcome would have occurred if defense counsel presented additional evidence of defendant’s drug and alcohol problem. In contrast to defendant’s contention, defense counsel and the prosecutor both presented evidence that defendant had used or possessed alcohol and drugs. Defendant’s argument is without merit and defendant’s assignment of error is overruled.

[3] We now address whether the trial court erred when it allowed Davonna to testify that defendant told her he would “be guilty” in court.

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The test is that if a reviewing court were to find error, a defendant must be prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial. N.C. Gen. Stat. § 15A-1443(a) (2005); *State v. Allen*, 127 N.C. App. 182, 186, 488 S.E.2d 294, 297 (1997).

It is well established that “[h]earsay 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). “A statement is admissible as an exception to the hearsay rule if it is offered against a party and it is (A) his own statement[.]” N.C. Gen. Stat. § 8C-1, Rule 801(d)(A) (2005).

In the present case, the following colloquy occurred during Davonna’s testimony:

Q: Can you describe for us how that meeting went and what was said to each other.

A: Me and my girlfriend, Kim Gervay (phonetic), we was sitting there. He walked around and came over and spoke to Kim. Then he came over and told me that he was sorry [sic] for what he did; and that I had to do what I had to do as a mother. He couldn’t do nothing but respect that. He said that when he came to court, he would be guilty. He was sorry and he loved me.

MR. LOVEN: Objection.

THE COURT: Overruled.

Here, defendant’s statement that he would “be guilty” was admissible under the hearsay exception N.C. Gen. Stat. § 8C-1, Rule 801(d)(A) because it was defendant’s own statement offered against his own interest. Therefore, the statement is admissible, and defendant’s assignment of error is overruled.

Accordingly, we vacate the judgment referenced by 04 CRS 209432, and find no error with respect to the judgment referenced by 04 CRS 209431.

NO ERROR in part; VACATED in part.

Chief Judge MARTIN and Judge LEVINSON concur.

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[178 N.C. App. 344 (2006)]

FRANCIS P. HAMMEL, PLAINTIFF v. USF DUGAN, INC., DEFENDANT

No. COA05-849

(Filed 5 July 2006)

1. Damages and Remedies— personal injury instructions— loss of use—reference to “plaintiff’s”—conceded and contested body parts

The trial court did not err by instructing the jury that damages for personal injury include compensation for partial loss of use of certain of “plaintiff’s” body parts and by including a contested brain injury in the listed body parts along with conceded orthopedic injuries because: (1) the pattern instruction would have included both the conceded and contested body parts in the same list; and (2) even if the court’s inclusion of the word “plaintiff’s” in the instruction was error, defendant cannot show that the jury was likely to be misled as to its duty given the numerous statements by the court to the jury properly describing the plaintiff’s burden of proof and the jury’s duty.

2. Evidence— expert opinion testimony—lost future earning capacity

The trial court did not err in a negligence case arising out of a collision between a vehicle and a truck by admitting allegedly inadmissible hearsay evidence regarding plaintiff’s lost future earning capacity as a truck driver, because: (1) defendant failed to argue this assignment of error in its brief; (2) even if the assignment of error and argument adequately brought forward the issue, it has no merit since an expert’s testimony of the facts that are the basis for his opinion is not hearsay when it is not offered for the truth of the matter; and (3) earning capacity is not determined solely on the present or past earnings of a plaintiff, and plaintiff was entitled to present evidence of his earning capacity as well as of his actual past earnings.

3. Discovery— motion for additional independent medical examination—peremptory trial

The trial court did not err in a negligence case arising out of a collision between a vehicle and a truck by denying defendant’s motions for additional independent medical examination of plaintiff and for continuance of the trial, because: (1) the parties obtained a peremptory trial setting for this case, and Local Rule 4.4 states that peremptorily set cases will not be continued except

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for extraordinary cause and only by the senior resident judge; (2) defendant moved for the additional Rule 35 examinations eleven weeks prior to trial, plaintiff had already been examined twice by defendant's neurologist, and defendant failed to discuss in its brief why another examination by a neurologist or by a forensic neuropsychiatrist was necessary; and (3) defendant's brief does not assert that it was unfairly surprised that plaintiff would call his treating doctors as witnesses, nor does he explain how an examination of plaintiff by its preferred doctor would overcome its concerns about possible disparagement of its Rhode Island witness.

Appeal by defendant from two orders entered 15 November 2004 by Judge Leon Stanback in the Superior Court in Wake County, an order entered 29 July 2004 by Judge Orlando F. Hudson, an order entered 21 September 2004 by Judge Donald W. Stephens, and denials by the court of defendant's motions to exclude evidence and to continue the trial date or to exclude testimony, and of pretrial motions *in limine*. Heard in the Court of Appeals 15 March 2006.

Twiggs, Beskind, Strickland & Rabenau, P.A., by Howard F. Twiggs, Donald R. Strickland and Donald H. Beskind, for plaintiff.

Smith Moore, L.L.P., by James G. Exum, Jr., Allison O. Van Laningham and Travis W. Martin, for defendant.

HUDSON, Judge.

On 19 July 2002, plaintiff Francis P. Hammel filed a complaint against defendant USF Dugan, Inc., ("defendant") and Allan Harvey Chappell, alleging negligence and seeking damages for injuries Hammel received as the result of a collision between his vehicle and defendant's truck. On 15 August 2002, defendant removed the case to the United States District Court for the Eastern District of North Carolina. On 8 October 2002, the case was remanded to the superior court in Wake County. The court entered a consent order on 26 July 2004 in which defendant admitted liability and plaintiff dismissed Chappell from the case. Following a trial, the jury awarded plaintiff \$6,000,000 on 21 October 2004. Defendant moved for judgment notwithstanding the verdict ("JNOV") or, in the alternative, for a new trial, which motion the court denied. Defendant appeals. As discussed below, we affirm.

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On 31 August 1999, defendant's truck, driven by Chappell, collided with plaintiff's vehicle. Plaintiff, a self-employed truck driver, alleged that he sustained orthopedic injuries and a closed head injury resulting in brain damage, and sought damages for pain and suffering, medical expenses, loss of enjoyment of life, and loss of income and future earning capacity. Pretrial, defendant moved for a mental and physical examination of plaintiff. Plaintiff had previously been examined twice by Dr. Edward Feldman, one of defendant's testifying expert witnesses. The court denied defendant's motion. At trial, defendant conceded plaintiff's orthopedic injuries, but contested his head injuries and brain damage, and any permanent consequences therefrom. Plaintiff's psychiatrist, Dr. Felicia Smith, his primary care physician, Dr. Frank Breslin, his speech pathologist, Robin Mirante, and his neurologist, Dr. Steve Massaquoi, each testified that plaintiff sustained a brain injury. Defendant offered testimony from Dr. Feldman, a neurologist, and from Dr. Robert Conder, a neuropsychologist. Plaintiff then called Patrick Logue, a neuropsychologist, in rebuttal.

Plaintiff also introduced evidence from Cynthia Wilhelm, Ph.D., a life care planner, and from Dr. Finley Lee, an economist, regarding the value of plaintiff's economic loss. Defendant objected to Dr. Lee's written report as being hearsay, since his analysis regarding plaintiff's future earning capacity was based on a report prepared by Maria Vargas, a vocational rehabilitation specialist who did not testify at trial. Ms. Vargas based her report on median wage data from the United States Bureau of Labor Statistics about truck drivers. The court overruled defendant's objection and admitted Dr. Lee's report. At the close of evidence, the court instructed the jury regarding damages as follows:

Damages for personal injury also include fair compensation for the partial loss of the use of *Plaintiff's* brain, left hip, left leg, left knee, left elbow, right wrist, lower back, mid back and neck experienced by the Plaintiff as a proximate result of the negligence of the defendant. There's no fixed formula for placing a value on the partial loss of the use of *Plaintiff's* brain, left hip, left leg, left knee, left elbow, right wrist, lower back, mid back and neck. You must determine what is fair compensation by applying logic and common sense to the evidence.

(Emphasis supplied.) Counsel for defendant objected to this instruction on grounds that it suggested that plaintiff in fact had suffered a brain injury, a matter which was contested at trial. The court over-

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ruled defendant's objection. After the jury returned its verdict awarding \$6,000,000 to plaintiff, defendant moved for JNOV, which motion the court denied.

[1] Defendant first argues that the trial court erred by inserting the word "plaintiff's" at two points and in listing the brain along with other body parts in the pattern jury instruction given. We disagree.

On appeal,

this Court considers a jury charge contextually and in its entirety. *Jones v. Development Co.*, 16 N.C. App. 80, 86, 191 S.E.2d 435, 439, *cert. denied*, 282 N.C. 304, 192 S.E.2d 194 (1972). The charge will be held to be sufficient if "it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed . . ." *Id.* at 86-87, 191 S.E.2d at 440. The party asserting error bears the burden of showing that the jury was misled or that the verdict was affected by an omitted instruction. *Robinson v. Seaboard System Railroad*, 87 N.C. App. 512, 524, 361 S.E.2d 909, 917, *disc. review denied*, 321 N.C. 474, 364 S.E.2d 924 (1988). "Under such a standard of review, it is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury." *Id.*

Boykin v. Kim, 174 N.C. App. 278, 286, 620 S.E.2d 707, 713 (2005).

Defendant contends that by including the contested brain injury in the list along with the conceded orthopedic injuries, the court "essentially removed a factually contested issue from the jury's consideration." The corresponding sentence in the pattern instruction reads:

Damages for personal injury also include fair compensation for the partial loss use of (list body parts affected) experienced by Plaintiff as a proximate result of the negligence of the defendant.

N.C.P.I.—Civil 810.12. "This Court has recognized that the preferred method of jury instruction is the use of the approved guidelines of the North Carolina Pattern Jury Instructions." *Caudill v. Smith*, 117 N.C. App. 64, 70, 450 S.E.2d 8, 13 (1994), *disc. review denied*, 339 N.C. 610, 454 S.E.2d 247 (1995). As in the instruction given here, the pattern instruction would have included both the conceded and contested body parts in the same list.

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Defendant also contends that the court's insertion of the word "Plaintiff's" immediately before the list of body parts created what "amounted to a peremptory instruction." However, we look to the entirety of the jury instruction on damages. Here, the court made numerous statements to the jury properly describing the jury's duty in this case, including: "[t]he plaintiff has the burden of proving that the defendant's negligence was a proximate cause of the plaintiff's injuries and damages" and "[t]his means that the plaintiff must prove by the greater weight of the evidence the amount of actual damages proximately caused by the negligence of the defendant." Even were the court's inclusion of the word "Plaintiff's" in the instruction error, in light of these statements and numerous others, defendant cannot show that the jury was likely to be misled as to its duty. We overrule this assignment of error.

[2] Defendant next argues that trial court erred in admitting inadmissible hearsay evidence regarding plaintiff's lost future earning capacity. We disagree.

Defendant USF Dugan, Inc., assigns as error:

(3) The trial court's denial of Defendant's Motion for Judgment Notwithstanding the Verdict or in the Alternative a New Trial on the ground that the errors cited therein, and set forth below in sub-paragraphs [below], in their cumulative effect necessitated the trial court's awarding of a new trial:

(e) The admission through the testimony of Finley Lee, PhD., of the incompetent opinions of Maria Vargas, an occupational therapist who opined without foundation regarding the plaintiff's lost earning capacity;

Defendant thus argues error in the admission of Dr. Lee's testimony as one of a cumulative list of errors which would entitle it to JNOV or a new trial. Defendant has failed to argue this assignment of error in its brief, and thus it is abandoned. N.C. R. App. P. 28(b)(6). In its brief, defendant focuses solely on whether the trial testimony of Dr. Lee was inadmissible hearsay or inherently reliable. The argument says nothing about why these issues would entitle defendant to JNOV.

Even if the assignment of error and argument adequately brought forward the issue, it has no merit. Rule 703 governs the bases of opinion testimony by experts:

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The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

N.C. Gen. Stat. § 8C-1, Rule 703 (2003). When an expert witness testifies to the facts that are the basis for his or her opinion, “such testimony is not hearsay because it is not offered for the truth of the matter, but to show the basis of the opinion.” *State v. Robinson*, 330 N.C. 1, 25, 409 S.E.2d 288, 302 (1991). Prior to the enactment of Rule 703, courts had adopted a policy allowing experts to base their opinions on information meeting an “inherently reliable” test, the standard defendant focuses on in his brief. *State v. Allen*, 322 N.C. 176, 184, 367 S.E.2d 626, 630 (1988). The current rule allows evidence where an expert relies on statistical information commonly used and accepted in his field. *State v. Demery*, 113 N.C. App. 58, 65, 437 S.E.2d 704, 709 (1993).

Here, the source of the statistics at issue is the U.S. Bureau of Labor Statistics, specifically the median income of all truck drivers. Lee testified that such median income statistics are a reasonably-relied-upon source on which an economist might base an opinion about earning capacity. In addition, plaintiff here was attempting to prove loss of earning capacity, not his actual earnings at the time of his injury. Earning capacity is not determined solely on the present or past earnings of a plaintiff. See *Johnson v. Lewis*, 251 N.C. 797, 802-3, 112 S.E.2d 512, 516 (1960) (approving the right of both minor children and housewives not currently working outside the home to receive damages for loss of earning capacity.) Plaintiff was entitled to present evidence of his earning capacity as well as of his actual past earnings. We overrule this assignment of error.

[3] Defendant also argues that the court erred in denying its motions for an additional independent medical examination of plaintiff and for continuance of the trial. We do not agree.

“Continuances are not favored and the party seeking [one] has the burden of showing sufficient grounds for it. . . . The question of whether or not to grant a continuance is a matter solely within the discretion of the trial court; absent a manifest abuse of discretion, this Court will not disturb the decision made below.” *Atl. & E. Carolina Ry. Co. v. Wheatly Oil Co.*, 163 N.C. App. 748, 754, 594

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S.E.2d 425, 429-30, *disc. review denied*, 358 N.C. 542, 599 S.E.2d 38 (2004) (quoting *Peace River Elec. Coop. v. Ward Transformer Co.*, 116 N.C. App. 493, 511, 449 S.E.2d 202, 215 (1994), *disc. review denied* 339 N.C. 739, 454 S.E.2d 655 (1995)).

Here, the parties obtained a peremptory trial setting for this case. Local Rule 4.4 states that “peremptorily set cases will not be continued, except for extraordinary cause and only by the Senior Resident Judge.”

Defendant assigns error to denials of his motion for continuance by Donald W. Stephens, the Senior Resident Judge in Wake County, and by Leon Stanback, the trial judge. As reflected in Local Rule 4.4 quoted above, Judge Stanback had no authority to grant a continuance. Defendant contends that plaintiff disclosed the name of his rebuttal witness Dr. Patrick Logue, a neuropsychologist, so close to trial that it was unable to adequately prepare. We note that defendant did not disclose its own expert in neuropsychology, Dr. Conder, until 24 August 2004, and did not make him available for deposition by plaintiff until 1 September 2004. On 20 September 2004, less than three weeks after the deposition of Dr. Conder, plaintiff disclosed Dr. Logue as a possible rebuttal witness. Defendant deposed Dr. Logue two days later. On these facts, we conclude that Judge Stephens did not abuse his discretion in denying defendant’s motion.

Defendant also contends that the court erred in denying defendant an opportunity for three additional medical examinations of plaintiff: by Dr. Feldman, a neurologist, Dr. Fozdar, a forensic neuropsychiatrist, and Dr. Conder, a neuropsychologist. “Rule 35 of our Rules of Civil Procedure provides in part that when the physical condition of a party is in controversy, the trial court may order the party to submit to a physical examination by a physician, but only for good cause shown and upon notice to all parties, including notice to the person to be examined.” *Morin v. Sharp*, 144 N.C. App. 369, 374, 549 S.E.2d 871, 874 (2001). A trial court’s order regarding matters of discovery is reviewed for an abuse of discretion. *Id.* Defendant moved for the additional Rule 35 examinations eleven weeks prior to trial. Plaintiff had already been examined twice by defendant’s neurologist, and in its brief, defendant does not discuss why another examination by a neurologist or by a forensic neuropsychiatrist was necessary. Regarding the examination of plaintiff by Dr. Conder, defendant’s brief describes the need as based on the likelihood that the jury would give greater weight to Dr. Conder’s testimony if he had per-

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sonally examined plaintiff rather than relying on plaintiff's medical records alone. The brief also raises the possibility that plaintiff would present evidence from its own neuropsychologist, Dr. Logue. However, Dr. Logue was not disclosed as a possible witness until after the Rule 35 hearing. At the hearing itself, defendant argued that the additional examinations were needed because plaintiff had disparaged the qualifications and impartiality of defendant's Rhode Island neurologist, and intended to present testimony from plaintiff's treating neurologist, psychiatrist and neuropsychologist. Defendant's brief does not assert that it was unfairly surprised that plaintiff would call his treating doctors as witnesses, nor does it explain how an examination of plaintiff by Dr. Conder would overcome its concerns about possible disparagement of its Rhode Island witness. The court did not abuse its discretion in denying defendant's motions. This assignment of error is without merit.

Affirmed.

Judges HUNTER and BRYANT concur.

STATE OF NORTH CAROLINA v. ROBERT SCOTT BLANKENSHIP

No. COA05-1373

(Filed 5 July 2006)

Discovery— SBI agent on methamphetamine production—not listed as expert

Defendant was granted a new trial on charges of possessing precursor chemicals where an SBI agent purportedly testified as a lay witness, but in fact was more qualified than the jury and testified as an expert witness, even though the State had not listed any experts in its response to defendant's discovery request. N.C.G.S. § 15A-903(a)(2).

Appeal by defendant from judgment entered 11 May 2005 by Judge Dennis Winner in Rutherford County Superior Court. Heard in the Court of Appeals 19 April 2006.

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Attorney General Roy A. Cooper, III, by Assistant Attorney General David D. Lennon, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Katherine Jane Allen, for defendant-appellant.

JACKSON, Judge.

On 12 January 2004, detective Chris Lovelace (“Lovelace”) of the Forest City Police Department responded to a disturbance call at a grocery store in Forest City. There he observed Robert Scott Blankenship (“defendant”) and two individuals arguing near a white pickup truck in the store’s parking lot. As the officer approached the individuals, defendant and another man attempted to leave in the truck. Lovelace asked the men to stop, which they did, and he questioned the individuals about what had occurred. During his questioning of the individuals, Lovelace learned the truck belonged to defendant. Lovelace asked for permission to search the truck. Defendant consented, allowing Lovelace and another officer to conduct a search of his truck. In the bed of defendant’s truck, the officers found four boxes of matches, six bottles of hydrogen peroxide, one bottle of rubbing alcohol, one box of Sudafed, and three bottles of iodine. Lovelace seized the items and arrested defendant for possession of precursor chemicals.

Defendant filed a Request for Voluntary Discovery on 11 March 2005, specifically requesting that the State voluntarily comply with defendant’s request for discovery by

2. Giving notice to the defendant of any expert witnesses that the State reasonably expects to call as a witness at trial, as well as furnishing to the defendant a report of the results of any examinations or tests conducted by the expert. In addition, the defendant requests the expert’s curriculum vitae, the expert’s opinion, and the underlying basis for that opinion. Further, the defendant requests the State give the notice and furnish the materials required by North Carolina General Statutes Section [15A-]903(a)(2) within a reasonable time prior to the trial or as specified by the court.

During defendant’s trial on 9 May 2005, the State proffered testimony by State Bureau of Investigation Special Agent Kenneth Razzo (“Agent Razzo”) as to the manufacturing process of methamphetamine and the ingredients used. Defendant objected to the testi-

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mony, arguing the State had failed to comply with defendant's discovery request pursuant to North Carolina General Statutes, section 15A-903(a)(2) and Agent Razzo's testimony should be excluded. The trial court permitted Agent Razzo to testify, and the jury subsequently found defendant guilty of possessing immediate precursor chemicals on 10 May 2005. Defendant, who was sentenced to a term of six to eight months imprisonment with the North Carolina Department of Correction, appeals from his conviction.

We note that defendant presents arguments in his brief for only one of his six assignments of error and, thus, the assignments of error for which he fails to present arguments are deemed abandoned. N.C. R. App. P. 28(b)(6) (2005).

In his sole argument on appeal, defendant contends the trial court erred when it permitted Agent Razzo to testify, and found that the State had not violated the discovery procedures provided by North Carolina General Statutes, section 15A-903. Defendant argues Agent Razzo's testimony constituted expert testimony, in which he stated his opinion, and that the State violated section 15A-903(a)(2) in failing to provide defendant with notice that it intended to call the expert witness, and in failing to provide defendant with required information and documentation concerning the expert witness, as required by our discovery statutes.

North Carolina General Statutes, section 15A-902(a) (2004) provides that a defendant may seek discovery from the State by requesting in writing, that the State comply voluntarily with defendant's discovery request. Once the State provides discovery to a defendant in response to a request for voluntary discovery, "the discovery is deemed to have been made under an order of the court." N.C. Gen. Stat. § 15A-902(b) (2004). In addition, once the State voluntarily provides discovery pursuant to section 15A-902(a), the discovery provided to defendant "shall be to the same extent as required by subsection (a)" of section 15A-903. N.C. Gen. Stat. § 15A-903(b) (2004). Section 15A-903 details specific items of discovery which the State must provide to a defendant, including,

Give notice to the defendant of any expert witnesses that the State reasonably expects to call as a witness at trial. Each such witness shall prepare, and the State shall furnish to the defendant, a report of the results of any examinations or tests conducted by the expert. The State shall also furnish to the defendant the expert's curriculum vitae, the expert's opinion, and the underlying-

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ing basis for that opinion. *The State shall give the notice and furnish the materials required by this subsection within a reasonable time prior to trial*, as specified by the court.

N.C. Gen. Stat. § 15A-903(a)(2) (2004) (emphasis added). Also, once a party, or the State has provided discovery there is a continuing duty to provide discovery and disclosure. N.C. Gen. Stat. § 15A-907 (2004).

On 11 March 2005, defendant filed a Request for Voluntary Discovery, specifically requesting, as required by section 15A-903(a)(2), that the State provide defendant with notice of any expert witnesses which the State reasonably expected to call as a witness. In a letter dated 1 December 2004, but marked as received on 18 March 2005, the State responded to defendant's Request for Voluntary Discovery by providing defendant with twenty-five pages of discovery materials. The discovery materials included the State's investigative materials for defendant's case, but did not list any expert witnesses the State intended to call. Pursuant to section 15A-903(b), once the State voluntarily responded to defendant's request for discovery, the State was then required to comply with the discovery requirements found in section 15A-903(a). These requirements include the State's duty to provide notice to defendant of any expert witnesses which the State reasonably expected to call to testify at defendant's trial.

“The purpose of discovery under our statutes is to protect the defendant from unfair surprise by the introduction of evidence he cannot anticipate.” *State v. Patterson*, 335 N.C. 437, 455, 439 S.E.2d 578, 589 (1994) (quoting *State v. Payne*, 327 N.C. 194, 202, 394 S.E.2d 158, 162 (1990), *cert. denied*, 498 U.S. 1092, 112 L. Ed. 2d 1062 (1991)). In the instant case, the State provided defendant with discovery consisting of the State's investigative materials, but did not provide defendant with names of any expert witnesses that the State planned to call as witnesses at defendant's trial. Thus, defendant was not placed on notice that the State intended to call Agent Razzo or any expert witness to testify.

Generally, our State's caselaw provides that in order to qualify as an expert witness, the witness need only be better qualified than the jury as to the subject at hand, such that the witness' testimony would be helpful to the jury. *State v. Davis*, 106 N.C. App. 596, 601, 418 S.E.2d 263, 267 (1992), *disc. review denied*, 333 N.C. 347, 426 S.E.2d 710 (1993). The determination of whether a witness' testimony constitutes expert testimony is one within the trial court's discretion, and

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will not be reversed on appeal absent an abuse of discretion. *State v. Morgan*, 359 N.C. 131, 160, 604 S.E.2d 886, 904 (2004), *cert. denied*, 546 U.S. 830, 163 L. Ed. 2d 79 (2005).

In the instant case, the State informed the trial court that it intended to call Agent Razzo to testify. Defendant immediately objected, citing that the State had not complied with discovery procedures pursuant to section 15A-903(a)(2). Defense counsel argued that Agent Razzo would be testifying as an expert, and that his testimony concerning the manufacturing process of methamphetamine would constitute expert testimony, of which defendant had not been provided proper prior notice and discovery. Defense counsel argued that the State had failed to provide defendant not only with notice of the expert witness, but also with the expert witness' curriculum vitae, opinion, underlying basis for his opinion, and any reports or examinations he may have conducted to arrive at his opinion. In response to defendant's objection, the State informed the trial court that it did not know who would be testifying on this issue until that morning, and that as soon as it had known that Agent Razzo would be providing testimony, the State informed defendant and told defendant what the substance of Agent Razzo's testimony would be. The Prosecutor went on to explain that there was a specific woman that he thought was going to testify, but that it fell through, and he was unsure whether someone from that area of the State would be testifying or whether someone would be coming from Raleigh. The trial court stated that since Agent Razzo would not be giving his opinion as to the specific facts of defendant's case, and he had not performed any tests or examinations on any of the evidence in the case, he would be permitted to testify as a fact witness.

Upon calling Agent Razzo to the stand, the State immediately proceeded with questioning him regarding his education, training and experience. Agent Razzo testified regarding his experience in narcotics investigations, his training in the field of manufacturing methamphetamine, and his extensive training in clandestine laboratory investigation. The State then attempted to tender Agent Razzo as an expert witness in the area of manufacturing methamphetamine, to which defendant objected. The trial court reminded the State that it told the court that it was only calling Agent Razzo as a fact witness, and that he would not be providing any opinion testimony. The trial court then permitted Agent Razzo to testify, over the objection of defendant, concerning the manufacturing process of methamphetamine.

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Although the trial court permitted Agent Razzo to testify as a so-called lay witness, we hold that he in fact qualified as, and testified as, an expert witness. The jury was permitted to hear testimony about his extensive training and experience in the process of manufacturing methamphetamine and clandestine laboratory investigations, along with his specialized knowledge of the manufacturing process of methamphetamine. Also, the State specifically tendered Agent Razzo as an expert witness, and the trial court failed to take any action to remedy the State's attempt to tender Agent Razzo as an expert. We hold that based on the presentation of evidence concerning Agent Razzo's extensive training and experience, he was "better qualified than the jury as to the subject at hand," and he testified as an expert witness. *Davis*, 106 N.C. App. at 601, 418 S.E.2d at 267.

Thus, as the State was required to comply with the discovery procedures in section 15A-903(a)(2), and as Agent Razzo was an expert witness who testified at defendant's trial, defendant was entitled to prior notice that the State intended to call this expert as a witness during his trial. Although the State may not have known the specific witness it would be calling, it did know, prior to the morning of defendant's trial, that it would be calling someone from the State Bureau of Investigation to testify concerning the process of manufacturing methamphetamine. The State also acknowledged that it had a specific person that it thought would be providing testimony; however the State failed to provide defendant with any information concerning this possible witness or any other potential law enforcement officers who would be testifying on this issue. The State failed to provide any notice whatsoever to defendant that it would be calling any law enforcement officer or expert to testify concerning the process of manufacturing methamphetamine.

Therefore, as Agent Razzo testified as an expert witness, we hold the trial court abused its discretion in permitting him to testify, and we hold the trial court erred in finding that the State was not required to comply with the discovery requirements pursuant to section 15A-903. As defendant was not provided sufficient notice that the State would be presenting any expert witnesses to testify concerning the process of manufacturing methamphetamine, we hold defendant was prejudiced by the State's failure to comply with our state's discovery statutes. Defendant is therefore entitled to a new trial.

New trial.

Judges TYSON and GEER concur.

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LEROY BLAIR AND PAMELA BLAIR, PLAINTIFFS v. ROGER D. ROBINSON AND WIFE,
MICHELLE ROBINSON, AND R&M HOMES, INC., DEFENDANTS

No. COA05-1259

(Filed 5 July 2006)

Corrections; Parties— necessary parties—res judicata—piercing the corporate veil—alternative remedies

The trial court erred by dismissing plaintiff's complaint seeking to hold the individual defendants liable for an earlier judgment rendered in plaintiffs' favor against a corporation for a refund of a deposit for the purchase of a manufactured home from the corporation because: (1) defendants, the sole shareholders, directors, and officers of the corporation, were not necessary parties to the first action under N.C.G.S. § 1A-1, Rule 19 when there was no basis at the time of the prior action to attempt to pierce the corporate veil and name the individuals as defendants; (2) plaintiffs appropriately filed suit for recovery of their deposit against the corporation which sold them the manufactured home, and defendants' untenable position would require every person seeking recovery against a corporation to attempt to pierce the corporate veil and name as defendants every officer and director of the company in order to ensure collection of any favorable judgment; (3) res judicata does not bar the present suit when the prior action sought recovery of a deposit and the present action seeks to pierce the corporate veil and determine whether defendants should be held liable for the corporate debt based on their alleged actions of selling off corporate assets for personal gain after the successful conclusion of plaintiffs' prior suit; and (4) the existence of possible alternative remedies does not preclude plaintiffs from pursuing their present course of action.

Appeal by plaintiffs from an order entered 28 June 2005 by Judge David S. Cayer in Gaston County Superior Court. Heard in the Court of Appeals 29 March 2006.

M. Clark Parker, P.A., by M. Clark Parker, for plaintiff-appellants.

J. Boyce Garland, Jr. for defendant-appellees.

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[178 N.C. App. 357 (2006)]

HUNTER, Judge.

Leroy and Pamela Blair (“plaintiffs”) appeal from an order of the trial court dismissing their complaint against Roger and Michelle Robinson (“the Robinsons”) and their company, R&M Homes, Inc. (“R&M Homes”) (collectively “defendants”). Plaintiffs contend their present action is neither barred by *res judicata* nor by their failure to join the Robinsons as necessary parties in an earlier action. We agree that the trial court erred in dismissing their complaint, and we therefore reverse the order of the trial court.

This appeal arose after plaintiffs filed a complaint against defendants in Gaston County Superior Court seeking to hold them liable for an earlier judgment rendered in plaintiffs’ favor against R&M Homes. The complaint alleged the following: On or about 28 July 2003, plaintiffs instituted a civil action in Gaston County against R&M Homes to recover a \$20,000.00 deposit made by plaintiffs for the purchase of a manufactured home sold by R&M Homes. The civil action did not name the Robinsons as defendants. A subsequent jury trial found in favor of plaintiffs, and judgment for \$20,000.00 against R&M Homes was entered accordingly. When plaintiffs attempted to enforce the judgment, however, they discovered that the Robinsons, as sole shareholders, directors, and officers of R&M Homes, had ceased operations and sold all assets. Plaintiffs alleged the Robinsons did so “in order to divest corporate assets and avoid paying the Judgment in favor of . . . Plaintiffs[.]” Plaintiffs further alleged that the Robinsons “improperly kept the proceeds of the sale of [the] corporate assets for personal benefit and have failed to use said sale proceeds or other assets of R & M Homes, Inc. to pay corporate debt, including the Judgment in favor of the Plaintiffs.” The complaint alleged that R&M Homes was operated as a mere instrumentality or alter ego of the Robinsons, and that plaintiffs should therefore recover from the Robinsons the amount of the earlier judgment entered against R&M Homes. The complaint also charged defendants with fraud and breach of fiduciary duty.

The Robinsons filed a motion to dismiss plaintiffs’ complaint, arguing that it was barred by the doctrine of *res judicata*, the failure of plaintiffs to join the Robinsons as necessary parties in the prior action against R&M Homes, and failure to state a claim upon which relief may be granted. The trial court agreed and entered an order dismissing plaintiffs’ complaint with prejudice. Plaintiffs appeal.

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Plaintiffs contend the trial court erred in dismissing their complaint. Defendants argue that the Robinsons were necessary parties to the first action, and the trial court therefore properly dismissed plaintiffs' present action.

North Carolina Rule of Civil Procedure 19 governs the necessary joinder of parties and provides in part:

(a) *Necessary joinder*.—Subject to the provisions of Rule 23, those who are united in interest must be joined as plaintiffs or defendants; but if the consent of anyone who should have been joined as plaintiff cannot be obtained he may be made a defendant, the reason therefor being stated in the complaint; provided, however, in all cases of joint contracts, a claim may be asserted against all or any number of the persons making such contracts.

N.C. Gen. Stat. § 1A-1, Rule 19(a) (2005). “ ‘Necessary parties must be joined in an action.’ ” *Karner v. Roy White Flowers, Inc.*, 351 N.C. 433, 438, 527 S.E.2d 40, 44 (2000) (citation omitted). “A necessary party is one who ‘is so vitally interested in the controversy that a valid judgment cannot be rendered in the action completely and finally determining the controversy without his presence.’ ” *Id.* at 438-39, 527 S.E.2d at 44 (quoting *Strickland v. Hughes*, 273 N.C. 481, 485, 160 S.E.2d 313, 316 (1968)).

According to the complaint, plaintiffs' prior suit against R&M Homes sought recovery of a deposit for the sale of a manufactured home by the corporation. Plaintiffs alleged that it was only after judgment was entered in favor of plaintiffs that the Robinsons allegedly ceased operations and sold all corporate assets in an effort to avoid payment. The present suit seeks to hold the Robinsons personally liable for the corporate debt based on these actions arising after the conclusion of the first suit. Assuming the allegations in the complaint are true, when they instituted the first suit, plaintiffs could not have predicted the subsequent actions of the Robinsons giving rise to the present suit. There was therefore no basis, at the time of the prior action, to attempt to pierce the corporate veil and name the Robinsons as defendants. Thus, the Robinsons were not necessary parties to the first action. N.C. Gen. Stat. § 1A-1, Rule 19. Plaintiffs appropriately filed suit for recovery of their deposit against R&M Homes, the corporation which sold them the manufactured home. Defendants' untenable position would require every person seeking recovery against a corporation to attempt to pierce the corporate veil

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and name as defendants every officer and director of the company in order to ensure collection of any favorable judgment.

Defendants next contend the doctrine of *res judicata* bars plaintiffs' present suit. Defendants assert that plaintiffs should have sought recovery from the Robinsons during the prior action and their failure to do so precludes plaintiffs' present claim. We do not agree.

Under the doctrine of *res judicata*:

“Where a second action or proceeding is between the same parties as the first action or proceeding, the judgment in the former action or proceeding is conclusive in the latter not only as to all matters actually litigated and determined, but also as to all matters which could properly have been litigated and determined in the former action or proceeding.”

Fickley v. Greystone Enters., Inc., 140 N.C. App. 258, 260, 536 S.E.2d 331, 333 (2000) (citation omitted). For *res judicata* to apply, there must be identity of (1) parties, (2) subject matter, and (3) issues. *Beall v. Beall*, 156 N.C. App. 542, 545, 577 S.E.2d 356, 359, *appeal dismissed*, 357 N.C. 249, 585 S.E.2d 754 (2003); *Merrick v. Peterson*, 143 N.C. App. 656, 662, 548 S.E.2d 171, 175-76 (2001).

In the present case, plaintiffs originally sought and obtained a final judgment against R&M Homes to recover their deposit from the sale of a manufactured home. The Robinsons were not parties to the first civil action. The present action seeks to pierce the corporate veil and determine whether the Robinsons should be held liable for the corporate debt of R&M Homes. The present complaint also sets forth claims of fraud and breach of fiduciary duty arising from the Robinsons' alleged actions in selling off corporate assets for personal gain. As noted *supra*, plaintiffs alleged that these actions did not occur until after the successful conclusion of plaintiffs' prior suit. Thus, according to the allegations in the complaint, plaintiffs' present claims were not and could not have been raised in the first suit. Because there is neither identity of parties, subject matter, or issues, *res judicata* is inapplicable and does not bar plaintiffs' present action. *See Beall*, 156 N.C. App. at 545, 577 S.E.2d at 359 (holding that, where the prior claim was a motion for an accounting arising out of divorce proceedings, *res judicata* did not bar the present claim for fraud, conversion, unfair and deceptive trade practice, and misappropriation); *compare Murillo v. Daly*, 169 N.C. App. 223, 226-27, 609 S.E.2d 478, 481 (2005) (holding that the tenant plaintiffs were not

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barred by the doctrine of *res judicata* from pursuing their complaint against the landlord defendant for breach of contract, negligence, and unfair and deceptive trade practices arising from a broken septic tank system, where the plaintiffs had failed to assert these claims as counterclaims in an earlier action brought by the defendant for ejection and recovery of unpaid rent).

Defendants contend the trial court properly dismissed plaintiffs' complaint for failure to state a claim upon which relief may be based. "A claim for relief should not suffer dismissal unless it affirmatively appears that plaintiff is entitled to no relief under any state of facts which could be presented in support of the claim." *Presnell v. Pell*, 298 N.C. 715, 719, 260 S.E.2d 611, 613 (1979). In ruling on a motion under Rule 12(b)(6), "the complaint must be viewed as admitted, and on that basis the court must determine as a matter of law whether the allegations state a claim for which relief may be granted." *Stanback v. Stanback*, 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979).

Defendants base their argument on their prior contentions that the Robinsons were necessary parties and *res judicata* bars the present action. In addition, defendants argue that plaintiffs have adequate statutory remedy and do not need to institute the present civil action. Section 1-352 of the General Statutes provides that:

When an execution against property of a judgment debtor, or any one of several debtors in the same judgment, issued to the sheriff of the county where he resides or has a place of business, or if he does not reside in the State, to the sheriff of the county where a judgment roll or a transcript of a judgment is filed, is returned wholly or partially unsatisfied, the judgment creditor at any time after the return, and within three years from the time of issuing the execution, is entitled to an order from the court to which the execution is returned or from the judge thereof, requiring such debtor to appear and answer concerning his property before such court or judge, at a time and place specified in the order, within the county to which the execution was issued.

N.C. Gen. Stat. § 1-352 (2005). Plaintiffs may also serve written interrogatories to discover assets of a judgment debtor. *See* N.C. Gen. Stat. § 1-352.1 (2005). Although we agree that plaintiffs might have sought some relief pursuant to these statutes, the existence of possible alternate remedies does not preclude plaintiffs from pursuing their present course of action. *See, e.g., Douglas v. Parks*, 68 N.C. App. 496, 497-98, 315 S.E.2d 84, 86 (1984) (discussing election of

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remedies doctrine). Because plaintiffs' complaint states several claims upon which relief may be granted, the trial court erred in dismissing plaintiffs' complaint.

In conclusion, we hold the trial court erred in dismissing plaintiffs' complaint, and we therefore reverse the order of the trial court.

Reversed.

Judges McGEE and STEPHENS concur.

MICHAEL SCOTT WEBB, BY AND THROUGH HIS GUARDIAN AD LITEM, RANDY BUMGARNER, AND JAYNE MANEY, PLAINTIFFS v. KENNETH NICHOLSON, IN HIS INDIVIDUAL CAPACITY, AND JACKSON COUNTY BOARD OF EDUCATION, DEFENDANTS

No. COA05-961

(Filed 5 July 2006)

Immunity— governmental—school principal at dance—student removed from window

Supervising a school dance was a governmental function for the principal, who was acting in his capacity as public official when he removed plaintiff Webb from a cafeteria window. Governmental immunity bars personal liability by the principal for negligence and the trial court did not err in granting his motion for judgment on the pleadings.

Appeal by plaintiffs from order entered 7 March 2005 by Judge Ronald K. Payne in the Superior Court in Jackson County. Heard in the Court of Appeals 22 February 2006.

Cloninger, Lindsay, Hensley & Searson, P.L.L.C., by John C. Hensley, Jr., for plaintiff-appellants.

Cranfill, Sumner, & Hartzog, L.L.P., by Ann S. Estridge and Meredith T. Black, for defendant-appellee Kenneth Nicholson.

Tharrington Smith, L.L.P., by Deborah R. Stagner, and Allison B. Schafer, General Counsel, for North Carolina School Boards Association, amicus curiae.

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[178 N.C. App. 362 (2006)]

HUDSON, Judge.

On 29 July 2004, plaintiffs Michael Scott Webb (“Webb”) and Jayne Maney filed a complaint against defendants Kenneth Nicholson (“Nicholson”), individually, and the Jackson County Board of Education (“the Board”). On 28 September 2004, Nicholson moved to dismiss the claims against him, which motion the court denied. In his answer and amended answer, Nicholson asserted defenses of public official and sovereign immunity. On 5 January 2005, Nicholson moved to dismiss the complaint and for judgment on the pleadings pursuant to Rule 12(c). By order of 1 March 2005, the court granted the motion for judgment on the pleadings and dismissed the claims against Nicholson. Plaintiffs appeal. As discussed below, we affirm.

On 7 September 2001, the Yearbook Club of Smoky Mountain High School sponsored a dance in the school cafeteria in order to raise money to publish the yearbook. Defendant Nicholson, principal of the high school, attended the dance to provide supervision. Plaintiff Webb testified that he attended the dance with his brother, and that his brother entered the dance after paying for his own ticket, but without paying for Webb. When Webb was denied entry, he went to a cafeteria window and leaned inside, allegedly in order to attract his brother’s attention. The assistant principal saw Webb and told him to get back outside. Nicholson pulled Webb back out through the window, and pushed him up against the exterior wall. Webb alleged that Nicholson and the Board negligently caused him injury. Webb suffered from osteonecrosis, a medical condition which had required several prior hip surgeries, and which left his hip in need of protection. Following the incident with Nicholson at the school dance, Webb required additional medical treatment including surgeries.

The court did not dismiss plaintiffs’ claims against the Board in the order granting a dismissal to Nicholson. “[A]n appeal of an order denying [a] motion for judgment on the pleadings is an interlocutory appeal.” *Paquette v. County of Durham*, 155 N.C. App. 415, 418, 573 S.E.2d 715, 717 (2002), *disc. review denied*, 357 N.C. 165, 580 S.E.2d 695 (2003). However, an interlocutory order raising issues of sovereign immunity affects a substantial right and warrants immediate appellate review. *Id.* Having concluded that this interlocutory appeal is properly before us, we turn to the substantive argument raised by plaintiffs.

Plaintiffs argue that the trial court erred in granting judgment on the pleadings pursuant to Rule 12(c) to Nicholson. We do not agree.

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Rule 12 provides that:

(c) Motion for judgment on the pleadings.—After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

N.C. Gen. Stat. § 1A-1, Rule 12(c) (2005).

Motions for judgment on the pleadings pursuant to Rule 12(c) are designed to ‘dispose of baseless claims or defenses when the formal pleadings reveal their lack of merit.’ *Ragsdale v. Kennedy*, 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974). The movant bears the burden of proving that, after viewing the facts and permissible inferences in the light most favorable to the non-movant, he or she is entitled to judgment as a matter of law. *DeTorre v. Shell Oil Co.*, 84 N.C. App. 501, 504, 353 S.E.2d 269, 271 (1987).”

Vereen v. Holden, 121 N.C. App. 779, 782, 468 S.E.2d 471, 473 (1996), *reh’ing granted*, 345 N.C. 646, 483 S.E.2d 719, *adhered to*, 127 N.C. App. 205, 487 S.E.2d 822 (1997). We review such a grant by determining “whether the moving party has shown that no material issue of fact exists upon the pleadings and that he is clearly entitled to judgment.” *Affordable Care, Inc. v. N.C. State Bd. of Dental Exam’rs*, 153 N.C. App. 527, 532, 571 S.E.2d 52, 57 (2002). “All factual allegations in the nonmovant’s pleadings are deemed admitted except those that are legally impossible or not admissible in evidence.” *Id.* Nicholson asserted the defense of public official immunity, arising from his position as principal of Smoky Mountain High School. Plaintiffs contend that the trial court erred in its grant of judgment on the pleadings because the pleadings did not show that Nicholson’s supervision of the school dance was a governmental function nor was it evident that Nicholson was acting as a public official rather than a public employee during the incident. This argument is not persuasive.

Under the doctrine of public official immunity, ‘when a governmental worker is sued individually, or in his or her personal capacity, our courts distinguish between public employees and public officials in determining negligence liability.’ *Hare v.*

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Butler, 99 N.C. App. 693, 699-700, 394 S.E.2d 231, 236 (1990) (citations omitted). ‘Officers exercise a certain amount of discretion, while employees perform ministerial duties.’ *Cherry v. Harris*, 110 N.C. App. 478, 480, 429 S.E.2d 771, 773 (1993) (citation omitted). ‘Discretionary acts are those requiring personal deliberation, decision[,] and judgment . . . Ministerial duties, on the other hand, are absolute and involve merely the execution of a specific duty arising from fixed and designated facts.’ *Isenhour v. Hutto*, 350 N.C. 601, 610, 517 S.E.2d 121, 127 (1999) (citations and quotations omitted). Additionally, ‘to constitute an office, as distinguished from employment, it is essential that the position must have been created by the constitution or statutes of the sovereignty, or that the sovereign power shall have delegated to an inferior body the right to create the position in question.’ *State v. Hord*, 264 N.C. 149, 155, 141 S.E.2d 241, 245 (1965).

Under these guidelines, this Court has recognized that school officials such as superintendents and principals perform discretionary acts requiring personal deliberation, decision, and judgment. *Gunter v. Anders*, 114 N.C. App. 61, 67-68, 441 S.E.2d 167, 171 (1994).

Farrell v. Transylvania Cty. Bd. of Educ., 175 N.C. App. 689, 695-96, 625 S.E.2d 128, 133 (2006). Local school boards are designated by statute as having the responsibility for supervision and oversight of extracurricular activities, such a school dance to raise yearbook funds:

(4) To Regulate Extracurricular Activities.—Local boards of education shall make all rules and regulations necessary for the conducting of extracurricular activities in the schools under their supervision, including a program of athletics, where desired, without assuming liability therefor; provided, that all interscholastic athletic activities shall be conducted in accordance with rules and regulations prescribed by the State Board of Education.

N.C. Gen. Stat. § 115C-47 (2005). Thus, supervision of the school dance was a governmental function to which governmental immunity would apply. Moreover, “[b]y statute and under traditional common-law principles, . . . the superintendent and principal are agents of the board.” *Abell v. Nash County Bd. of Education*, 71 N.C. App. 48, 53, 321 S.E.2d 502, 506 (1984), *disc. review denied*, 313 N.C. 506, 329 S.E.2d 389 (1985).

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A public official may only be held personally liable when his tortious conduct falls within one of the immunity exceptions: 1) the conduct is malicious; 2) the conduct is corrupt; or 3) the conduct is outside the scope of official authority. *Epps v. Duke Univ., Inc.*, 122 N.C. App. 198, 205, 468 S.E.2d 846, 851-52, *review denied*, 344 N.C. 436, 476 S.E.2d 115 (1996). A public employee, on the other hand, is not entitled to such protection. *Meyer v. Walls*, 347 N.C. 97, 489 S.E.2d 880 (1997). A public official is one whose position is created by the N.C. Constitution or the N.C. General Statutes and exercises some portion of sovereign power and discretion, whereas public employees perform ministerial duties. *Block v. County of Person*, 141 N.C. App. 273, 540 S.E.2d 415 (2000).

Mabrey v. Smith, 144 N.C. App. 119, 122, 548 S.E.2d 183, 186, *disc. review denied*, 354 N.C. 219, 554 S.E.2d 340 (2001). “Discretionary acts are those requiring personal deliberation, decision and judgment; duties are ministerial when they are absolute, certain, and imperative, involving merely the execution of a specific duty arising from fixed and designated facts.” *Hare v. Butler*, 99 N.C. App. 693, 700, 394 S.E.2d 231, 236, *disc. review denied*, 327 N.C. 634, 399 S.E.2d 121 (1990) (internal quotation marks omitted). Our general statutes describe the duties of a school principal, including:

(e) To Discipline Students and to Assign Duties to Teachers with Regard to the Discipline, General Well-being, and Medical Care of Students.—The principal shall have authority to exercise discipline over the pupils of the school under policies adopted by the local board of education as prescribed by G.S. 115C-391(a). The principal shall use reasonable force to discipline students under G.S. 115C-390 . . .

N.C. Gen. Stat. § 115C-288 (2005). In addition, N.C. Gen. Stat. § 115C-390 authorizes principals to “use reasonable force in the exercise of lawful authority to restrain or correct pupils and maintain order.” N.C. Gen. Stat. § 115C-390 (2005). Further, “school personnel may use reasonable force, including corporal punishment, to control behavior or to remove a person from the scene in those situations when necessary. . . .” N.C. Gen. Stat. § 115C-391 (2005). These statutes make clear that a principal’s decision to use reasonable force in order to maintain discipline at a school dance is a discretionary act.

Because supervising the school dance was a governmental function, and Nicholson was acting in his capacity as a public official

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when he removed Webb from the cafeteria window, governmental immunity bars Nicholson from personal liability for negligence. Accordingly, the trial court did not err in granting Nicholson's motion for judgment on the pleadings.

Affirmed.

Judges HUNTER and BRYANT concur.

DIANE FINGER, PLAINTIFF v. GASTON COUNTY, DEFENDANT

No. COA05-871

(Filed 5 July 2006)

Cities and Towns; Police Officers— discontinuance of special allowance for retirement from county's police force— absence of preaudit certificate

The trial court did not err in a breach of contract case by granting summary judgment in favor of defendant county in an action for breach of contract for its failure to continue paying plaintiff a special allowance based on her retirement from the county's police force, because: (1) an agreement with a county requiring the payment of money is not enforceable in the absence of the preaudit certificate mandated by N.C.G.S. § 159-28(a); (2) the agreement in this case that is the subject of this appeal is for the payment of money, and thus, *Lee v. Wake County*, 165 N.C. App. 154 (2004), is inapplicable; and (3) the pertinent memorandum is not enforceable under principles of estoppel since to permit a party to use estoppel to render a county contractually bound despite the absence of the certificate would effectively negate N.C.G.S. § 159-28(a).

Appeal by plaintiff from order entered 3 January 2005 by Judge Jesse B. Caldwell III in Gaston County Superior Court. Heard in the Court of Appeals 9 February 2006.

Thomas B. Kakassy, P.A., by Thomas B. Kakassy, for plaintiff-appellant.

Stott, Hollowell, Palmer & Windham, LLP, by Martha Raymond Thompson, for defendant-appellee.

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GEER, Judge.

Plaintiff Diane Finger appeals from the trial court's grant of summary judgment in favor of defendant Gaston County. Finger sued the County after it stopped paying her a special allowance based on her retirement from the County's police force. This Court's decision in *Data Gen. Corp. v. County of Durham*, 143 N.C. App. 97, 545 S.E.2d 243 (2001), holding that an agreement with a county is not enforceable in the absence of the preaudit certificate mandated by N.C. Gen. Stat. § 159-28(a) (2005), requires that we uphold the order granting summary judgment.

Facts

The facts in this case are not in dispute. Finger was employed by Gaston County as a police officer until March 1999, when she retired on medical disability. Two and a half years later, in October 2001, Charles Vinson, the Gaston County Human Resources Director, informed Finger that she was entitled to receive a supplemental retirement benefit, called a "Law Enforcement Special Allowance," because her retirement was the result of medical disability. In November 2001, Chuck Moore, the Gaston County Attorney, told Finger that the County owed her arrearages because of the County's failure to pay her the special allowance.

On 7 February 2003, Finger and Vinson signed a "Memorandum of Understanding Between: Diane P. Finger and the County of Gaston Regarding Law Enforcement Special Separation Allowance" ("the Memorandum"). The Memorandum provided that: (1) Finger was entitled to receive \$687.11 per month from the date of her retirement until she reached the age of 62; (2) the County had thus far incorrectly denied this benefit to Finger; (3) Finger was entitled to 46 months of arrearages totaling \$31,607.25; (4) Finger would receive half of the arrearages in a lump sum of \$15,803.62 and the remainder in 23 monthly installments of \$687.11 each; (5) in addition to the monthly arrearage installments, Finger would also begin receiving her regular monthly allowance of \$687.11 per month, bringing her monthly payments to \$1,374.23; and (6) after the 23 months were finished, Finger would continue to receive \$687.11 per month until the first month after she turned 62 years old.

On 26 June 2003, however, the Gaston County Board of Commissioners determined that they had misapplied N.C. Gen. Stat. § 143.166.41(a) (2005) when they had previously concluded that

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Finger and other county employees were entitled to a special allowance. The Board, therefore, adopted Resolution 2003-245, which ended the supplemental benefit payment that Finger and others had been receiving.

Once the County ceased paying Finger, Finger brought suit for breach of contract, seeking \$100,989.00 in damages, as well as attorneys' fees. Gaston County's motion to dismiss under Rule 12(b)(6) was denied, but subsequently its motion for summary judgment was allowed. Finger filed a timely notice of appeal to this Court.

Discussion

Finger first argues that summary judgment was inappropriate because issues of fact exist as to whether the Memorandum is an enforceable contract. This Court has previously held that "N.C. Gen. Stat. § 159-28(a) sets forth the requirements and obligations that must be met before a county may incur contractual obligations." *Cincinnati Thermal Spray, Inc. v. Pender County*, 101 N.C. App. 405, 407, 399 S.E.2d 758, 759 (1991). That statute provides in pertinent part:

If an obligation is evidenced by a contract or agreement requiring the payment of money or by a purchase order for supplies and materials, the contract, agreement, or purchase order shall include on its face a certificate stating that the instrument has been preaudited to assure compliance with this subsection. . . . An obligation incurred in violation of this subsection is invalid and may not be enforced.

N.C. Gen. Stat. § 159-28(a). It is undisputed that the Memorandum did not include the preaudit certificate required by § 159-28(a).

In *Data General*, this Court acknowledged that whenever a county enters into a *valid* contract, it waives sovereign immunity and may be sued for damages in the event of a breach of that contract. 143 N.C. App. at 102, 545 S.E.2d at 247. On the other hand, "in the absence of a valid contract, a state entity [including a county] may not be subjected to contractual liability." *Id.* The Court then held:

Where a plaintiff fails to show that the requirements of N.C. Gen. Stat. § 159-28(a) have been met, there is no valid contract, and any claim by plaintiff based upon such contract must fail.

In the instant case, [plaintiff] Data General has failed to make a showing that the required preaudit certificate exists, and none

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is evidenced in the record. Furthermore, Durham County has argued that no such certificate exists. As there is insufficient evidence in the record that the requirements of N.C. Gen. Stat. § 159-28(a) have been met, we conclude that no valid contract was formed between Data General and Durham County, and Durham County therefore has not waived its sovereign immunity to be sued (and Data General may not maintain a suit) for contract damages.

Id. at 103, 545 S.E.2d at 247-48 (internal citation omitted). The Court, therefore, affirmed dismissal of the plaintiff's breach of contract claim. *Id.*

We have been unable to identify any basis for distinguishing *Data General* from this case. Because the Memorandum had no preaudit certificate, "there is no valid contract, and any claim by plaintiff based upon such contract must fail." *Id.*, 545 S.E.2d at 247. *See also Cabarrus County v. Systel Bus. Equip. Co.*, 171 N.C. App. 423, 425, 614 S.E.2d 596, 597 ("Cabarrus County argues that the trial court erred in concluding that a settlement agreement between itself and [plaintiff] was valid and binding despite the absence of a completed preaudit certificate. We agree."), *disc. review denied*, 360 N.C. 61, 621 S.E.2d 177 (2005).

Finger relies upon *Lee v. Wake County*, 165 N.C. App. 154, 598 S.E.2d 427, *disc. review denied*, 359 N.C. 190, 607 S.E.2d 275 (2004), in arguing that the lack of a signed preaudit certificate does not necessarily render the Memorandum unenforceable. *Lee*, however, involved a memorandum agreement signed in a workers' compensation mediation in which the parties agreed "to prepare a formalized settlement compromise agreement for the [Industrial] Commission's consideration." *Id.* at 162, 598 S.E.2d at 433. The *Lee* Court held that this preliminary agreement did not require a preaudit certificate "to enable the Commission to direct the submission of a formalized compromise settlement agreement." *Id.* at 163, 598 S.E.2d at 433.

As this Court recognized in *Systel*, in rejecting the same argument made by Finger regarding *Lee*, "the action on appeal [in *Lee*] was 'for specific performance, not for the payment of money.'" *Systel*, 171 N.C. App. at 426, 614 S.E.2d at 598 (quoting *Lee*, 165 N.C. App. at 162, 598 S.E.2d at 433). In the present case, as in *Systel*, the agreement that is the subject of this appeal is for the payment of money, and *Lee* is therefore inapplicable. *See* N.C. Gen. Stat. § 159-28(a) (requiring a

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preaudit certificate with respect to an “agreement requiring the payment of money”).

Finger next argues that, even if the Memorandum is not legally enforceable, a genuine issue of fact exists as to whether it is enforceable under principles of estoppel. In *Data General*, this Court rejected an identical argument:

We have concluded, *supra*, that the lease agreement entered between the parties was not a valid contract sufficient to bind Durham County as it failed to comply with the statutory requirements in N.C. Gen. Stat. § 159-28(a). Data General may not recover under an equitable theory such as estoppel for breach of contract where Durham County has not expressly entered a valid contract. Furthermore, parties dealing with governmental organizations are charged with notice of all limitations upon the organizations’ authority, as the scope of such authority is a matter of public record. Likewise, the preaudit certificate requirement is a matter of public record, N.C. Gen. Stat. § 159-28(a), and parties contracting with a county within this state are presumed to be aware of, and may not rely upon estoppel to circumvent, such requirements.

143 N.C. App. at 104, 545 S.E.2d at 248 (internal citations omitted).

Our General Assembly has in N.C. Gen. Stat. § 159-28(a) made a policy determination to forbid counties from entering into contracts for payment of money that lack a preaudit certificate. To permit a party to use estoppel to render a county contractually bound despite the absence of the certificate would effectively negate N.C. Gen. Stat. § 159-28(a). We are not free to allow a party to obtain a result indirectly that the General Assembly has expressly forbidden. The trial court, therefore, also properly granted summary judgment with respect to Finger’s claims based on estoppel.

Affirmed.

Judges HUDSON and TYSON concur.

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[178 N.C. App. 372 (2006)]

TERRIE S. WOODLE, PETITIONER v. ONSLOW COUNTY ABC BOARD AND EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA, RESPONDENTS

No. COA05-1458

(Filed 5 July 2006)

Administrative Law— Employment Security Commission findings—no exception—no trial court authority to consider

The superior court had no authority to determine that Employment Security Commission findings were not supported by the evidence and then make its own findings where petitioner had not excepted to the ESC findings. The trial court compounded its error by relying on a decision by an appeals referee in favor of a co-worker; by statute, that decision was not admissible or binding. N.C.G.S. § 96-15(i); N.C.G.S. § 96-4(t)(8).

Appeal by respondents from judgment entered 21 July 2005 by Judge Jerry Braswell in Onslow County Superior Court. Heard in the Court of Appeals 17 May 2006.

Wright Law Firm, by Ernest J. Wright, for petitioner-appellee.

Ward and Smith, P.A., by William Joseph Austin, Jr., for respondent-appellant Onslow County ABC Board.

Acting Chief Counsel David L. Clegg, by Sharon A. Johnston, for respondent-appellant Employment Security Commission of North Carolina.

HUNTER, Judge.

The Employment Security Commission of North Carolina (“ESC”) and the Onslow County ABC Board (“ABC”) (collectively “respondents”) appeal from judgment of the trial court reversing a decision by the ESC in favor of Terrie S. Woodle (“petitioner”). For the reasons stated herein, we reverse the judgment of the trial court.

Petitioner worked as a sales clerk for ABC from 22 October 2002 until 11 November 2004, when she resigned. Petitioner thereafter filed a claim for unemployment benefits. An adjudicator hearing petitioner’s claim determined that she had left her employment without good cause and denied benefits. Petitioner appealed her claim to an ESC appeals referee who, upon reviewing petitioner’s case, made the following pertinent findings:

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3. Claimant left this job because she did not wish to work for a particular manager.

4. Claimant began working for employer on October 22, 2002.

5. On October 22, 2004, claimant and another employee spoke to the Onslow County ABC Board administrator about concerns they had with their manager. The manager allegedly took merchandise from the store, acted unprofessionally, and violated employer's policies and procedures.

6. On October 26, 2004, the administrator met with claimant's manager, who largely denied the allegations against her. The administrator decided to move the manager to another store for 60 days to see how she performed there.

7. The administrator monitored the manager's job performance at the store where she had been placed and found it to be satisfactory. On November 8, 2004, the [administrator] decided to bring the manager back to the store where claimant worked on November 15, 2004.

8. On November 11, 2004, the administrator went to the store where claimant worked and told her that their former manager would be returning on November 15, 2004.

9. Claimant protested the manager's return and threatened to quit if she came back. The administrator told claimant the manager was coming back on November 15, 2004, and that if she didn't like it, "there is the door," and she could leave.

10. Claimant left the store, effectively resigning her employment.

Based on these findings, the appeals referee concluded that petitioner had not shown good cause attributable to her employer to leave her job and she was therefore not qualified for unemployment benefits.

Petitioner appealed to the full ESC. The ESC reviewed the evidence and found that the decision of the appeals referee was supported by competent and credible evidence of record and adopted the findings made below with the following modification to finding of fact number 7:

7. Wilbert Watkins, administrator, was satisfied with the store manager's performance at the other location. On November 8,

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2004, he decided to return the manager to the store at which the claimant worked.

The ESC otherwise affirmed the decision of the appeals referee.

Petitioner filed a petition for judicial review on 23 March 2005, arguing the decision of the ESC was erroneous as a matter of law. Specifically, petitioner argued that her co-worker, Tracie Hensley (“Hensley”), who left her employment under identical circumstances as petitioner, had received a favorable decision from another ESC appeals referee approximately one week prior to the decision rendered by petitioner’s appeals referee. Petitioner contended the ESC appeals referee hearing her case was bound by *stare decisis* to render the same decision in her case as that of her co-worker. Petitioner attached the decision rendered in favor of her co-worker to her petition for judicial review.

Petitioner’s case came before the trial court on 11 July 2005. Upon examining the record, the trial court determined that the facts found by the ESC were not based upon competent evidence of record, and that the ESC improperly applied the law to the facts. The trial court made the following facts:

1. That from the record, the facts and circumstances in the cases of Terrie S. Woodle, Commission Decision No. 05 (UI) 0946 and Tracie S. Hensley, Appeals Decision No. IV-A-44999 are identical.
2. That the Petitioner, Terrie S. Woodle, along with Ms. Hensley, reported that their supervisor Nancy Foster was committing theft at their store.
3. That the supervisor was removed for sixty days so that the administrator of the Onslow County ABC Board, Mr. Will Watkins, could investigate the allegations.
4. That both employees, Woodle and Hensley, engaged in state protected activities to wit: “whistleblowing.”
5. That the record reflects that supervisor Foster had violated company policy according to Administrator Watkins.
6. That supervisor Foster was placed back in the same position over petitioner Woodle and Hensley within 60 days from her removal.
7. That the petitioner was given an ultimatum to work under supervisor Foster or to quit her employment.

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8. That both employees left their employment for good cause not attributable to the employees.
9. That employee-Hensley filed and received an award of unemployment compensation benefits from Appeals Referee Christopher Adams in January 24, 2005. The employer did not appeal the decision.
10. That Petitioner Woodle filed and was denied unemployment compensation benefits from Appeals Referee Edward L. Anderson on February 3, 2005.
11. That the treatment of both employees is disparate under the same set of facts.
12. That a manifest injustice exists regarding the denial of employee-Woodle's unemployment compensation benefits.

The trial court entered an order reversing the decision of the ESC. Respondents appeal.

By their first assignment of error, respondents contend the trial court erred by applying an improper standard of review and deciding the case on its merits. We agree.

Section 96-15 of the North Carolina General Statutes provides for judicial review of decisions rendered by the ESC in pertinent part as follows:

Judicial Review.—Any decision of the Commission, in the absence of judicial review as herein provided, shall become final 30 days after the date of notification or mailing thereof, whichever is earlier. Judicial review shall be permitted only after a party claiming to be aggrieved by the decision has exhausted his remedies before the Commission as provided in this Chapter and has filed a petition for review in the superior court of the county in which he resides or has his principal place of business. The petition for review shall explicitly state what exceptions are taken to the decision or procedure of the Commission and what relief the petitioner seeks. . . .

N.C. Gen. Stat. § 96-15(h) (2005). "In 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).

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Pursuant to section 96-15, the trial court's review of a decision by the ESC is confined to two steps: determining (1) if the ESC's findings of facts are supported by competent evidence, and (2) if those facts sustain the conclusions of law. *In re Graves v. Culp, Inc.*, 166 N.C. App. 748, 750, 603 S.E.2d 829, 830 (2004); *In re Enoch*, 36 N.C. App. 255, 256-57, 243 S.E.2d 388, 389-90 (1978). The trial court has no authority to make findings of fact with respect to the substantive issues in the case. *Gilliam v. Employment Security Comm. of N.C.*, 110 N.C. App. 796, 801, 431 S.E.2d 772, 775 (1993). Rather, the trial court may only "affirm the [ESC]'s dismissal of the appeal or remand the case for consideration of the substantive issues by the [ESC]." *Id.* "The [ESC] will be upheld if there is any competent evidence to support its findings." *Graves*, 166 N.C. App. at 750, 603 S.E.2d at 830.

In the present case, the trial court determined that the findings made by the ESC were not supported by the evidence. Petitioner made no exceptions to the findings made by the ESC, however. The trial court therefore lacked jurisdiction to consider this issue. *Id.* at 751, 603 S.E.2d at 831 (holding that, where the claimant made no exceptions to the ESC's findings in his petition for review, the claimant did not preserve these issues for review and the superior court lacked jurisdiction to address them). The trial court then proceeded to make its own findings from the evidence. The trial court had no authority to make such findings, however. *Gilliam*, 110 N.C. App. at 801, 431 S.E.2d at 775. While making such unauthorized findings, the trial court compounded its error by relying upon the appeals referee decision rendered in favor of petitioner's co-worker, Hensley. Section 96-4(t)(8) of our General Statutes provides, however, that:

Any finding of fact or law, judgment, determination, conclusion or final order made by an adjudicator, appeals referee, commissioner, the Commission or any other person acting under authority of the Commission pursuant to the Employment Security Law *is not admissible or binding* in any separate or subsequent action or proceeding, between a person and his present or previous employer brought before an arbitrator, court or judge of this State or the United States, *regardless of whether the prior action was between the same or related parties or involved the same facts.*

N.C. Gen. Stat. § 96-4(t)(8) (2005) (emphasis added). Thus, the Hensley decision was not admissible and the trial court should not

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have considered it. The decision of the trial court is erroneous and must be reversed.

Petitioner's sole argument in her petition for judicial review was that the ESC was bound to apply the earlier decision rendered by the appeals referee in favor of Hensley to her own case. N.C. Gen. Stat. § 96-4(t)(8) specifically precludes this argument, however. Having no other issue before it, the trial court should have affirmed the decision of the ESC. We therefore reverse the judgment and remand this case to the trial court to affirm the decision of the ESC.

Reversed and remanded.

Judges BRYANT and CALABRIA concur.

PEARL A. WILKINS, PETITIONER v. NORTH CAROLINA STATE UNIVERSITY,
RESPONDENT

No. COA05-1253

(Filed 5 July 2006)

Public Officers and Employees—rehiring after reduction in force—priority—years of service

A state employee with more than ten years of general service with the State who was subjected to a reduction in force did not have a priority under N.C.G.S. § 126-7.1(c2) over another employee who had also been reduced in force with approximately four years of state service. The trial erroneously held that the statutory phrase “in the same or related position classification” applies to employees with less than ten years of service but not to employees with more than ten years of service.

Appeal by respondent from judgment entered 14 June 2005 by Judge Abraham Penn Jones in Wake County Superior Court. Heard in the Court of Appeals 29 March 2006.

Schiller & Schiller, PLLC, by David G. Schiller, Kathryn H. Schiller, and Marvin Schiller, for petitioner-appellee.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Q. Shanté Martin, for respondent-appellant.

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[178 N.C. App. 377 (2006)]

HUNTER, Judge.

North Carolina State University (“NCSU”) appeals from judgment of the trial court concluding that Pearl A. Wilkins (“petitioner”) was entitled to priority consideration for a vacant position at NCSU. NCSU contends the trial court erred in its interpretation of the dispositive statute. We agree and therefore reverse the judgment of the trial court.

Petitioner worked for NCSU in the Animal Science Department from January 1979 to June 1990. She returned to NCSU as an administrative billing assistant in the Communication Technologies Department in February 1993. Petitioner was eventually promoted to the position of “Telecom Project Manager/Telecom Analyst II.” In May 2002, NCSU notified petitioner of an impending reduction in force (“RIF”) from her position. Her RIF became effective in June 2002. In December 2002, a “Telecom Analyst I” position became vacant. Petitioner applied for the position, but NCSU hired another former employee who had also been reduced in force. The employee hired had approximately four years of state service at the time of his RIF. Petitioner had more than ten years of general state service at the time of her RIF, but she had less than ten years of service in the specific position of a telecommunications analyst.

Petitioner subsequently brought this action in the Office of Administrative Hearings, arguing that, as an RIF employee with more than ten years of service, she was entitled to priority consideration for the vacant position pursuant to section 126-7.1 of the North Carolina General Statutes. Section 126-7.1 provides in pertinent part as follows:

(c2) If the applicants for reemployment for a position include current State employees, a State employee with more than 10 years of service shall receive priority consideration over a State employee having less than 10 years of service in the same or related position classification. This reemployment priority shall be given by all State departments, agencies, and institutions with regard to positions subject to this Chapter.

N.C. Gen. Stat. § 126-7.1(c2) (2005). Petitioner’s case eventually came before the trial court, which agreed that petitioner was entitled to priority consideration pursuant to section 126-7.1(c2) and entered judgment accordingly. NCSU appeals.

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NCSU contends the trial court erred in its interpretation of section 126-7.1(c2). NCSU argues that the phrase “in the same or related position classification” applies to both State employees with less than ten years of experience and those with more than ten years of experience. Thus, under NCSU’s interpretation of section 126-7.1(c2), only those State employees with more than ten years of experience in the same or related position classification as the position to which they are applying would receive priority consideration over State employees with less than ten years of experience. Because petitioner had less than ten years of experience as a “Telecom Analyst,” the position for which she was applying, NCSU contends she was not entitled to priority consideration over the RIF employee with less than ten years of State service.

As the central dispute in this case centers on statutory interpretation, our review is *de novo*. *N.C. Dep’t of Env’t & Natural Res. v. Carroll*, 358 N.C. 649, 659, 599 S.E.2d 888, 894-95 (2004); *Good Hope Hosp., Inc. v. N.C. Dep’t of Health & Human Serv.*, 175 N.C. App. 309, 311, 623 S.E.2d 315, 317 (2006) (“[i]n determining whether an agency erred in interpreting a statute, this Court employs a *de novo* standard of review”).

“The primary rule of statutory construction is to effectuate the intent of the legislature.” *In re Estate of Lunsford*, 359 N.C. 382, 392, 610 S.E.2d 366, 373 (2005). “[W]here the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must construe the statute using its plain meaning.” *Id.* at 391, 610 S.E.2d at 372 (quoting *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990)). “But where a statute is ambiguous, judicial construction must be used to ascertain the legislative will.” *Burgess*, 326 N.C. at 209, 388 S.E.2d at 136-37. It is well established that “a statute must be construed, if possible, to give meaning and effect to all of its provisions.” *HCA Crossroads Residential Ctrs. v. N.C. Dept. of Human Res.*, 327 N.C. 573, 578, 398 S.E.2d 466, 470 (1990).

Here, the statute provides that “a State employee with more than 10 years of service shall receive priority consideration over a State employee having less than 10 years of service in the same or related position classification.” N.C. Gen. Stat. § 126-7.1(c2). From the wording of the statute, it is unclear whether the phrase “in the same or related position classification” applies to both State employees with more and less than ten years of service, or only to a State employee having less than ten years of service. Because the statute is ambigu-

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ous, we must employ judicial construction in order to devise the intent of the legislature in drafting the statute. *Burgess*, 326 N.C. at 209, 388 S.E.2d at 136-37.

The trial court ruled that the phrase “in the same or related position classification” refers to the “‘State employee having less than 10 years of service’” but does not refer to the “‘State employee with more than 10 years of service.’” Under the trial court’s reading, a State employee with more than ten years of service, regardless of the particular position, should receive priority consideration over another State employee with less than ten years of service in the same or related position classification. Under such a scheme, a State employee with nine years of general experience, but only one year of specific experience in the same or related position classification, would be entitled to priority consideration over a State employee with nine years of specific experience in the vacant position. However, this interpretation renders the phrase “in the same or related position classification” entirely superfluous. If the legislature had truly intended for State employees with more than ten years of service to receive priority consideration over others with less than ten years of service, it could have eliminated the phrase “in the same or related position classification” altogether while achieving the same effect. The statute would then read “[i]f the applicants for reemployment for a position include current State employees, a State employee with more than 10 years of service shall receive priority consideration over a State employee having less than 10 years of service.” Because the trial court’s interpretation renders the phrase “in the same or related position classification” redundant and meaningless, we conclude the trial court erred in its reading of the statute. See *HCA Crossroads Residential Ctrs.*, 327 N.C. at 578, 398 S.E.2d at 470 (rejecting an interpretation of a statute that rendered its language superfluous).

Petitioner argues the trial court properly construed the statute employing the doctrine of the last antecedent. Under this doctrine, “relative and qualifying words, phrases, and clauses *ordinarily* are to be applied to the word or phrase immediately preceding and, *unless the context indicates a contrary intent*, are not to be construed as extending to or including others more remote.” *Id.* at 578, 398 S.E.2d at 469 (emphasis added). “This doctrine is not an absolute rule, however, but merely one aid to the discovery of legislative intent.” *Id.* Strict application of the doctrine of the last antecedent to the statutory language at issue here would render

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the phrase “in the same or related position classification” meaningless and therefore does not serve to illuminate legislative intent. We reject petitioner’s argument.

In conclusion, we hold the phrase “in the same or related position classification” in section 126-7.1(c2) applies to both State employees with more and less than ten years of service. *See* N.C. Gen. Stat. § 126-7.1(c2). Because petitioner did not have more than ten years of service in the same or related position classification as the position to which she applied, she was not entitled to priority consideration for the vacant position pursuant to section 126-7.1(c2). The trial court erred in determining otherwise. We therefore reverse the judgment of the trial court.

Reversed.

Judges McGEE and STEPHENS concur.

KAREN SCOTT LOVIN, PLAINTIFF v. RICHARD WAYNE BYRD, DEFENDANT

No. COA05-1326

(Filed 5 July 2006)

Arbitration and Mediation—prejudgment interest left open in award—later calculation by judge

The trial court did not err by adding prejudgment interest to an arbitration award where the arbitrator had expressly left the amount of prejudgment interest open. Both the arbitration agreement as understood by the parties and the award contemplated prejudgment interest; the judge’s mathematical calculation of the interest award did not amount to a modification of the award.

Appeal by unnamed defendant from an order and judgment entered 25 July 2005 by Judge Michael Beale in Richmond County Superior Court. Heard in the Court of Appeals 20 April 2006.

Kitchin, Neal, Webb, Webb & Futrell, P.A., by Henry L. Kitchin and Stephan R. Futrell for plaintiff-appellee.

Robinson Elliott & Smith, by William C. Robinson for defendant-appellant.

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CALABRIA, Judge.

The unnamed defendant, Allstate Insurance Company (“Allstate”), an under-insured motorist insurance provider, appeals an order and judgment granting Karen Scott Lovin’s (“plaintiff”) motion to amend an arbitration award to include prejudgment interest. We affirm.

On or about 14 February 1992, plaintiff and Richard Wayne Byrd (“defendant”) were involved in an automobile accident. On 5 January 1995, plaintiff filed a complaint against the defendant for negligence. After Allstate filed an answer, the plaintiff exercised her contractual right to demand arbitration. The parties agreed Gary S. Hemric (“Mr. Hemric”) would serve as the arbitrator and decide on the appropriate amounts for compensatory damages, prejudgment interest, and costs. At the arbitration proceeding, both parties presented evidence. On 28 April 2005, Mr. Hemric awarded plaintiff \$127,968.50 in compensatory damages, but expressly declined to award prejudgment interest. Mr. Hemric stated, in pertinent part:

This award is intended to reflect only my opinion as to the amount of compensation due Mrs. Lovin from the defendant. I have not attempted to calculate or take into account prejudgment interest in this award. The determination whether prejudgment interest should be paid by defendant and if so in what amount, is expressly left to counsel for the parties and a Superior Court Judge in Richmond County to decide. This will confirm my understanding that the parties have an arbitration agreement which anticipated a separate award of prejudgment interest; I am expressly declining to make that separate award of prejudgment interest at this time because I do not know enough about the history of the litigation to make an informed decision in that regard.

On 4 May 2005, plaintiff filed a motion to confirm the arbitration award and to award costs and interests. Plaintiff’s motion specifically requested the court award prejudgment interest from the date of filing until paid less any credit previously paid by defendant’s underlying primary insurance carrier. Allstate replied to plaintiff’s motion to confirm the arbitration award and to award costs and interest. On 6 June 2005, Judge Preston Cornelius confirmed the arbitrator’s award for compensatory damages. In addition, the court awarded plaintiff prejudgment interest at the legal rate of interest of eight percent (8%). Allstate filed a Rule 60 motion requesting the trial court vacate its order since plaintiff’s motion was never placed on the trial court cal-

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endar, counsel for Allstate never received notice to appear and therefore never appeared at the hearing. On 25 July 2005, Judge Michael Beale determined notice was inadequate and ordered a rehearing pursuant to Rule 60. Judge Beale confirmed the amount of the prior arbitration award less the credit. The principal amount was \$127,968.50 in compensatory damages minus a credit of \$25,000, an amount previously paid to the plaintiff by defendant's underlying primary insurance carrier. Judge Beale also awarded plaintiff eight percent (8%) interest from the date of filing up to and including the date the principal amount was paid, the 30th day of June 2005, for a total amount of \$86,324.56 in prejudgment interest. Defendant appeals.

I. Prejudgment Interest:

Defendant argues the trial court erred when it allegedly modified the arbitrator's award to include prejudgment interest. Defendant contends N.C. Gen. Stat. § 1-569.24 places strict limitations on a trial court's ability to modify an arbitration award. Defendant further contends that because the grounds for the alleged modification do not fall within the express parameters of § 1-569.24, the trial court erred in awarding prejudgment interest to the plaintiff. We disagree.

N.C. Gen. Stat. § 1-569.24 (2005), which governs modification of an arbitration award, states in relevant part:

(a) Upon motion . . . the Court shall modify or correct the award if:

(1) There was an evident mathematical miscalculation or an evident mistake in the description of a person, thing, or property referred to in the award;

(2) The arbitrator has made an award on a claim not submitted to the arbitrator, and the award may be corrected without affecting the merits of the decision on the claims submitted; or

(3) the award is imperfect in a matter of form not affecting the merits of the decision on the claims submitted.

(b) If a motion made under subsection (a) of this section is granted, the court shall modify and confirm the award as modified or corrected. Otherwise, unless a motion to vacate is pending, the court shall confirm the award.

N.C. Gen. Stat. § 1-569.24 applies only if the trial court modified the arbitration award. Black's Law Dictionary defines modification as

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“1. [a] change to something; an alteration.” Black’s Law Dictionary 1025 (8th ed. 2004). Here, the trial court did not change or alter any provision of the arbitration award, but merely enforced it as written. At the arbitration proceeding, Mr. Hemric stated “the parties have an arbitration agreement which anticipated a separate award of prejudgment interest,” but he did not calculate the amount at that time. Mr. Hemric stated the amount of the award was left open to be determined by “counsel for the parties and a Superior Court Judge in Richmond County[.]” Superior Court Judge Michael Beale found the arbitrator expressly stated the amount of prejudgment interest was unknown at the time, but could be determined by counsel for the parties and the Superior Court of Richmond County.

N.C. Gen. Stat. § 24-5(b) (2005) provides “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*[.]” (emphasis added). Judge Beale calculated the amount of prejudgment interest based upon the following: a legal rate of interest of eight percent (8%) and Mr. Hemric’s award of \$127,968.50 in compensatory damages decreased by the \$25,000 credit previously paid to the plaintiff by the defendant’s underlying primary insurance carrier. The legal rate of interest applied from the date the action commenced, 5 January 1995, to the date the principal amount was paid, 30 June 2005. Therefore, Judge Beale’s mathematical calculation, largely a ministerial function, does not amount to a modification of the arbitration award, but rather enforces the award as written.

We note the instant case is distinguishable from both *Palmer v. Duke Power Co.*, 129 N.C. App. 488, 499 S.E.2d 801 (1998) and *Eisinger v. Robinson*, 164 N.C. App. 572, 596 S.E.2d 831 (2004). In *Palmer*, this Court affirmed the trial court’s confirmation of an arbitration award absent prejudgment interest reasoning “we are persuaded by the fact that neither the arbitration agreement nor the arbitration award . . . makes any provision for the award of prejudgment interest.” *Palmer*, 129 N.C. App. at 498, 499 S.E.2d at 807. Similarly, in *Eisinger*, this Court denied plaintiff’s motion for prejudgment interest stating “[p]laintiff and defendant agreed at the time of the hearing that the award would be only for the value of the personal injury claim *and would not include interest or costs*.” *Eisinger*, 164 N.C. App. at 574, 596 S.E.2d at 832 (emphasis added). In the case *sub judice*, however, both the arbitration agreement as understood between the parties and the arbitration award as drafted by Mr.

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Hemric contemplate an award of prejudgment interest. Consequently, as the facts are readily distinguishable, neither *Palmer* nor *Eisinger* control in the instant case. We hold Judge Beale did not modify the arbitration award when he calculated prejudgment interest, but merely enforced the award as written.

Affirmed.

Judges McCULLOUGH and STEELMAN concur.

DON SETLIFF & ASSOCIATES, INC., PLAINTIFF v. SUBWAY REAL ESTATE CORP.,
DEFENDANT

No. COA05-1423

(Filed 5 July 2006)

**Small Claims— appeal to district court—estoppel defense—
failure to plead—no waiver**

Defendant did not waive its affirmative defense of estoppel because it was not pled in accordance with N.C.G.S. § 1A-1, Rule 8(c) upon appeal from small claims court to the district court for a trial de novo because no affirmative defenses are required to be pled in small claims court, N.C.G.S. § 7A-220, and a district court judge may try the case on the pleadings filed, N.C.G.S. § 7A-229.

Appeal by Plaintiff from judgment entered 15 July 2005 by Judge Thomas G. Foster, Jr. in District Court, Guilford County. Heard in the Court of Appeals 6 June 2006.

Wyatt Early Harris Wheeler, LLP, by Stanley F. Hammer, for plaintiff-appellant.

Norman L. Sloan for defendant-appellee.

WYNN, Judge.

“There are no required pleadings in assigned small claim actions other than the complaint.”¹ Here, Plaintiff contends that Defendant waived its affirmative defense of estoppel because it was not pled in accordance with North Carolina Rule of Civil Procedure

1. N.C. Gen. Stat. § 7A-220 (2005).

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8(c) upon appeal from small claims court to the district court for a trial *de novo*. Because no affirmative defenses are required to be pled in small claims court, and a district court judge may try the case on the pleadings filed,² we hold that Defendant did not waive its affirmative defense by failing to plead it.

In January 1996, Plaintiff Don Setliff & Associates, Inc., leased to Defendant Subway Real Estate Corporation the premises of 121 East Main Street, Jamestown, North Carolina, by terms of a written lease. On 14 February 2005, Setliff, Inc. filed a Complaint in Summary Ejectment in small claims court alleging that Subway Real Estate breached the lease by failing to pay any real estate taxes or special assessments. Following trial in small claims court, on 24 March 2005, the magistrate found that Subway Real Estate breached the lease by failing to pay taxes and ordered Subway Real Estate removed from the premises.

On 29 March 2005, Subway Real Estate gave notice of appeal to the district court. Following a trial *de novo*, District Court Judge Thomas G. Foster, Jr., found and concluded that Subway Real Estate breached the lease and was indebted to Setliff, Inc. for \$13,789.98,³ the amount of past due taxes, and that Setliff, Inc. was estopped to assert Subway's failure to pay taxes as a basis for termination of the lease and ejectment. Setliff, Inc. appeals.

On appeal, Setliff, Inc. argues that the trial court erred in concluding that it was estopped from asserting Subway Real Estate's failure to pay taxes as a breach of the lease agreement, because Subway Real Estate never pled estoppel as a defense pursuant to North Carolina Rule of Civil Procedure 8(c). We disagree.

Rule 8(c) requires parties asserting an affirmative defense, i.e., estoppel, to plead the defense in order to assert it at trial. N.C. Gen. Stat. § 1A-1, Rule 8(c) (2005). However, section 7A-220 of the North Carolina General Statutes provides that: "There are no required pleadings in assigned small claim actions other than the complaint. Answers and counterclaims may be filed by the defendant in accordance with G.S. 7A-218 and G.S. 7A-219. Any new matter pleaded in avoidance in the answer is deemed denied or avoided."

2. N.C. Gen. Stat. § 7A-229 (2005).

3. The amount listed in the facts and conclusions of law is \$13,789.98, but the trial court then ordered payment in the amount of \$13,798.98. This appears to be a scrivener's error on the part of the trial court and there is no dispute on appeal of the amount of payment.

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N.C. Gen. Stat. § 7A-220. Further, section 7A-218 provides in pertinent part: “Failure of defendant to file a written answer after being subjected to the jurisdiction of the court over his person constitutes a general denial.” N.C. Gen. Stat. § 7A-218 (2005). Accordingly, Subway Real Estate was not required to file an answer in small claims court in order to preserve its defense of estoppel for the *de novo* trial in district court. See *Aldridge v. Mayfield*, 2004 N.C. App. LEXIS 1109, *9-10 (COA03-1006) (filed 15 June 2004) (unpublished) (“[D]efendants were not required to file a pleading that asserted the defense of *res judicata* in small claims court to preserve the issue for the district court.”).

Nonetheless, Setliff, Inc. argues that although Subway Real Estate was not required to file an answer in small claims court, in order to try the issue of estoppel in district court, Subway Real Estate had to plead the defense in accordance with Rule 8(c) of the North Carolina Rules of Civil Procedure. Upon appeal from small claims court to district court, “[t]he district judge before whom the action is tried *may* order repleading or further pleading by some or all of the parties; *may* try the action on stipulation as to the issue; or *may* try it on the pleadings as filed.” N.C. Gen. Stat. § 7A-229 (emphasis added). This statute gives discretion to the trial court as to whether further pleadings are needed or to try the case on the pleadings filed in small claims court, of which no answer is required, including a pleading of affirmative defenses. While Rule 8(c) does require affirmative defenses to be pled for cases arising in the superior or district courts, section 7A-218 allows for general denials for cases arising in small claims court. Section 7A-229 then gives discretion to the trial court whether, upon appeal to the district court for a trial *de novo*, to allow more pleadings beyond those filed in small claims court or to proceed in district court on the existing pleadings. However, a defendant has not waived an affirmative defense because the trial court, in its discretion, did not allow for further pleadings upon appeal to the district court. See N.C. Gen. Stat. § 7A-229.

Setliff, Inc. cites to *Jones v. Ratley*, 168 N.C. App. 126, 607 S.E.2d 38 (Tyson, J., dissenting), *rev’d per curiam*, 360 N.C. 50, 619 S.E.2d 504 (2005), in support of its contention that upon appeal to the district court the North Carolina Rules of Civil Procedure “fully apply.” The dissent adopted by our Supreme Court without further opinion, held that upon appeal to the district court from small claims court, the district court judge was required to make adequate findings of fact and state the basis for its conclusion of the law to support its

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judgment. *Id.* at 134, 607 S.E.2d at 43. *Jones* addressed the requirements of the district court's judgments, not pleadings in the district court. Therefore, *Jones* is inapplicable to this case.

Accordingly, as Subway Real Estate was not required to plead its affirmative defense in small claims court and the district court tried the case on the pleadings as filed, Subway Real Estate did not waive its affirmative defense of estoppel. Therefore, the trial court did not err in considering the estoppel defense.

Affirmed.

Judges GEER and STEPHENS concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

Filed 5 July 2006

DAVIS v. CONTINENTAL TIRE No. 05-787	Ind. Comm. (I.C. #811985)	Affirmed
DODRILL v. RHYNE'S COLLISION REPAIR No. 05-1408	Ind. Comm. (I.C. #331691)	Affirmed
ESTATE OF QUESENBERRY v. BIG CREEK UNDERGROUND No. 05-1356	Ind. Comm. (I.C. #276369)	Affirmed; remanded for consideration of defendants' motion for attorneys' fees
FLAHIVE v. RMA HOME SERVS., INC. No. 05-1325	Rowan (03CVS1564)	Dismissed
HY-TECH CONSTR., INC. v. WAKE CTY. BD. OF EDUC. No. 05-884	Wake (04CVS388)	Affirmed
IN RE C.C. & H.P. No. 05-1532	Alamance (04J137) (04J138)	Affirmed
IN RE C.E.E. No. 05-1489	Yancey (98J72)	Affirmed
IN RE E.J.C. No. 05-990	Wayne (04JT194)	Affirmed
IN RE ESTATE OF WADE No. 05-1323	Rowan (03E460)	Dismissed
IN RE H.C. & G.C. No. 05-1349	Lee (04J91) (04J92) (01J52)	Affirmed as to the de- nial of the new trial motion and adjudica- tion of neglect and dependency as to grandfather. Re- versed as to the adju- dication of neglect and dependency as to the grandmother.
IN RE H.S.M. No. 05-1483	Buncombe (04J236) (04J237)	Affirmed
IN RE J.O.J. No. 05-1133	Alamance (99J7003)	Affirmed, remanded in part for correction of clerical error

IN RE T.T.L. No. 05-1443	Durham (04J114)	Dismissed
IN RE W.D.S. No. 05-1442	Graham (04J9)	Affirmed
IN RE WGR, EMK, MAK No. 05-1664	Wake (05J200)	Affirmed
JEFFERSON v. WASTE INDUS. No. 05-1302	Ind. Comm. (I.C. #323983)	Affirmed
JOYCE v. DAIMLERCHRYSLER MOTOR CORP. No. 05-1380	Watauga (04CVS309)	Reversed and remanded
LEVEL 3 COMMUNICATIONS, LLC v. COUCH No. 05-1505	Mecklenburg (00SP815)	Affirmed
OVERCASH GRAVEL & GRADING CO. v. WAHL No. 05-1484	Cabarrus (04CVS1068)	Dismissed
STATE v. ALSTON No. 05-1552	Alamance (04CRS23566) (04CRS58608) (04CRS58611) (04CRS58612) (04CRS58613) (04CRS58614)	No error
STATE v. BLAIR No. 05-1462	Mecklenburg (03CRS248566) (03CRS248567) (04CRS14735) (04CRS14736)	No error
STATE v. BOONE No. 05-1627	Forsyth (04CRS59348) (04CRS63106)	No error
STATE v. BOWMAN No. 05-1262	McDowell (02CRS53620)	No error
STATE v. CASTANO No. 05-1352	Mecklenburg (04CRS239984) (04CRS239985)	No prejudicial error
STATE v. CLARK No. 05-1407	Cherokee (03CRS51800) (03CRS51802)	No error

STATE v. COOPER No. 05-1296	Gaston (02CRS54985) (03CRS55035)	Case No. 02CRS54985 Affirmed. Case No. 03CRS55035 Affirmed; remanded for correction of judgment
STATE v. CRAWFORD No. 05-1324	Guilford (01CRS105092)	No error
STATE v. CROSBY No. 05-1530	Forsyth (04CRS60269)	No error; petition for Writ of Certiorari denied
STATE v. DAVIS No. 05-1523	Mecklenburg (04CRS30722) (04CRS30723)	No error
STATE v. DAY No. 05-1691	McDowell (03CRS54707)	No error
STATE v. DRIVER No. 05-1193	Carteret (05CRS50120)	No error
STATE v. EVERETTE No. 05-1385	Edgecombe (03CRS7001) (03CRS7002) (03CRS7003) (03CRS7004)	No error
STATE v. FENNELL No. 05-1678	Pender (05CRS4711)	Affirmed
STATE v. FITZGERALD No. 05-732	Johnston (03CRS53978)	No error
STATE v. FORD No. 05-1357	Wayne (03CRS60511) (04CRS50435) (04CRS1035) (04CRS3959)	No error at trial; re- versed and remanded for a new habitual felon hearing.
STATE v. FRANKUM No. 05-1508	Gaston (05CRS11459) (05CRS11460) (05CRS11461) (05CRS11462) (05CRS11463) (05CRS11464) (05CRS11465) (05CRS11466) (05CRS11467) (05CRS11468) (04CRS63415)	Affirmed

	(04CRS63416)	
	(04CRS63417)	
	(04CRS63418)	
	(04CRS63419)	
	(04CRS63420)	
	(04CRS63421)	
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	(04CRS63429)	
	(04CRS63430)	
	(04CRS63431)	
	(04CRS63432)	
	(04CRS63433)	
	(04CRS63434)	
	(04CRS63435)	
	(04CRS63436)	
STATE v. GEORGE No. 05-1454	Craven (03CRS52717)	No error
STATE v. GILLIKIN No. 05-1180	Craven (04CRS7470) (04CRS7471) (04CRS55127)	No error
STATE v. GRAHAM No. 05-1223	Forsyth (03CRS14599) (03CRS56458)	No error
STATE v. HARRIS No. 05-1526	Brunswick (04CRS55826) (04CRS55827) (04CRS55935) (04CRS56032) (04CRS56121) (04CRS56183) (04CRS56184) (04CRS56185)	Affirmed
STATE v. HARRISON No. 05-1468	Burke (04CRS3069)	No error
STATE v. HICKS No. 05-1200	New Hanover (04CRS51966)	No error
STATE v. HOUSE No. 05-1112	Buncombe (04CRS64239)	Dismissed

STATE v. JOHNSON No. 05-1198	New Hanover (03CRS64674) (03CRS64687)	No error
STATE v. JOYNER No. 05-1361	Surry (05CRS1619)	No error
STATE v. KING No. 05-1447	Rockingham (04CRS2135) (04CRS2136) (04CRS2137) (04CRS2138)	No prejudicial error
STATE v. LACHIUSA No. 06-43	Pamlico (03CRS50246)	No error
STATE v. LYNCH No. 05-1455	Wake (04CRS43834)	No error
STATE v. McADAMS No. 05-992	Wayne (04CRS54785)	No error
STATE v. v. McKENZIE No. 05-1171	Scotland (04CRS50394)	No error
STATE v. MOSS No. 05-1281	Person (02CRS51491)	No error
STATE v. RICHARDSON No. 05-1128	Forsyth (04CRS62833)	No error
STATE v. ROGERS No. 05-1047	Guilford (04CRS93602)	No error
STATE v. ROSS No. 05-1476	Forsyth (03CRS55132) (03CRS27450)	No error
STATE v. SCALES No. 05-643	Forsyth (03CRS63172)	No error
STATE v. SCOTT No. 05-1485	New Hanover (04CRS51671)	No error
STATE v. SKINNER No. 05-1239	Richmond (05CRS50191)	No error
STATE v. SPELLER No. 05-1599	Beaufort (04CRS51691) (04CRS51692)	No error
STATE v. STEPHENS No. 05-1218	Forsyth (04CRS57426) (04CRS35977)	No error

STATE v. STURDIVANT No. 05-1194	Union (03CRS51227) (03CRS51228) (03CRS51229) (03CRS51330) (03CRS51331) (03CRS51332) (03CRS51333) (03CRS51334) (03CRS51335) (03CRS51336) (03CRS51337)	No error
STATE v. THAXTON No. 05-1344	Buncombe (03CRS53975) (04CRS63018)	New trial
STATE v. WILLIAMS No. 05-1024	Mecklenburg (02CRS200469) (02CRS200470) (02CRS200485)	No error
STATE v. WITHERSPOON No. 05-1467	Forsyth (04CRS8843) (04CRS51939)	No error
STATE v. YOUNG No. 05-1265	Forsyth (04CRS11386) (04CRS54540) (04CRS54541)	No error
ULIN v. ULIN No. 05-1207	Brunswick (03CVD584)	Dismissed

STATE v. TAYLOR

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STATE OF NORTH CAROLINA v. MATTHEW LAWRENCE TAYLOR

No. COA05-1580

(Filed 18 July 2006)

1. Discovery— criminal—statutory only—interviewing prosecution witnesses—not included in statute

A detective was not required to submit to an interview with defense counsel against his wishes before trial. Pretrial discovery is statutory rather than a constitutional or common law right, and the General Assembly has not included the right to interview the State's witnesses in a criminal trial in the discovery statute. N.C.G.S. § 15A-903(a)(1).

2. Evidence— hearsay exception—plan for future act—murder victim's statement

A murder victim's statement of his plans for the night on which he was killed was admissible pursuant to the hearsay exception in N.C.G.S. § 8C-1, Rule 803(3), as a then-existing plan to engage in a future act.

3. Search and Seizure— probable cause to search residence—binding findings

The trial court correctly determined that probable cause existed to search a murder defendant's residence where there were unchallenged findings that it was reasonable to conclude that a crime had been committed, that defendant was involved, and that his residence might contain items missing from the victim's car and the weapon used in the crime.

4. Evidence— testimony that cellular phone images existed—no details—no prejudice

There was no prejudice in a prosecution for first-degree murder and other crimes in admitting testimony that defendant had a cellular telephone with stored photos. No evidence was presented about the contents of the images (guns), the jury did not see the images, and presuming the telephone was improperly seized, defendant failed to show that a different result would likely have been reached if that evidence had been excluded.

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5. Appeal and Error— preservation of issues—evidence previously admitted without objection

The benefit of an objection is lost if the evidence has previously been admitted without objection. Defendant here failed to preserve his objection for appellate review where he did not object when the prior written statements were offered or admitted, but did object when the State sought to publish the statements to the jury. The court properly gave a limiting instruction.

6. Discovery— school records of witness—reviewed in camera—not discoverable

The school records of a tenth grader (an accomplice to first-degree kidnapping and murder) who testified in defendant's trial pursuant to a plea agreement were reviewed in camera on appeal and held to contain no information favorable and material to defendant's guilt and punishment, nor any evidence adversely affecting the witness's credibility. Therefore, the trial court properly denied defendant's motion to be allowed to review those records for impeachment purposes.

7. Evidence— autopsy photographs—illustrations of victim's wounds

There was no abuse of discretion in admitting autopsy photographs of a murder victim where a forensic pathologist testified that each photograph depicted a distinct aspect of the victim's wounds and would provide the jury with a helpful illustration of the wounds.

8. Evidence— pathologist's opinion—time required for death

An expert forensic pathologist's testimony about the time a victim's death from his wounds would have required had he not drowned was within the witness's area of expertise and was relevant and appropriate to show the number and severity of the wounds. The trial court did not abuse its discretion by admitting it.

9. Witnesses— last-minute—not abuse of discretion

The trial court did not abuse its discretion in a first-degree murder prosecution by admitting testimony from a "surprise witness," a telephone company manager who retrieved text messages between the victim's telephone number and one assigned to defendant.

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[178 N.C. App. 395 (2006)]

10. Evidence— transcript of text messages—authentication—confrontation issue not preserved

The trial court did not abuse its discretion by admitting into evidence transcripts of text messages. There was testimony sufficient to authenticate the exhibits; moreover, defendant both failed to cite on appeal any authority to support the argument that his right to confront witnesses was denied and did not object at trial on constitutional grounds.

11. Constitutional Law— cruel and unusual punishment—life sentence for sixteen-year-old

The argument that a life sentence without parole for a sixteen-year-old defendant was cruel and unusual was not raised at trial and was not preserved. Even so, defendant did not show that his sentence violated his constitutional rights.

12. Appeal and Error— presentation of issues—assignments of error—insufficient

Assignments of error were deemed abandoned where defendant merely recited the standards of review and stated that he chose not to elaborate other than to state the argument and cite authorities for the court's review.

Appeal by defendant from judgments entered 20 July 2005 by Judge Henry W. Hight in Durham County Superior Court. Heard in the Court of Appeals 8 June 2006.

Attorney General Roy Cooper, by Assistant Attorney General Amy C. Kunstling, for the State.

James M. Bell, for defendant-appellant.

TYSON, Judge.

Matthew Lawrence Taylor (“defendant”) appeals from judgments entered after a jury found him to be guilty of first-degree murder, first-degree kidnapping, and robbery with a dangerous weapon of Sean Owens (“the victim”). We find no prejudicial error.

I. Background

The victim, age twenty-three, lived with his mother, stepfather, and sister in Franklinton. The victim's sister, Tiffany McFalls (“McFalls”) testified the victim was an openly homosexual male. On 17 February 2004, the victim walked into the kitchen, where McFalls

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was washing dishes, and told her he was going to Durham to meet someone nicknamed “Blue” and that “he was going to go get some black meat tonight.” McFalls testified she interpreted this statement to mean the victim was “going to Durham to have sex with a black person.” The victim told McFalls he had communicated with “Blue” through his cellular telephone, which contained internet access, was going to “check on some things at work,” and would be back home “in a little bit.” The victim left home driving his mother’s 1998 burgundy Ford Contour automobile.

McFalls became concerned after she was unable to contact the victim and he did not return home by 5:00 p.m. The victim’s family reported him as a missing person on 20 February 2004.

On 21 February 2004, Durham police and paramedics responded to a report of a dead body floating in the river at Old Farm Park in Durham. The body was found face down approximately twenty feet below the river embankment. The body was identified as the victim.

On 22 February 2004, Durham police were dispatched to 614 Shepard Street where they found a 1998 burgundy Ford Contour belonging to the victim’s mother partially burned and still smoldering. Investigators recovered a broken beaded necklace belonging to the victim from the floorboard of the car. Investigators determined the fire had been intentionally set with a lit newspaper.

On 4 March 2004, Durham police executed a search warrant of defendant’s residence. Shelton Epps (“Epps”) and Derrick Maiden (“Maiden”) were present at defendant’s residence. Defendant was at school when police executed the warrant. Defendant agreed to go to the police station, where he gave a statement to Detective Wallace Early (“Detective Early”).

A. Defendant’s Statement

Defendant told Detective Early that he came home early from school on 17 February 2004 because he had an upset stomach. Epps and Maiden were present at defendant’s residence. Maiden asked defendant if he could use his cellular telephone. Maiden told defendant that someone was coming over. About thirty minutes later, the victim called defendant on his cellular telephone. Defendant told the victim that he did not know him, and handed the telephone to Maiden. Maiden told defendant, “let’s go to the clubhouse.” Defendant accompanied Epps and Maiden to the Eno Trace Clubhouse. The victim had parked the burgundy Ford Contour automobile in the parking lot when defendant, Epps, and Maiden arrived.

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The victim drove defendant, Epps, and Maiden to Old Farm Park. All four men exited the car and began walking toward a picnic table. Defendant stated he was walking in front and the other three men were behind him. Defendant heard a gunshot, turned around, and saw Epps chasing the victim across the park with a gun in his hand. Epps wrestled the victim to the ground, and Maiden and Epps began to punch and kick the victim. Epps put the gun to the back of the victim's head and shot him again. Either Epps or Maiden choked the victim. Epps and Maiden dragged the victim to the river and threw him in. Maiden drove the victim's car away from the scene with defendant and Epps as passengers, and dropped defendant off at his residence. The next day at school, Maiden told defendant a "boot" had been placed on the car. Maiden gave money to Jimetrus Harris ("Jimetrus") to pay the fine to have the boot removed. Maiden drove defendant home after school in the victim's mother's burgundy Ford Contour. After defendant gave his statement, Detective Early spoke with two other detectives and placed defendant under arrest.

Defendant was indicted for first-degree murder, first-degree kidnapping, and robbery with a dangerous weapon. Defendant was tried in the Durham County Superior Court in July 2005. Defendant was seventeen years of age at the time of trial.

B. The Murder Weapon

Derek Taylor ("Taylor") testified for the State that he had known defendant for a couple of months before February 2004. Taylor knew defendant by the name "Blue." During that time, Taylor saw defendant in possession of a handgun on four or five occasions. Taylor later bought that gun from a man named "Wood" for \$132.00. After the victim's murder, Taylor had a conversation with "Wood" and turned the gun over to police. State Bureau of Investigation Forensic Firearms Examiner Adam Tanner ("Examiner Tanner") testified he identified the gun as a .32 caliber Smith & Wesson revolver. Examiner Tanner opined the bullets recovered from the victim's body were fired from "this firearm and this firearm alone."

The jury found defendant to be guilty of all three charges. Defendant was convicted of first-degree murder under the Felony Murder Rule rather than on the basis of malice, premeditation, and deliberation.

The trial court arrested judgment on defendant's robbery conviction. Defendant was sentenced to life imprisonment without parole

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for the first-degree murder conviction and a consecutive sentence of seventy-three to ninety-seven months for the kidnapping conviction. Defendant appeals.

II. Issues

Defendant argues the trial court erred by: (1) denying his motion to allow an interview with the police investigator; (2) overruling his objection to McFalls's hearsay testimony regarding what the victim said to her on 17 February 2004; (3) denying his motion to suppress evidence gathered in the search of his residence where probable cause did not support the issuance of the search warrant; (4) overruling his objection to testimony regarding the existence of a cellular telephone and photographic images contained therein where such cellular telephone was taken from him without issuance of a search warrant; (5) overruling his objection to allowing written statements to be published to the jury which were inconsistent with Jimetrus's and his sister, Andrea Harris's, ("Andrea") testimonies in court; (6) denying him the opportunity to review and use school records to impeach Maiden; (7) overruling his objection to the admission of certain autopsy photographs; (8) overruling his objection to speculative testimony by Dr. Gullede regarding how long it would have taken the victim to die as a result of his injuries; (9) overruling his objection to testimony by surprise witness Michael Woods ("Woods"); (10) overruling his objection to admission of State's Exhibits 87 and 88, transcripts of cellular telephone text messages; (11) denying his motion to dismiss at the close of all evidence; (12) denying his motion to vacate the jury's verdict due to insufficient evidence; and (13) imposing a sentence of life in prison without parole in violation of his Eighth and Fourteenth Amendment Rights.

III. Interview with the Police Investigator

[1] Defendant argues the trial court erred in denying his motion to allow an interview with the police investigator. We disagree.

Defense counsel requested a meeting with Detective Early, the lead police investigator. Detective Early refused to meet with defense counsel. Defense counsel moved the trial court to allow an interview with Detective Early and the trial court denied defendant's motion. The trial court entered findings of fact and conclusions of law in support of its order denying the motion.

The trial court's findings of fact state that Detective Early did not want to and was told by his supervisors that he was not required to

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meet with defense counsel. Detective Early knew that it was the “unofficial policy” of the Durham Police Department for an officer to refrain from talking with defense counsel. The trial court found that Detective Early was never advised he was prohibited from meeting with defense counsel by anyone with the Durham County District Attorney’s Office.

Defendant did not assign error to any of the trial court’s findings of fact. “Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal.” *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) (citations omitted). The trial court concluded, “no attorney with the Durham County District Attorney’s Office has obstructed the Defendant’s attempts to conduct an interview with W.L. Early,” and that “W.L. Early’s refusal to meet with Defendant’s attorneys was not the product of any improper directive by anyone with the Durham County District Attorney’s Office.”

Defendant bases his argument on N.C. Gen. Stat. § 15A-903(a)(1) (2005), which provides in pertinent part:

(a) Upon motion of the defendant, the court must order the State to:

(1) Make available to the defendant the complete files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes committed or the prosecution of the defendant. The term “file” includes the defendant’s statements, the codefendants’ statements, witness statements, investigating officers’ notes, results of tests and examinations, or any other matter or evidence obtained during the investigation of the offenses alleged to have been committed by the defendant.

Defendant claims “the spirit if not the letter” of this statute entitles his counsel to interview Detective Early “for purposes of clarifying discovery material provided by the State.”

Our Supreme Court held, “[t]here is no general constitutional or common law right to discovery in criminal cases.” *State v. Haselden*, 357 N.C. 1, 12, 577 S.E.2d 594, 602, *cert. denied*, 540 U.S. 988, 157 L. Ed. 2d 382 (2003) (citing *Weatherford v. Bursey*, 429 U.S. 545, 559, 51 L. Ed. 2d 30, 42 (1977); *State v. Alston*, 307 N.C. 321, 335, 298 S.E.2d 631, 641 (1983)). “The right to pre-trial discovery is a statutory right.” *State v. Phillips*, 328 N.C. 1, 12, 399 S.E.2d 293, 298, *cert. denied*, 501 U.S. 1208, 115 L. Ed. 2d 977 (1991). Prior to the 2004

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amendment of N.C. Gen. Stat. § 15A-903, our Supreme Court held, “Nothing in the statutory provisions compels State witnesses to subject themselves to questioning by the defense before trial.” *Id.* Nothing in the 2004 amendments to N.C. Gen. Stat. § 15A-903 appears to have changed this rule. The General Assembly could have provided but failed to include defendant’s right to interview State’s witnesses in the statute. Under our Supreme Court’s precedent in *Phillips*, Detective Early was not required to submit to an interview by the defense counsel against his wishes prior to trial. *Id.* This assignment of error is overruled.

IV. Hearsay Testimony

[2] Defendant argues the trial court erred by overruling his objection to hearsay testimony from McFalls regarding what the victim stated to her on 17 February 2004. We disagree.

McFalls testified as follows:

Q: Tiffany, that morning or that afternoon when you were talking with Sean, what did he tell you? What did he tell you that morning, February 17th, 2004?

....

A: He came into the kitchen while I was washing dishes. He had his cell phone in his hand. Then he said he was going to go get some black meat tonight. Well, he told me his name, which was Taylor’s name. I couldn’t remember it at the time.

....

Q: Tiffany, when he said he was going to get some black mean [sic] tonight, what did he say to you after that?

A: He was going to meet Blue.

Rule 803 of the North Carolina Rules of Evidence sets forth exceptions to the hearsay rule. The Rule provides:

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

....

(3) Then Existing Mental, Emotional, or Physical Condition.—A statement of the declarant’s then existing state of mind, emotion,

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sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health)

N.C. Gen. Stat. § 8C-1, Rule 803(3) (2005). The victim's statements to McFalls is admissible under this exception to the hearsay rule. The victim's statement tended to show his plan or intent to engage in a future act. *See State v. McElrath*, 322 N.C. 1, 17, 366 S.E.2d 442, 451 (1988) (telephone message written by a neighbor from the victim to his roommate that the victim was traveling to North Carolina with the defendant was admissible under Rule 803(3) because it was a statement of the victim's "then-existing intent to do an act in the future"); *State v. Braxton*, 352 N.C. 158, 190-91, 531 S.E.2d 428, 447 (2000) ("Moore's statement to McCombs that he was going to approach the defendant about straightening out the victim's debt was admissible as evidence of Moore's then-existing intent to engage in a future act."), *cert. denied*, 531 U.S. 1130, 148 L. Ed. 2d 797 (2001); *State v. Taylor*, 332 N.C. 372, 385-86, 420 S.E.2d 414, 422 (1992) (witness's testimony that the victim had requested the day off from work and said "that the Taylor guy was coming to pay him the money" was admissible to show then-existing intent and plan to engage in a future act).

As in *McElrath*, *Braxton*, and *Taylor* precedents, McFalls's testimony showed the victim's then-existing plan to engage in a future act. The trial court properly admitted the testimony pursuant to N.C. Gen. Stat. § 8C-1, Rule 803(3). This assignment of error is overruled.

V. Motion to Suppress

[3] Defendant asserts the trial court erred in denying his motion to suppress the items seized from his residence and argues the search warrant was not supported by probable cause. We disagree.

Our Supreme court stated in *State v. Sinapi*:

[W]hen addressing whether a search warrant is supported by probable cause, a reviewing court must consider the totality of the circumstances. In applying the totality of the circumstances test, this Court has stated that an affidavit is sufficient if it establishes reasonable cause to believe that the proposed search . . . 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. Probable cause does not mean actual and positive cause nor import absolute certainty. Thus, under the totality of the circumstances test, a reviewing court

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must determine whether the evidence as a whole provides a substantial basis for concluding that probable cause exists.

In adhering to this standard of review, we are cognizant that great deference should be paid a magistrate's determination of probable cause and that after-the-fact scrutiny should not take the form of a *de novo* review.

359 N.C. 394, 398, 610 S.E.2d 362, 365 (2005) (internal quotations omitted). Finding of Fact Number 15 in the trial court's order summarizes the information set forth in the affidavit in support of the search warrant. In Finding of Fact Number 16, the trial court found "it is reasonable to conclude that a crime has been committed, that the defendant was involved in that crime and that his residence might contain certain items missing from Sean Owens car and the weapon used to commit the crime." Defendant did not assign error to these findings of fact and they are binding on appeal. *Koufman*, 330 N.C. at 97, 408 S.E.2d at 731.

After a careful review of the trial court's order, the trial court correctly determined probable cause existed for the search, and did not err in denying defendant's motion to suppress. This assignment of error is overruled.

VI. Evidence of Defendant's Cellular Telephone

[4] Defendant argues the trial court erred in admitting testimony regarding the existence of his cellular telephone and photographic images contained therein, because the cellular telephone was taken from him without issuance of a search warrant.

The police took a cellular telephone capable of taking photographs from defendant at the police station on 4 March 2004. This telephone was not the same cellular telephone the text messages were sent to and received from the victim. Sergeant David Rose testified on *voir dire* that stored images of two guns were recovered from the cellular telephone. Defendant moved to suppress this evidence on the grounds the cellular telephone had been impermissibly seized from him. The trial court ordered the State not to present the contents of the photographic images stored within the cellular telephone to the jury unless the State could show the cellular telephone was properly seized from defendant.

No evidence was presented to the jury regarding the contents of the photographic images stored on the cellular telephone. The

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only evidence presented to the jury was that defendant possessed a cellular telephone with photographic images stored within upon his arrest. The jury did not see the photographic images or hear evidence regarding their contents. Presuming *arguendo* the cellular telephone was improperly seized, defendant has failed to demonstrate any prejudice. Defendant has failed to show that “a different outcome likely would have been reached” if the evidence would have been excluded. *State v. Mann*, 355 N.C. 294, 306, 560 S.E.2d 776, 784, *cert. denied*, 537 U.S. 1005, 154 L. Ed. 2d 403 (2002). This assignment of error is overruled.

VII. Witnesses' Prior Statements

[5] Defendant argues the trial court erred in admitting the prior written statements of Jimetrus and Andrea Harris to police for corroborative purposes.

Jimetrus and Andrea were fellow students with defendant at Northern High School. Jimetrus and defendant were teammates on the high school football team. Jimetrus drove defendant home from school occasionally. On 18 February 2004, defendant told Jimetrus a “boot” had been placed on his car in the school parking lot. Jimetrus did not know what car defendant was talking about. Jimetrus told defendant that he would have to go to the school office and pay \$25.00 to have the boot removed. Defendant and Jimetrus went to the school office together. Defendant gave Jimetrus \$25.00 and asked him to pay to have the boot removed because he did not have his driver’s license with him. Jimetrus paid the fine and the boot was removed. Defendant then asked Jimetrus to retrieve the car for him. The car was parked behind the school cafeteria in a lot restricted to students. Jimetrus drove the vehicle, a 1998 burgundy Ford Contour, to the front of the school where he met defendant. On a prior occasion, defendant had told Jimetrus that he owned a gun. Andrea testified that she knew defendant by the nickname “Blue.”

Defendant failed to object when the prior written statements were offered or admitted into evidence. Defendant did object when the State sought to publish the statements to the jury. The trial court noted that defendant’s objection was “a little late” because defendant failed to object upon their admission into evidence. The trial court overruled defendant’s objection to the statements being published to the jury. The trial court instructed the jury that the statements were admitted solely to corroborate the witnesses’ in-court testimonies.

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“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(b)(1) (2006). Our Supreme Court has held, “Where evidence is admitted over objection, and the same evidence has been previously admitted or is later admitted without objection, the benefit of the objection is lost.” *State v. Whitley*, 311 N.C. 656, 661, 319 S.E.2d 584, 588 (1984). The trial court properly gave a limiting instruction to the jury. Defendant failed to preserve this issue for our review. This assignment of error is dismissed.

VIII. Derrick Maiden

Defendant argues the trial court erred in denying his motion to review and use Maiden’s school records to impeach his testimony. We disagree.

Maiden was also charged with first-degree murder, robbery with a dangerous weapon, and first-degree kidnapping in connection with the victim’s death. The State offered Maiden a plea bargain for second degree murder. Maiden testified for the State at defendant’s trial under a plea agreement in exchange for truthful testimony.

A. Maiden’s Testimony

In February 2004, Maiden was a tenth grade student at Northern High School. Maiden had been friends with defendant, whom he called “Blue,” since Maiden was ten years old. Maiden was also friends with Epps, who resided in defendant’s home.

On 17 February 2004, Maiden and defendant left school early due to snow and went to defendant’s house. Epps was present at defendant’s house and played video games with Maiden. Defendant went outside the house speaking on his cellular telephone. Defendant reentered his home and told Maiden and Epps “the whip was on the way.” Maiden testified that “whip” meant car. Maiden, Epps, and defendant left defendant’s house to meet the victim at the clubhouse. Defendant went back inside the house, returned with a gun, and handed it to Epps. Defendant and Epps discussed who would carry the gun. Maiden testified Epps carried the gun, but defendant stated “he would shoot him if the guy resisted.”

The three men entered the victim’s car upon arrival at the clubhouse. Defendant sat in the front passenger’s seat. The victim drove

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to a Donut King and then to the store to buy a cigar to use to roll marijuana. Defendant possessed marijuana in a plastic bag. The victim drove defendant, Maiden, and Epps back to the park at approximately 1:00 p.m.

According to Maiden, the four men exited the victim's car and began walking towards a park bench. Epps shot the victim in the back of the head. The victim began running and stated, "please don't do this to me." Defendant and Epps chased after the victim and wrestled him to the ground. The victim got up and ran towards his car. As the victim attempted to enter his car, defendant hit him again. Epps tried to shoot the victim a second time. Epps handed Maiden the gun, and Maiden handed the gun to defendant. Defendant handed the gun back to Epps. Maiden testified that "somewhere along the line" the victim was shot a second time. After the victim fell to the ground, Epps began choking the victim, saying "he won't die." Epps stomped the victim in the head. After these incidents, Maiden testified he "thought [the victim] was dead."

Defendant and Maiden carried the victim to the river bank. Epps kicked the victim into the river. The three men reentered the victim's mother's car. Epps pulled the car over to wash the victim's blood off of him with snow. Defendant, Maiden, and Epps drove around for an hour or two smoking marijuana before returning to defendant's house. Defendant drove the car.

Defendant drove Maiden to school the following day in the victim's car. Defendant did not want to pay for a parking pass and parked the car behind the cafeteria. Epps gave Maiden a pair of boots from the victim's car. Maiden was wearing the victim's boots when he was arrested on 4 March 2004.

On 19 February 2004, Epps sprayed lighter fluid into the car and set it on fire. Defendant, Maiden, and Epps had wiped the car down with Clorox the night before. Maiden testified the plan on 17 February 2004 was to steal the victim's car. He also testified that defendant had tried unsuccessfully about a month or two earlier to contact someone on a chat line and steal that person's car.

B. Maiden's School Records

[6] Defendant asked to be provided with Maiden's juvenile and school records to determine if any impeachment material was contained in those records. Maiden had no prior juvenile record. The trial court received and reviewed Maiden's school records *in camera*. The

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trial court concluded “there is nothing in them which is discoverable in this matter.” The trial court ordered Maiden’s school records to be resealed and placed in the record for appellate review.

Defendant has requested this Court to examine Maiden’s sealed records and determine whether they contain information “favorable” and “material” to defendant’s guilt and punishment. *State v. McGill*, 141 N.C. App. 98, 102, 539 S.E.2d 351, 355 (2000). “If the sealed records contain evidence which is both ‘favorable’ and ‘material,’ defendant is constitutionally entitled to disclosure of this evidence.” *Id.* (citing *Pennsylvania v. Ritchie*, 480 U.S. 39, 60, 94 L. Ed. 2d 40, 59 (1987)). “‘Favorable’ evidence includes evidence which tends to exculpate the accused, as well as ‘any evidence adversely affecting the credibility of the government’s witnesses.’” *Id.* (quoting *U.S. v. Trevino*, 89 F.3d 187, 189 (4th Cir. 1996)). “‘Evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A ‘reasonable probability’ is a probability sufficient to undermine confidence in the outcome.’” *Id.* at 103, 539 S.E.2d at 356 (quoting *United States v. Bagley*, 473 U.S. 667, 682, 87 L. Ed. 2d 481, 494, (1985)).

After reviewing Maiden’s sealed school records, we hold they do not contain information favorable and material to defendant’s guilt and punishment, nor any evidence adversely affecting Maiden’s credibility as a witness. *Id.* This assignment of error is dismissed.

IX. Autopsy Photographs

[7] Defendant argues the trial court erred by admitting certain autopsy photographs into evidence. We disagree.

This Court recently discussed the admission of autopsy photographs:

Pictures of a victim’s body may be introduced “even if they are gory, gruesome, horrible or revolting, so long as they are used for illustrative purposes and so long as their excessive or repetitious use is not aimed solely at arousing the passions of the jury.” *State v. Hennis*, 323 N.C. 279, 284, 372 S.E.2d 523, 526 (1988). While noting that there is no bright line test to determine what is an excessive amount of photographs, *Hennis* instructs that courts should examine the “content and the manner” in which the evidence is used and the “totality of circumstances” comprising the presentation. *Id.* at 285, 372 S.E.2d at 527. The decision as to

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whether evidence, including photographic evidence, is more probative than prejudicial under Rule 403 of the Rules of Evidence and what constitutes an excessive number of photographs lies within the sound discretion of the trial court. *State v. Sledge*, 297 N.C. 227, 232, 254 S.E.2d 579, 583 (1979).

State v. Anderson, 175 N.C. App. 444, 451, 624 S.E.2d 393, 399 (2006).

Here, Dr. Christopher Gulledge (“Dr. Gulledge”) testified during *voir dire* that each of the photographs depict distinct aspects of the victim’s wounds, and each photograph would be helpful to illustrate the victim’s wounds to the jury. Defendant has failed to show the trial court abused its discretion in admitting the autopsy photographs. This assignment of error is overruled.

X. Dr. Gulledge’s Testimony

[8] Defendant argues the trial court erred in overruling his objection as “speculative” to testimony by Dr. Gulledge regarding how long it took the victim to die. We disagree.

Dr. Gulledge performed an autopsy on the victim’s body. Dr. Gulledge found a number of blunt force injuries to the victim’s face and two gunshot wounds on the right side of the victim’s head. One of the gunshot wounds was a point blank or contact wound. Dr. Gulledge opined neither of the two gunshot wounds to the victim’s head would not have been immediately lethal, and that the cause of the victim’s death was drowning.

The following exchange took place during the State’s direct examination of Dr. Gulledge:

Q: Now, Dr. Gulledge, you told the jury that the injuries that you observed were bruises on the face, is that right, and scrapes and scratches?

A: That is correct.

Q: And from looking at those bruises and scrapes and scratches on his face, were those injuries in and of themselves, enough to cause Sean to die?

A: I do not believe so.

Q: And then I believe the next thing you talked to the jury about was a gunshot to the ear, is that right?

A: That’s correct.

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Q: And that injury of itself, was that enough to cause Sean to die?

A: It would not be immediately lethal. It may have been lethal over time without medical attention, but would not—it would not have been an immediately lethal injury.

Q: And do you have an estimate as to how long it would have—by itself, that wound would have taken him to die if he hadn't gotten medical attention.

DEFENSE COUNSEL: Objection to the speculation.

THE COURT: Overruled.

A: On the order of hours.

Q: And what about the second gunshot wound?

A: The gunshot wound to the back of the head caused the depressed skull fracture would not—also would not have been immediately lethal. A depressed skull fracture is a serious medical emergency and would require surgical attention, but it would not be immediately lethal.

We review the trial court's admission of expert testimony under an abuse of discretion standard. *State v. Washington*, 141 N.C. App. 354, 362, 540 S.E.2d 388, 395 (2000), *disc. rev. denied*, 353 N.C. 396, 547 S.E.2d 427 (2001).

Dr. Gullege was allowed to testify without objection as a medical expert witness in the field of forensic pathology. An expert witness may testify in the form of opinion if "scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." N.C. Gen. Stat. § 8C-1, Rule 702 (2005)

In *State v. Bearthes*, the medical examiner testified that the victim received twenty-three life-threatening wounds and died from these wounds within a three-to-five-minute period. 329 N.C. 149, 162, 405 S.E.2d 170, 177 (1991). The medical examiner then testified regarding how long it would have taken the victim to die from each individual wound. *Id.* Our Supreme Court explained, "In determining whether a defendant acted after premeditation and deliberation, the nature of wounds to a victim is a circumstance to be considered." *Id.* (citing *State v. Bray*, 321 N.C. 663, 365 S.E.2d 571 (1998)). At bar, defendant was tried for first-degree murder on the basis of malice, premeditation, and deliberation and under the Felony Murder Rule.

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Here, as in *Bearthes*, Dr. Gulledge's opinions "were within his area of expertise and . . . were relevant and appropriate to show the number and severity of the wounds." *Id.* at 162-63, 405 S.E.2d at 177. This assignment of error is overruled.

XI. State's "Surprise" Witness

[9] Defendant argues the trial court erred in allowing testimony from the State's "surprise" witness, Woods. Woods's name was not included on the State's witness list provided to defendant. The State called Woods as a witness and was allowed to testify over defendant's objection.

Maiden had previously testified defendant's cellular telephone number was 919-423-2117. The victim worked at Wireless Express with Woods and had been issued a company-owned cellular telephone with the number 919-279-7004. The victim's telephone could send and receive text messages and could access the internet.

Woods was the manager of Wireless Express and had retrieved text messages received by and sent from the telephone number assigned to the victim's telephone on 16 and 17 February 2004. These text messages were admitted as State's Exhibits 87 and 88. These exhibits include sexually explicit text messages setting up a rendezvous that were sent to and received from telephone number 919-423-2117. Woods testified regarding the text messages sent to and received from the victim's company issued cellular telephone number and the telephone number 919-423-2117, which Maiden had testified belonged to defendant. We review the trial courts admission of "surprise" witness testimony for an abuse of discretion. *Kinlaw v. N.C. Farm Bureau Mutual Ins. Co.*, 98 N.C. App. 13, 19, 389 S.E.2d 840, 844 (1990).

N.C. Gen. Stat. § 15A-903(a)(3) (2005) provides that at the beginning of jury selection, the State is required to give a defendant "a written list of the names of all other witnesses whom the State reasonably expects to call during the trial." The statute further provides:

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.

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Id. Defendant objected to allowing the State to present the subject of the text messages sent and received between the victim's cellular telephone and the cellular telephone with the number 919-423-2117. Defendant argued earlier the State had failed to present evidence to show the identity of the person who had retrieved the text messages. The State contacted Woods, who had retrieved the text messages. The State notified the court and defendant of its intention to call Woods as a witness. Woods was present to testify in court "with less than an hour's notice." Defendant objected on the grounds that Woods was not included on the State's witness list. The State pointed out that the "Custodian of Nextel Phone Records" was included on the State's witness list. Woods's name was also listed within Detective Early's file, which had been provided to defendant during discovery. Transcripts of the text messages were also provided to defendant during discovery.

The trial court allowed Woods to testify for the State. The court said it would give the defense as much time as needed to meet with Woods and prepare a cross-examination. The defense requested to meet with Woods at the end of the day and be prepared to cross-examine him the following day. The trial court agreed to this request.

Although Woods was not listed by name as a witness the State reasonably expected to call, the State did disclose it would call the "Custodian of Nextel Phone Records," and provided Woods's name to defendant as listed in Detective Early's file. Defendant was also provided with the transcript of the text messages during discovery. Defendant has failed to show the trial court abused its discretion in admitting Woods's testimony pursuant to N.C. Gen. Stat. § 15A-903(a)(3). This assignment of error is overruled.

XII. Admission of Text Messages

[10] Defendant argues the trial court erred in denying his motion *in limine* and admitting State's Exhibits 87 and 88 into evidence. These exhibits are printouts or transcripts of the text messages sent to and from the telephone number assigned to the victim's company issued cellular telephone. We disagree.

Defendant argues the text messages were not properly authenticated. The trial court made written findings of fact stating the reasons the court was satisfied that State's Exhibits 87 and 88 are what they purport to be, copies of the incoming and outgoing text messages for cellular telephone number 919-279-7004. Defendant did not object to

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the trial court's findings of fact and they are binding on appeal. *Koufman*, 330 N.C. at 97, 408 S.E.2d at 731. We review the trial court's denial of defendant's motion *in limine* for an abuse of discretion. *State v. Williams*, 355 N.C. 501, 547, 565 S.E.2d 609, 636 (2002), *cert. denied*, 537 U.S. 1125, 154 L. Ed. 2d 808 (2003).

Rule 901 of the North Carolina Rules of Evidence provides, "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." N.C. Gen. Stat. § 8C-1, Rule 901(a) (2005). The statute provides several methods to authenticate evidence. N.C. Gen. Stat. § 8C-1, Rule 901(b). This list includes testimony of a witness with knowledge "that a matter is what it is claimed to be." N.C. Gen. Stat. § 8C-1, Rule 901(b)(1).

Brent Jones ("Jones"), a strategic care specialist with Nextel Communications ("Nextel"), testified at trial. Jones testified Nextel keeps a record of all incoming and outgoing text messages to and from its customers. The content of text messages and the times they are received and sent are stored in the Nextel database. Customers of Nextel may access a record of their text messages via the internet by visiting Nextel's website and inserting their access code. Jones testified that he does not have access to the text messages stored in Nextel's database.

Woods testified at trial as a manager of the Wireless Express Store in Raleigh in February 2004. Woods assigned and issued the victim a Nextel cellular telephone with the number 919-279-7004. The victim's cellular telephone contained the capacity to send and receive text messages. Woods was authorized to access the Nextel website for text messages to and from cellular telephone number 919-279-7004. Woods identified State's Exhibit 87 to be what he had retrieved from the Nextel website as the stored incoming text messages for cellular telephone number 919-279-7004. Woods also identified State's Exhibit 88 to be what he had retrieved from the Nextel website as the stored outgoing text messages for cellular telephone number 919-279-7004.

Jones and Woods are both witnesses with knowledge of how Nextel sent and received text messages and how these particular text messages were stored and retrieved. This testimony was sufficient to authenticate States Exhibits 87 and 88 as text messages sent to and from the victim's assigned Nextel cellular telephone number on 16 and 17 February 2004.

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Defendant argues no showing was made of who actually typed and sent the text messages. The text messages contain sufficient circumstantial evidence that tends to show the victim was the person who sent and received them. *See* N.G. Gen. Stat. § 8C-1, Rule 901(b)(4) (provides authentication may be made through “Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.”). The messages include information that the person would be driving a 1998 Contour, and the sender self-identified himself twice as “Sean,” the victim’s first name.

Although this issue has not been considered in this jurisdiction, other jurisdictions have upheld admission of electronic messages as properly authenticated. *See U.S. v. Whitaker*, 127 F.3d 595, 601 (7th Cir. 1997) (rejecting the defendant’s argument that the government failed to authenticate computer records where the government presented testimony of an FBI agent who was present when records were retrieved); *U.S. v. Safavian*, 435 F. Supp. 2d 36, 40 (D.C. Cir. 2006) (e-mail messages held properly authenticated where the e-mail addresses contain “distinctive characteristics” such as, *inter alia*, the “@” symbol and a name of the person connected to the address, the bodies of the messages contain a name of the sender or recipient, and the contents of the e-mails also authenticate them as being from the purported sender and to the purported recipient); *Massimo v. State*, 144 S.W.3d 210, 216-17 (Tex. App. 2004) (e-mail message held properly authenticated where, *inter alia*, the e-mail was sent to the victim’s e-mail address shortly after she and defendant had a physical altercation and the e-mail referenced that altercation, and the victim recognized defendant’s e-mail account address.).

Defendant argues he was denied his Sixth Amendment right to confront witnesses against him. Defendant failed to object on this ground at trial. Constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal. *State v. Benson*, 323 N.C. 318, 322, 372 S.E.2d 517, 519 (1988) (citation omitted). Further, defendant failed to cite any authority in support of this argument, and it is deemed abandoned. 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.”).

The State properly authenticated the text messages pursuant to N.C. Gen. Stat. 8C-1, Rule 901. The trial court did not abuse its dis-

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cretion in denying defendant's motion *in limine* and admitting State's Exhibits 87 and 88. This assignment of error is overruled. Defendant's attempt to argue lack of ability to confront witnesses is abandoned and dismissed.

XIII. Life Imprisonment Without Parole

[11] Defendant argues the trial court erred in sentencing him to life in prison without parole in violation of the Eighth Amendment's prohibition against cruel and unusual punishment because he: (1) was not proven to be the shooter; (2) was sixteen years old at the time the victim was shot; and, (3) had no prior record.

Defendant also failed to preserve this argument for appellate review. He did not raise the issue or object to the sentencing before the trial court. Constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal. *State v. Benson*, 323 N.C. 318, 322, 372 S.E.2d 517, 519 (1988) (citation omitted).

Presuming *arguendo* defendant had properly raised and preserved this assignment of error, defendant has failed to show his sentence of life in prison without parole violated his constitutional rights. "Only in exceedingly unusual non-capital cases will the sentences imposed be so grossly disproportionate as to violate the Eighth Amendment's proscription of cruel and unusual punishment." *State v. Ysaquire*, 309 N.C. 780, 786, 309 S.E.2d 436, 441 (1983). Defendant was convicted of first-degree murder on a felony murder theory. In *State v. Hightower*, 168 N.C. App. 661, 669-70, 609 S.E.2d 235, 240-41, *disc. rev. denied*, 359 N.C. 639, 614 S.E.2d 533 (2005), this Court rejected the defendant's argument that the trial court's imposition of a life in prison without parole sentence for felony murder was cruel and unusual.

Defendant asserts the lack of evidence presented to show he was the shooter renders his sentence cruel and unusual. Evidence presented tended to show that defendant arranged for the meeting with the victim, helped beat the victim, and helped carry the victim to the riverbank where Epps kicked him into the river. Dr. Gullledge testified the cause of the victim's death was drowning.

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

[I]f two persons join in a purpose to commit a crime, each of them, if actually or constructively present, is not only guilty as a principal if the other commits that particular crime, but he is

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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. at 306, 560 S.E.2d at 784 (citations and quotations omitted), *cert. denied*, 537 U.S. 1005, 154 L. Ed. 2d 403 (2002).

Defendant also asserts the sentence imposed is cruel and unusual in light of his age at the time of the victim's death. In *State v. Lee*, this Court held a sentence of life in prison without parole imposed on a defendant who was fourteen years old at the time he committed murder was not cruel and unusual. 148 N.C. App. 518, 524-25, 558 S.E.2d 883, 888, *appeal dismissed*, 355 N.C. 498, 564 S.E.2d 228, *cert. denied*, 537 U.S. 955, 154 L. Ed. 2d 305 (2002). Defendant has failed to show his life in prison without parole sentence rises to the level of cruel and unusual punishment. *Id.*

[12] In defendant's eleventh and twelfth assignments of error, he argues the trial court erred in denying his motion to dismiss at the close of all evidence and denying his motion to vacate the jury's verdict based on insufficient evidence. In these assignments of error, defendant merely recites the standards of review and states, "the Appellant chooses not to elaborate . . . other than to state the above argument and cite the above authorities for this honorable court's review." Because defendant has set forth "no reason or argument" in support of these assignments of error, they are deemed abandoned. N.C. R. App. P. 28(b)(6).

XIV. Conclusion

The trial court did not err in denying defendant's motion to require the police investigator to submit to a pretrial interview with defense counsel. Detective Early was not required to submit to an interview against his wishes by defense counsel prior to trial. *Phillips*, 328 N.C. at 12, 399 S.E.2d at 298; N.C. Gen. Stat. § 15A-903(a)(1). The trial court properly admitted hearsay testimony from McFalls regarding what her brother, the victim, stated to her on 17 February 2004 pursuant to N.C. Gen. Stat. 8C-1, Rule 803(3). The trial court properly concluded the search warrant of defendant's residence was supported by probable cause, and properly denied defendant's motion to suppress the items seized from his residence.

Defendant has failed to show he was prejudiced by the admission of testimony regarding the existence of his cellular telephone containing images of two guns where the contents of those images were

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not revealed to the jury. Defendant failed to properly preserve his argument regarding the admission into evidence of Jimetrus and Andrea Harris' prior statements. Defendant failed to object when the statements were admitted.

After review of Maiden's sealed school records, we hold they neither contain information favorable and material to defendant's guilt and punishment, nor evidence adversely affecting Maiden's credibility as a witness.

The trial court did not abuse its discretion in: (1) admitting the autopsy photographs of the victim; (2) allowing Dr. Gulledge's testimony regarding how long it would have taken the victim to die as a result of his injuries; (3) admitting printouts of the text messages sent to and received from the victim's cellular telephone; and (4) allowing Woods to testify as a "surprise" witness.

Defendant's eleventh and twelfth assignments of error regarding his motion to dismiss and motion to vacate the jury's verdict are deemed abandoned. Although defendant failed to object or properly preserve the trial court's imposition of a life in prison without parole sentence, his arguments reveal no errors in his sentence. Defendant received a fair trial free from prejudicial errors he preserved, assigned, and argued.

No prejudicial error.

Judge McCULLOUGH and HUDSON concur.

CHRISTINA M. BINNEY, PETITIONER v. BANNER THERAPY PRODUCTS AND EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA, RESPONDENTS

No. COA05-916

(Filed 18 July 2006)

1. Unemployment Compensation— employment-related misconduct—actions reasonable and taken with good cause

A de novo review revealed that the superior court erred by affirming the Employment Security Commission's decision to deny unemployment benefits to petitioner under N.C.G.S. § 96-14(2) based on alleged employment-related misconduct, including her removal of a hard drive from the computer supplied

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to her by respondent company and assertion of a personal copyright interest in the company's catalogs and website, and the case is reversed and remanded to the Commission for additional proceedings not inconsistent with the Court of Appeals' decision, because: (1) an employee's behavior will not be construed as misconduct within the meaning of N.C.G.S. § 96-14(2) if the evidence shows that the actions of the employee were reasonable and were taken with good cause; (2) petitioner's supervisor conceded that there was no formal policy that prohibited petitioner from taking the hard drive off the premises, it was uncontested that petitioner removed the hard drive so that she could prepare for a meeting with a client, another witness who also worked for the company testified that under the same circumstances he may have also removed the hard drive, petitioner was the employee who maintained the company's computers, and there was no evidence that petitioner's conduct was unreasonable or undertaken in bad faith; and (3) there was no evidence that petitioner's assertions of personal copyright interests either inconvenienced or jeopardized the company's ability to operate, the record does not show that petitioner's reliance on federal statutory copyright protections based on her own research was unreasonable or was taken in bad faith, and the record does not show any evidence that petitioner did not genuinely believe that she owned a copyright interest in the company's catalogs and website or any evidence that petitioner intended to use her personal assertions of copyright for any purpose which was detrimental to the company.

2. Administrative Law— judicial review of agency decision— petition sufficient to challenge findings of fact

The superior court did not err by concluding that the petition for judicial review was sufficient to challenge the Employment Security Commission's (ESC) findings of fact, because: (1) the petition stated petitioner was challenging the ESC's findings of fact on the grounds that they were not supported with competent record evidence and were inconsistent with applicable law; and (2) given the facts and circumstances of the instant case, the petition was sufficient to permit judicial review.

Judge HUNTER concurring in part and dissenting in part.

Appeal by petitioner from judgment entered 17 November 2004 by Judge James L. Baker, Jr., in Buncombe County Superior Court. Heard in the Court of Appeals 15 March 2006.

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Ferikes & Bleyнат, PLLC, by Edward L. Bleyнат, Jr.; and Evans & Rice, PLLC, by Susan L. Evans, for petitioner-appellant.

Acting Chief Counsel David L. Clegg, by Sharon A. Johnston, for the Employment Security Commission of North Carolina, respondent-appellee.

McCULLOUGH, Judge.

Christina Binney (Binney) appeals from a superior court order affirming the decision of the North Carolina Employment Security Commission (ESC), which denied Binney's claim for unemployment benefits. We affirm in part, reverse in part, and remand.

Facts

On 5 April 2003, Binney was discharged from her employment with Banner Therapy Products (Banner) because she included a statement of personal copyright interest on the catalogs and web site that she had designed for Banner and because she removed the hard drive of the computer supplied to her by the company. Binney thereafter filed a claim for unemployment benefits, which was contested by Banner. Banner asserted that Binney was disqualified from receiving benefits because she was discharged for misconduct connected with her work.

At a hearing before the ESC, the evidence tended to show the following: Banner is a company in the business of selling rehabilitation and other health care products. The company was founded by Binney and two other people, Sandor Sharp (Sharp) and Thomas Maroney (Maroney). Initially, the three co-founders each owned an equal one-third share of the company. Maroney later came to be the majority shareholder, owning eighty percent of the company.

Binney first performed work for Banner in the summer of 1996, before the company was incorporated, when she created the company's first catalog. In the course of creating the catalog, Binney compiled data for all the products to be sold, wrote and edited text, and designed the layout.

When the company was incorporated in December 1996, Binney was named treasurer. At a hearing before the ESC, Binney claimed that she also held the title of Vice President of Marketing and Computer Technology. Thomas Maroney disputed this claim. According to Maroney, Binney gave herself the title, though he admitted that

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she was neither told to refrain from using the title, nor advised that the title was improper in any way. Further, it is undisputed that Binney was the individual with primary responsibility for Banner's computers and that she was responsible for designing the company's catalog. When asked to describe Binney's title, Maroney stated, "I think she held herself as vice president in charge of marketing and computer technology. . . . That's the title that she had. . . . It was never officially voted on, but that's the title that she had and that's the position she worked at."

Banner's first catalog was distributed in 1997. This catalog did not bear any copyright information. All subsequent catalogs indicated that Binney had a copyright interest. Binney asserted that these later catalogs were derivative works of the original catalog that she produced.

Binney was also responsible for designing and maintaining Banner's internet web site. When designing the web site, Binney included a statement which indicated that she had a copyright interest in the material on the web site.

Binney did not consult an attorney for advice as to whether she owned copyright interests in the catalogs and the web site until after her employment was terminated. Her assertion of such interests were premised upon her own research and analysis of federal copyright law.

On 20 March 2003, Maroney and Sharp came into Binney's office, at which point Maroney confronted her about the copyright assertions. Binney responded by explaining her belief that she owned a copyright interest in the catalogs and web site because she had worked on the first catalog prior to becoming an employee of the company and the subsequent catalogs and web site were derivatives of the first catalog.

On 4 April 2003, Binney was asked to make an immediate transfer with respect to certain of Banner's accounts payable records. Though Binney generally performed this task on a monthly basis, this request was unusual because such transfers were not usually made so early in the month and because she had never been asked before to make an early transfer.

As Binney was preparing to leave work on the afternoon of Friday, 4 April 2003, a Banner customer, Tom Blexrod, called to request a meeting with Binney on the following Monday. Binney

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decided to take her computer's hard drive home with her so she could work on Blexrod's account and be prepared for the Monday meeting, rather than spend a considerably longer amount of time transferring the necessary information to disk. Binney had a compatible computer at home that would accommodate her work computer's hard drive, and she had, on several occasions, taken work home for the night in this manner.

Banner did not have a company policy about taking such work equipment home. Indeed, an employee in Banner's computer department, Jeremy King, testified that he might have taken the hard drive home had he been in Binney's situation. There was no evidence that Binney misused or attempted to misuse the data on the hard drive. Further, there was no evidence that anyone needed the hard drive over the weekend, or that Binney was not planning to return it on Monday.

On 5 April 2003, before Binney could return to work, she received a voicemail from Maroney informing her she was no longer employed at Banner and forbidding her to return to the company.

An ESC adjudicator denied Binney's claim for unemployment benefits, and this decision was affirmed by an ESC appeals referee and subsequently by the ESC Chairman. The ESC determined that Binney was disqualified from receiving benefits because she was discharged for the following incidents of employment-related misconduct: (1) the assertion of a personal copyright interest in Banner's catalogs and web site, and (2) the unauthorized removal of a hard drive from the computer supplied to her by Banner.

Binney petitioned the Buncombe County Superior Court for judicial review of the ESC's decision. The superior court affirmed. Binney now appeals to this Court.

Legal Discussion

I.

[1] In her sole argument on appeal, Binney contends that the superior court erroneously affirmed the decision of the ESC to disqualify her from receiving unemployment benefits, under section 96-14(2) of the General Statutes, for being discharged due to misconduct connected with her work. We hold that the ESC's determinations with respect to each ground for disqualification were erroneous, such that the superior court erred by affirming the decision of the ESC.

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Our standard of review is governed by the following principles: A party claiming to be aggrieved by a decision of the ESC may “file[] a petition for review in the superior court of the county in which he resides or has his principal place of business.” N.C. Gen. Stat. § 96-15(h) (2005). “The legislature, in granting this jurisdiction to the superior court, intended for the superior court to function as an appellate court.” *In re Enoch*, 36 N.C. App. 255, 256, 243 S.E.2d 388, 389 (1978). “An appeal may be taken from the judgment of the superior court, as provided in civil cases.” N.C. Gen. Stat. § 96-15(i) (2005). The same standard of review applies in the superior court and in the appellate division: “[T]he findings of fact by the [ESC], 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.” *Id.* Accordingly, this Court, like the superior court, will only review a decision by the ESC to determine “ ‘whether the facts found by the Commission are supported by competent evidence and, if so, whether the findings support the conclusions of law.’ ” *RECO Transportation, Inc. v. Employment Security Comm.*, 81 N.C. App. 415, 418, 344 S.E.2d 294, 296, *disc. review denied*, 318 N.C. 509, 349 S.E.2d 865 (1986) (citation omitted).

“Ordinarily a claimant is presumed to be entitled to benefits under the Unemployment Compensation Act. The employer bears the burden of rebutting this presumption by showing circumstances which disqualify the claimant.” *Williams v. Davie County*, 120 N.C. App. 160, 164, 461 S.E.2d 25, 28 (1995) (citations omitted). One ground for disqualification is a misconduct-related discharge, which is governed, as follows, by section 96-14(2) of the North Carolina General Statutes:

[An individual shall be disqualified for unemployment benefits] [f]or the duration of his unemployment beginning with the first day of the first week after the disqualifying act occurs with respect to which week an individual files a claim for benefits if it is determined by the [ESC] 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

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intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer.

N.C. Gen. Stat. § 96-14(2) (2005).

Discharge for employment-related misconduct may exist as a ground for denying unemployment benefits notwithstanding the fact that the fired employee has not violated a specific work rule if the conduct resulting in termination was unreasonable or taken in bad faith. *Williams v. Burlington Industries, Inc.*, 318 N.C. 441, 455-56, 349 S.E.2d 842, 851 (1986). For example, our courts have held that, in the absence of a specific rule which was contravened, an employee could be disqualified from benefits for misconduct resulting in discharge where the employee, *inter alia*, failed to notify his supervisor that he was leaving early despite his knowledge that he was supposed to do so, and repeatedly falsified his time records when being paid by the hour, *id.* at 456, 349 S.E.2d at 851; sold the employer's property without permission, *In re Vanhorn v. Bassett Furniture Ind.*, 76 N.C. App. 377, 381, 333 S.E.2d 309, 311-12 (1985); failed to file a state income tax return despite being employed as a collector of delinquent taxes, *In re Gregory v. N.C. Dept. of Revenue*, 93 N.C. App. 785, 785, 379 S.E.2d 51, 51 (1989); or got into a fight at work, *Yelverton v. Kemp Furniture Industries, Inc.*, 51 N.C. App. 215, 219, 275 S.E.2d 553, 555 (1981).

However, an employee's behavior "will not be construed as misconduct within the meaning of [section] 96-14(2), if the evidence shows that the actions of the employee were reasonable and were taken with good cause." *In re Helmandollar v. M.A.N. Truck & Bus Corp.*, 74 N.C. App. 314, 316, 328 S.E.2d 43, 44 (1985) (citing *Intercraft Industries Corp. v. Morrison*, 305 N.C. 373, 289 S.E.2d 357 (1982)). "Good cause is a reason which would be deemed by reasonable men and women as valid and not indicative of an unwillingness to work." *Id.* (citing *In re Watson*, 273 N.C. 629, 161 S.E.2d 1 (1968)).

Thus, our Courts have declined to rule that an employee was necessarily disqualified from receipt of unemployment benefits because of misconduct-related discharge where he, *e.g.*, was merely inefficient or unable to perform well, *State ex rel. Employment Sec. Com. v. Smith*, 235 N.C. 104, 106, 69 S.E.2d 32, 33 (1952); or missed work because of an inability to find child care, *Intercraft*, 305 N.C. at 376-77, 289 S.E.2d at 359-60; or failed to report to a supervisor's office to discuss an unimportant matter under circumstances where the supervisor had repeatedly summoned the discharged employee to

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discuss trivial items, and the employee was attempting to finish work on his desk and was available by telephone, *Umstead v. Employment Security Commission*, 75 N.C. App. 538, 539-41, 331 S.E.2d 218 (1985); or rested during working hours because of faintness brought on by influenza but remained available to help as needed so that the employer's business did not suffer, *Baxter v. Bowman Gray School of Medicine*, 87 N.C. App. 409, 410-11, 361 S.E.2d 109, 109-10 (1987).

A.

We first address whether the Commission erred by finding and concluding that Binney committed employment-related misconduct by removing the hard drive from her work computer without authorization. In its decision, the Commission found as a fact that

[o]n April 4, 2003, the employer learned that [Binney] had removed the hard drive from the computer assigned to [her] by the employer. The employer did not authorize the claimant to remove the hard drive.

The Commission concluded that Binney's "unauthorized removal of the hard drive of an employer[']s computer[] showed a deliberate disregard of the standards of behavior that the employer had a right to expect of [her]" such that "she was discharged for misconduct connected with [her] work."

The evidence before the Commission tended to show that Binney was a part-owner of Banner and that she held herself out as the Vice President of Marketing and Computer Technology for Banner. Her superior, Thomas Maroney, was equivocal as to whether she in fact held this title; however, it was undisputed that Binney was the individual who was primarily responsible for Banner's computer equipment. Maroney conceded that there was no formal policy that prohibited Binney from taking the hard drive off the premises. It is likewise uncontested that Binney removed the hard drive so that she could prepare for a meeting with a client, and a witness called by Maroney testified that, under the same circumstances, he may have also removed the hard drive. There was no evidence that Binney removed the hard drive for some improper purpose or that the removal of the hard drive either inconvenienced or jeopardized Banner's ability to operate.

The dissent maintains that Binney engaged in misconduct by removing the hard drive. This conclusion fails to take into account the uncontradicted evidence that, regardless of title, Binney was the

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employee who maintained the company's computers. Having the authority to authorize maintenance of the computers, to oversee their operation and preserve corporate records, she believed she had the obvious authority to remove the hard drive. It is clear that an employee who has the apparent authority to remove the hard drive cannot be fired for having exercised her discretion to do just that. Further, unless her actions are unreasonable, she cannot be said to have engaged in misconduct. *See Williams v. Burlington Industries, Inc.*, 318 N.C. 441, 349 S.E.2d 842.

Thus, even if Binney was not expressly authorized to remove the hard drive from her work computer, there was no evidence that her conduct in doing so was unreasonable or was undertaken in bad faith. Banner failed to offer any competent evidence to meet its burden of proving that Binney should be disqualified from receiving benefits because of misconduct-related discharge stemming from the removal of the hard drive. The Commission erred by reaching contrary findings and conclusions, and the superior court erred by affirming the Commission concerning this ground for disqualification.

The dissent further maintains that in reaching this result, we are substituting our judgment for that of the Commission. That is not correct. The issue of whether competent evidence is contained in the record is a matter of law and is reviewable *de novo*. *State ex rel. Long v. ILA Corp.*, 132 N.C. App. 587, 591, 513 S.E.2d 812, 816 (1999).

The finding of fact at issue has been set forth previously and found that the "employer did not authorize the claimant to remove the hard drive." That finding lacks any support as the employer admitted that the company had no policy at all. The President also admitted that the claimant was the Vice President for Computer Technology. Thus, for her removal of the hard drive to warrant loss of benefits, her act would have to be so unreasonable as to constitute a deliberate disregard of standards of behavior that the employer had the right to expect. As noted in the *Helmandollar* case, and others cited earlier, the determination of whether the evidence of record supports the Commission's determination is also reviewed by this Court *de novo*.

B.

We next address whether the Commission erred by finding and concluding that Binney committed employment-related misconduct

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by asserting a personal copyright interest in Banner's catalogs and web site. In its decision, the Commission found the following facts:

4. The claimant was an officer of the employer corporation at the time it was formed.
5. The claimant was responsible for the production and distribution of the employer's product catalog. The first of these catalogs was produced in mid-1997.
6. In 2001, the claimant created an internet web site for the employer.
7. On or about March 15, 2003, Thomas Maroney . . . discovered that the employer's web site contained the following statement: "Copyright © 2001, Christine Marie Binney, All Rights Reserved." The employer had not authorized the claimant to include such a statement on the web site.
8. The employer then discovered that the 1997, 1998/1999, 2000, 2001, 2002, and 2003 catalogs, all of which were produced by the claimant in the performance of her job, contained similar statements that asserted that the claimant had a copyright interest in the catalogs. The employer had not authorized the claimant to include such a statement in the catalogs.
9. The employer confronted the claimant concerning her copyright assertions. The claimant advised the employer that she had a copyright interest in the catalogs and web site; however, the claimant did not seek legal advice concerning her copyright interests prior to her discharge from employment.

The Commission concluded that Binney's "assertion of a personal copyright interest in the employer's catalogs and web site . . . showed a deliberate disregard of the standards of behavior that the employer had a right to expect of [her]" such that she "was discharged for misconduct connected with [her] work."

The evidence before the Commission tended to show that Binney conducted her own research of copyright law and concluded that she owned a copyright interest in the first catalog unless it was a "work-for-hire" compilation or she agreed that only Banner would hold the copyright. Binney determined that she did own such an interest in the first catalog, which was produced and distributed by Banner in 1997,

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because she actually compiled it in 1996, prior to the time that she was actually an employee of the company. Binney's assertions of copyright interests in subsequent catalogs and in the company web site were premised upon her determination that these items constituted "derivative works" under copyright law. There was no evidence that Binney's assertions of personal copyright interests either inconvenienced or jeopardized Banner's ability to operate.

Federal statutory copyright protection " 'is secured automatically when a work is created, and is not lost when the work is published, even if the copyright notice is omitted entirely.' " *Hasbro Bradley, Inc. v. Sparkle Toys, Inc.*, 780 F.2d 189, 193 (2d Cir. 1985) (quoting H. Rep. No. 1476, 94th Cong., 2d Sess. 147).

A work is "created" when it is fixed in a copy or phonorecord for the first time; where a work is prepared over a period of time, the portion of it that has been fixed at any particular time constitutes the work as of that time, and where the work has been prepared in different versions, each version constitutes a separate work.

17 U.S.C. § 101 (2005). "Copyright in a work . . . vests initially in the author or authors of the work. The authors of a joint work are co-owners of copyright in the work." *Id.* § 201(a). "In the case of a work made for hire, the employer . . . is considered the author . . . , and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright." *Id.* § 201(b). Copyright subsists not only in original works of authorship, *id.* § 102(a), but also in "derivative works." *Id.* § 103(a). A derivative work is "a work based upon one or more pre[-]existing works." *Id.* at § 101.

We make no comment as to whether, under the foregoing federal authorities, Binney actually owned any copyright interests in Banner's catalogs and web site. However, we note that the record is bereft of any indication that Binney's reliance on these authorities was unreasonable or was taken in bad faith. Further, the record is bereft of any evidence that Binney did not genuinely believe that she owned a copyright interest in Banner's catalogs and web site, or any evidence that Binney intended to use her personal assertions of copyright for any purpose which was detrimental to Banner.

Thus, even if Binney was not expressly authorized to include a personal copyright statement on the catalogs or web site, Banner necessarily failed to meet its burden of proving that Binney should be

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disqualified from receiving benefits because of misconduct-related discharge stemming from her assertions of copyright. The Commission erred by reaching contrary findings and conclusions, and the superior court erred by affirming the Commission concerning this ground for disqualification.

II.

[2] By a cross-assignment of error, the Commission argues that the superior court erred by concluding that Binney's petition for judicial review was sufficient to challenge the Commission's findings of fact. In making this argument, the Commission cites to section 96-15(h) of the General Statutes, which states that a petition for judicial review "shall explicitly state what exceptions are taken to the decision or procedure of the Commission and what relief the petitioner seeks." N.C. Gen. Stat. § 96-15(h) (2005).

In the instant case, Binney's petition for superior court review stated that she was challenging the ESC's findings of fact on the grounds that they were not supported with competent record evidence and were inconsistent with applicable law. Given the facts and circumstances of the instant case, we hold that Binney's petition was sufficient to permit judicial review of the ESC's findings.

The cross-assignment of error is overruled.

Conclusion

The superior court order affirming the Commission's decision to deny unemployment benefits to Binney is reversed, and this matter is remanded. On remand, the superior court shall enter an order which reverses the Commission's decision, and remand this case to the Commission for additional proceedings not inconsistent with this opinion.

Affirmed in part, reversed in part and remanded.

Judge TYSON concurs.

Judge HUNTER concurs in part and dissents in part by separate opinion.

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

I concur with Section II of the majority opinion overruling the ESC's cross-assignment of error. However, as I conclude the trial

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court correctly determined that the decision of the ESC is supported by competent evidence and proper findings of fact, which in turn support the conclusions of law, I respectfully dissent from the remainder of the opinion.

Petitioner was discharged from her employment for misconduct. 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.

N.C. Gen. Stat. § 96-14(2) (2005) (emphasis added). The ESC found that petitioner "had removed the hard drive from the computer assigned to [petitioner] by the employer. The employer did not authorize [petitioner] to remove the hard drive." The ESC concluded that petitioner's "unauthorized removal of the hard drive of an employer computer[] showed a deliberate disregard of the standards of behavior that the employer had a right to expect of [petitioner]." The majority concludes there was insufficient evidence to support this conclusion. I disagree.

The majority asserts that "[t]here was no evidence that . . . the removal of the hard drive either inconvenienced or jeopardized Banner's ability to operate." This assertion is unsupported by the record. Petitioner's superior, Thomas Maroney ("Maroney") testified regarding the reaction of the company's computer consultant when he learned of petitioner's removal of the hard drive. He stated, "my God, if she drops it, if it falls, she's in an accident, all the [company] records for the past seven years are gone." According to Maroney, the hard drive contained "all the information about the Corporation—all of our customers are on there, our billing was on there, all of our customer lists were on there. Everything that we had gathered over all of the years was on the hard drive." Maroney stated that, because of petitioner's removal of the hard drive, "all the prior information that was on the computer" was gone and that "Banner Therapy, basically, was out of business as of that time, without the hard drive." When the company discovered that the hard drive was missing, a computer consultant worked for ten to eleven hours, costing the

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company a “high price to get [the] system operating again so it could work on Monday morning.” Jeremy King, a computer technician employed by Banner, testified that the hard drive was “critical” to the company, and that its removal “caused us to waste a lot of time . . . trying to . . . get into our accounts[.]” This evidence directly contradicts the majority’s assertion that “[t]here was no evidence that . . . the removal of the hard drive either inconvenienced or jeopardized Banner’s ability to operate.”

The majority concludes that “even if Binney was not expressly authorized to remove the hard drive from her work computer, there was no evidence that her conduct in doing so was unreasonable or was undertaken in bad faith.” Again, I must disagree. The evidence showed that removal of the hard drive was patently unreasonable. Respondent submitted uncontradicted evidence that petitioner physically removed the internal hard drive from her employer’s computer without authorization. King testified that such removal of the hard drive was not recommended, and that petitioner could have easily achieved the same result by either copying needed files onto computer discs or copying the hard drive. In addition to Maroney’s testimony regarding the potentially disastrous consequences of petitioner’s actions in removing the hard drive and the hardship she caused to the company, Maroney testified that there “was never any authorization by anyone to take any computer hard drive . . . off the premises. It was never authorized, it was never discussed, and it would never have been permitted.” King testified that he would have never removed a hard drive from a company computer without authorization. This testimony underscores the obvious disregard by petitioner of well-established workplace behavioral norms regarding employer-owned computers and computer technology. In fact, the unauthorized removal of a hard drive from an employer’s computer is a criminal act under our General Statutes. *See* N.C. Gen. Stat. § 14-455(a) (2005); *State v. Johnston*, 173 N.C. App. 334, 340-41, 618 S.E.2d 807, 811 (2005) (concluding that the trial court did not err in denying the defendant’s motion to dismiss the charge of violating N.C. Gen. Stat. § 14-455 where the evidence showed she deliberately removed software from her employer’s computer without authorization, resulting in loss of data stored on the hard drive). As such, respondent submitted competent evidence that petitioner’s conduct in removing the hard drive without authorization was unreasonable and supports the ESC’s determination that petitioner exhibited a “deliberate disregard of the standards of behavior that the employer had a right to expect of [her].” *See Lynch v. PPG Industries*, 105 N.C.

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App. 223, 225, 412 S.E.2d 163, 165 (1992). By disregarding the competent evidence in support of the ESC's decision, the majority violates our well-established standard of review and places itself in the role of fact-finder. *In re Graves v. Culp, Inc.*, 166 N.C. App. 748, 750, 603 S.E.2d 829, 830 (2004) (“[t]he [ESC] will be upheld if there is any competent evidence to support its findings”).

The majority concludes that because petitioner had the authority to maintain the company computers, she had the apparent authority to remove the hard drive. This conclusion disregards this Court's limited role on appeal. First, the ESC expressly found that petitioner was not authorized to remove the hard drive. There was substantial evidence to support this finding. We are therefore bound by such a finding. *See id.* (stating that, in the absence of fraud, the ESC's findings are conclusive where there is any competent evidence to support them, and the jurisdiction of the court is confined to questions of law). The majority, however, ignores our standard of review and finds its own facts to support its conclusion that petitioner was authorized to remove the hard drive. Second, there is a vast degree of difference between having authorization to *maintain* a computer and having authorization to *physically remove the internal hard drive of a computer containing a company's entire database and take it off-site*. The ESC found and concluded that this action, which arguably violated N.C. Gen. Stat. § 14-455(a), demonstrated a deliberate disregard of the standards of behavior that petitioner's employer had a right to expect of her. The majority's conclusion to the contrary improperly attempts to substitute its own view for that of the ESC.

I conclude that the ESC's determination regarding petitioner's misconduct arising from her unauthorized removal of her employer's hard drive is supported by the evidence and the findings of fact and sustains its decision to deny her unemployment benefits. As such, I need not address the ESC's second ground for misconduct, that of petitioner's unauthorized assertion of a personal copyright interest in the company catalog. Thus, the trial court properly affirmed the decision of the ESC, and I would uphold the trial court.

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THE NORTH CAROLINA STATE BAR, PLAINTIFF v. ROBERT K. LEONARD,
ATTORNEY, DEFENDANT

No. COA05-1411

(Filed 18 July 2006)

1. Attorneys— malpractice—embezzlement of client funds

A whole record test revealed that the trial court did not err by concluding the State Bar Disciplinary Hearing Commission's (DHC) findings of fact were competent to support its conclusions that defendant attorney violated the Rules of Professional Conduct based on mismanagement of a client's settlement money in defendant's trust account, because: (1) the State Bar does not need to show that defendant intentionally used the property entrusted to him for his own purposes, but instead it is sufficient to show that defendant fraudulently or knowingly and willfully misapplied the property for purposes other than those for which he received it as agent or fiduciary; (2) the State Bar put on substantial evidence that defendant knowingly and willfully misapplied his client's settlement money for other purposes; and (3) a charge of embezzlement constitutes conduct involving dishonesty in violation of N.C. Admin. Code tit. 27, r. 2.8, Rule 8.4 which warrants discipline.

2. Attorneys— malpractice—incompetent representation of a client—sharing legal fees with a nonlawyer—failing to properly supervise—willfully mismanaging client funds

A whole record test revealed that the trial court did not err by concluding the State Bar Disciplinary Hearing Commission's (DHC) findings of fact were competent to support its conclusions that defendant attorney violated the Rules of Professional Conduct based on incompetent representation of a client in a domestic relations case, sharing legal fees with a nonlawyer, failing to properly supervise a nonlawyer, and willfully mismanaging client funds entrusted to him in a fiduciary capacity.

3. Attorneys— malpractice—sanctions—disbarment

The State Bar Disciplinary Hearing Commission (DHC) did not err by disbaring defendant attorney based on violations of multiple Rules of Professional Conduct, because: (1) neither of DHC's errant findings of aggravation regarding indifference to making restitution and untimeliness, without the necessary find-

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ing of bad faith and intentional failure to comply, diminished the other six appropriate aggravating factors where each of those were sufficient in and of themselves to warrant an escalated sanction; (2) even if the Court of Appeals agreed that DHC could have found the mitigating factors that defendant suffered from personal or emotional problems or physical or mental disability of impairment based on his evidence of panic attacks and stress, it cannot be said that DHC's potential error in not doing so amounted to an abuse of discretion; (3) the presence or absence of aggravating and mitigating factors is only one part of the evaluation of whether DHC's decision to disbar defendant was rationally based on the evidence especially given the fact that these factors are not associated with a particular type of sanction; (4) defendant has been adjudicated responsible for violating eight rules of Professional Conduct, including a criminal act that tarnished his honesty, trustworthiness, or fitness as a lawyer; and (5) defendant's violations covered a varied range of activities over a period of nearly four years, and his disbarment had a rational basis in the evidence.

4. Attorneys— malpractice—disbarment—denial of motion for new trial—abuse of discretion standard

The State Bar Disciplinary Hearing Commission did not abuse its discretion by denying defendant attorney's motion for a new trial even though one of the DHC panel members failed to recuse herself on her own motion after learning that an attorney from the Attorney General's office, where she also worked, had prepared an affidavit for one of the prosecuting witnesses, and after hearing evidence concerning the Attorney General's investigation of a convicted felon who worked on postconviction cases with defendant, because nothing in the record indicated that the panel member was unable to render a fair and impartial decision on defendant's interactions with his clients.

Appeal by defendant from orders entered 14 June 2005 and 27 July 2005 by the Disciplinary Hearing Commission of the North Carolina State Bar. Heard in the Court of Appeals 7 June 2006.

Attorneys Carolin Bakewell, Katherine Jean, and David R. Johnson of the North Carolina State Bar for plaintiff-appellee.

White and Crumpler, by Dudley A. Witt, for defendant-appellant.

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ELMORE, Judge.

Robert K. Leonard (Leonard) appeals from an order of the Disciplinary Hearing Commission of the State Bar of North Carolina (DHC) barring him from practicing law in this state. He also appeals from an order of the DHC denying his motion for a new trial. For the foregoing reasons, we affirm the decisions of the DHC.

Leonard was investigated by the State Bar for violations of the Rules of Professional Conduct on the basis that he failed to properly maintain his trust account, commingled trust account and operational funds, and was negligent in the representation of several clients. Specifically, the DHC concluded Leonard had violated Rules 1.1, 1.3, 1.4, 1.5, 1.15-2, 5.3, 5.4, and 8.4 of the Rules of Professional Conduct based on evidence submitted regarding several clients. The relevant evidence supporting these facts is laid out below.

I.

Leonard was admitted to the State Bar in 1970. Since then he has served as an assistant county attorney and a district court judge, but has chiefly maintained a general practice in and around Winston-Salem. During that time he has represented thousands of clients, both civilly and criminally, including several facing capital murder charges. The State Bar put on evidence covering Leonard's handling of several clients, all of which together the Bar contends, makes its case for disbarment. These client matters can be broken down into four categories: Leonard's handling of Betty Wilson's funds, his work with Olin C. Robinson's divorce, his interactions with clients associated with Richard Mears, and his management of traffic clients' funds.

Betty Wilson

At some point prior to July 1999 Betty Wilson hired Leonard to represent her in a personal injury claim. Leonard contracted for a twenty-five percent fee, and on 1 July 1999 Wilson's claims were settled for \$52,000.00.

Leonard deposited the funds into his trust account at BB&T that same day. Several days later, on 6 July 1999, Leonard paid himself \$13,000.00, an amount constituting his entire fee. On 28 January 2000, over six months later, Leonard disbursed nearly \$22,000.00 of the remaining \$39,000.00 to Wilson. As of 26 December 2000 the parties have stipulated that \$16,584.00 should have been held in the trust

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account for Wilson's benefit. Thirty-six months later, Leonard paid \$2,840.31 to Medicare on behalf of Wilson. Three months after that payment, on 22 April 2003, he disbursed the remaining money to Wilson. In May 2002, mid-way through the thirty-six months Leonard was to be holding at least \$16,584.00 for Wilson, his trust account balance fell to \$110.20. This was followed by a deposit of personal funds in June 2002 totaling \$19,750.00, thus restoring the trust account to at least the minimum necessary. The State Bar alleges that Leonard's prolonged default in the trust account constituted embezzlement, due to his intentional withdrawals and disbursements to himself or others of money held in trust for Wilson.

Olin Robinson

In April 1996 Leonard contracted to represent Olin C. Robinson in a domestic relations case. An equitable distribution hearing occurred on 26 January 1999 that led to an 18 April 2000 order in which Robinson's wife received most of the marital property. The State Bar contends Leonard's lack of preparation for the hearing led to the imbalanced order. On 28 December 2001 Leonard filed an appeal of that order and collected \$2,650.00 from Robinson for the appeal. Leonard failed to perfect the appeal and ultimately withdrew the appeal without Robinson's consent. Robinson only found out about the appeal's dismissal after discharging Leonard and receiving a copy of his file. Leonard denied Robinson's claim for a refund of the \$2,650.00 fee for the appeal. When Robinson filed a grievance with the State Bar, Leonard apprised it that he would resolve the issue on 17 October 2003. It was not until a year later, after a small claims suit and an appeal to district court, that Leonard refunded Robinson the money.

Richard Mears

In 1997 or 1998 Leonard began to work on post-conviction cases with Richard Mears, a convicted felon. From this time until early 2001, Leonard worked with Mears on 15 to 20 cases. Leonard and Mears rarely met to discuss a case. Further, Leonard failed to supervise Mears or inquire into his methods of acquiring clients and collecting fees. Mears has since been convicted of illegally scheming money from the relatives of prisoners during this time frame; he apparently was promising them that their loved one would be released from prison through his political connections. Leonard continued to work with Mears on post-conviction cases even after Mears approached him with an offer to join the lucrative scheme.

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The State Bar brought forth evidence of three cases involving Leonard and Mears: Johnny Chatham, Clifton Ferrell, and Larry Allred. On 12 May 1999 Leonard signed a contract with Rev. D.L. Chatham in which Leonard agreed to seek post-conviction relief for Rev. Chatham's brother, Johnny Chatham. Leonard collected a \$5,000.00 fee that he paid half of to Mears. A year later in May 2000 Leonard filed a motion for appropriate relief in Chatham's case and attended a hearing on the matter in 2001. The motion was denied in January 2002. Leonard did not pursue the matter further or refund any money to Rev. Chatham.

In February 2001 Leonard undertook representation of Clifton Ferrell in his motion for appropriate relief, for which Clifton's brother paid Leonard \$3,500.00 of a \$5,000.00 fee. Leonard paid \$1,500.00 to Mears. Leonard filed nothing on behalf of Ferrell and never met with him, nor did he refund any part of the collected fee.

Also, in March 2001, Mears collected a \$15,500.00 fee from Carolyn Stover, on behalf of her son Larry Allred. Mears promised he would seek clemency for Allred and if that was unsuccessful, refund the money. In January 2002 Stover contacted Leonard, who agreed to file several motions on Allred's behalf. Later, in April 2002, Leonard filed a motion for appropriate relief that was prepared by Mears. The motion was lacking supporting documents and was facially denied as insufficient. Leonard took no other action with regard to the Allred matter.

Traffic Clients

As of January 2000, Leonard opened a separate "trust" account at Piedmont Federal designated as a "cost account." He deposited money from numerous unidentified traffic clients he was representing on a flat fee basis. The fee charged to the client included Leonard's fee and any court costs the client might have to pay. On seventeen occasions between January 2000 and July 2001 Leonard paid his personal American Express bill from the funds in the "cost account" without his clients' consent.

DHC Conclusions

Based on this evidence, the DHC concluded that Leonard had violated each of the Rules of Professional Conduct the State Bar claimed. First, his actions with Wilson's entrusted funds violated Rules 1.15-2(a) and (m) regarding trust accounts. The DHC also concluded that since these actions were knowing and intentional—and

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therefore were criminal acts that reflected adversely on his fitness as a lawyer—Leonard also violated Rule 8.4. Second, with regard to Leonard’s actions with Robinson, the DHC concluded he violated Rules 1.1, 1.3, and 1.4, regarding competence, diligence, and communication. Third, with regard to Leonard’s actions involving Mears, the DHC concluded he violated Rules 1.1, 1.3, 1.5, 5.3, and 5.4 regarding competence, diligence, fees, supervision of a non-lawyer, and the independence of a lawyer, respectively. Based on their conclusions, and the evidence presented, the DHC ultimately concluded disbarment was the only appropriate sanction for Leonard.

II.

[1] Leonard argues that the DHC erred by concluding his mismanagement of Wilson’s settlement money in the trust account was knowing and intentional, thus making his actions criminal. Leonard argues there was no clear, cogent and convincing evidence that he intended to misappropriate the funds; rather, he argues that the evidence of his stress, medical illnesses, good character, and poor record keeping contradict a criminal conclusion and favor a conclusion of gross negligence. We disagree.

Our review of the DHC’s findings and conclusions has been previously laid out in *N.C. State Bar v. Talford*, 356 N.C. 626, 576 S.E.2d 305 (2003). Attorney Talford was disbarred for mismanaging his trust account; this Court vacated that decision, and DHC appealed to the Supreme Court arguing that this Court lacked the authority to review a sanction by the DHC. The Court, citing to *N.C. State Bar v. DuMont*, 304 N.C. 627, 642-43, 286 S.E.2d 89, 98 (1982), noted the standard of appellate review is the “whole record test,” which “requires the reviewing court to determine if the DHC’s findings of fact are supported by substantial evidence in view of the whole record, and whether such findings of fact support its conclusions of law.” *Talford*, 356 N.C. at 632, 576 S.E.2d at 309. After reviewing the factors in this analysis the Court concluded that a reviewing court must determine whether the DHC’s decision has a “rational basis in the evidence.” *Id.* at 632-34, 576 S.E.2d at 310.

[T]he following steps are necessary as a means to decide if a lower body’s decision has a ‘rational basis in the evidence’: (1) Is there adequate evidence to support the order’s expressed finding(s) of fact? (2) Do the order’s expressed finding(s) of fact adequately support the order’s subsequent conclusion(s) of law? and (3) Do the expressed findings and/or conclusions adequately sup-

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port the lower body's ultimate decision? We note, too, that in cases such as the one at issue, e.g., those involving an 'adjudicatory phase' (Did the defendant commit the offense or misconduct?), and a 'dispositional phase' (What is the appropriate sanction for committing the offense or misconduct?), the whole-record test must be applied separately to each of the two phases.

Id. at 634, 576 S.E.2d at 311.

Leonard challenges several of the DHC's findings supporting its determination that his actions were criminal.

12. By no later than April 2000, Leonard knew that Ms. Wilson would be entitled to receive at least \$13, 066.92 of the settlement funds even after Medicare and her medical bills were paid.

...

15. Between Dec. 26, 2000 and June 30, 2002, Leonard knowingly and intentionally wrote a number of checks drawn on his BB&T trust account that were payable to himself and to the Forsyth County Clerk of Superior Court. Funds belonging to Ms. Wilson were used to pay these checks, although the payments were made for Leonard's benefit and the benefit of clients other than Ms. Wilson without her knowledge or consent.

16. Between May 2001 and May 30, 2002, Leonard knowingly and intentionally disbursed all but \$110.20 of Ms. Wilson's funds to himself and other clients without Ms. Wilson's knowledge or consent.

...

19. The fact that there was no activity in the BB&T trust account between Nov. 11, 2001 and May 30, 2002 is evidence that Leonard was aware that he had misappropriated Ms. Wilson's funds.

We conclude, however, that there is adequate evidence to support these findings.

Adequate evidence in this circumstance is synonymous with substantial evidence, *see Talford*, 356 N.C. at 632-34, 576 S.E.2d at 309-11, and " 'evidence is substantial if, when considered as a whole, it is such that a reasonable person might accept [it] as adequate to support a conclusion,' " *N.C. State Bar v. Frazier*, 62 N.C. App. 172, 177-78, 302 S.E.2d 648, 652 (1983) (quoting *DuMont*, 304 N.C. at 643,

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286 S.E.2d at 98-99 (1982)). “The whole-record test also mandates that the reviewing court must take into account any contradictory evidence or evidence from which conflicting inferences may be drawn.” *Talford*, 356 N.C. at 632, 576 S.E.2d at 310. That does not mean the mere existence of evidence in the record contradicting the lower body’s decision renders it reversible or gives this Court discretion to substitute its judgment between two reasonably conflicting views. Instead, “the ‘whole record’ rule requires the court, in determining the substantiality of evidence supporting the Board’s decision, to take into account whatever in the record fairly detracts from the weight of the Board’s evidence.” *Elliott v. North Carolina Psychology Bd.*, 348 N.C. 230, 237, 498 S.E.2d 616, 620 (1998) (internal quotations omitted); see also *N.C. Dep’t of Crime Control & Pub. Safety v. Greene*, 172 N.C. App. 530, 533, 616 S.E.2d 594, 598 (2005).

The State Bar introduced evidence that after Wilson’s settlement was deposited in Leonard’s trust account, the balance was just over \$57,000.00. After 26 December 2000, the date in which the funds could not drop below \$16,594.00, Leonard’s trust account fell to as little as \$110.20 at the end of May 2002. From May 2001 until Leonard deposited his personal funds in July of 2002, there was not enough money in the entire account to cover Wilson’s funds. Nonetheless, from May 2001 until November 2001, Leonard continued to use the trust account for various unnamed traffic cases, as well as other matters, in which he deposited funds and made payments to himself and others, placing his account out of balance by over \$16,500.00. He stopped using the account at all from November 2001 until the end of May 2002, when he made a withdrawal that left the balance in the account at \$110.20. Even without attempting to reconcile the account, for over a year Leonard received monthly statements from BB&T that at a bare minimum would alert a reasonable person to the fact that trust account money, in particular Wilson’s money, had been spent.

There was also evidence in the record to support the fact that Medicare alerted Leonard in an April 2000 letter that unless Wilson filed other claims related to the 1997 accident, her bills would not exceed \$4,000.00 when finalized; in fact the final bill was \$2,840.31. Still, Leonard did not release any of the remaining \$16,584.00 until April 2003.

Both parties agree that the criminality, if any, of Leonard’s actions arises from section 14-90 of our General Statutes, which estab-

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lishes embezzlement as a crime. Leonard could be found guilty of embezzlement only if he:

(1) . . . being more than sixteen years of age, acted as an agent or fiduciary for his principal, (2) that he received money or valuable property of his principal in the course of his employment and by virtue of his fiduciary relationship, and (3) that he fraudulently or knowingly and willfully misapplied or converted to his own use such money or valuable property of his principal which he had received in his fiduciary capacity.

State v. Pate, 40 N.C. App. 580, 583, 253 S.E.2d 266, 269, *cert. denied*, 297 N.C. 616, 257 S.E.2d 222 (1979); N.C. Gen. Stat. § 14-90 (2005). Leonard challenges the third element; rather than intentionally misapplying the funds in his trust account, he contends he is responsible for no more than gross negligence. Leonard is correct in his statement that the Bar, under these circumstances, must prove that he had the intent to “to embezzle or otherwise willfully and corruptly use or misapply the property of the principal for purposes for which the property is not held.” *State v. Britt*, 87 N.C. App. 152, 153, 360 S.E.2d 291, 292 (1987). Importantly though, the Bar does not need to show he intentionally used the property entrusted to him for his own purposes; instead it is sufficient to show that “defendant fraudulently or knowingly and willfully misapplied the property *for purposes other than those for which he received it* as agent or fiduciary.” *State v. Melvin*, 86 N.C. App. 291, 298, 357 S.E.2d 379, 384 (1987) (emphasis added) (citing *Pate*, 40 N.C. App. at 583-84, 253 S.E.2d at 269).

We determine the State Bar put on substantial evidence that Leonard knowingly and willfully misapplied Wilson’s settlement money for other purposes. For months he was aware that not only was his trust account out of balance, but that it was woefully short of the necessary funds. During this time there is evidence that the Wilsons were checking in with Leonard about creditors, he was receiving notices from Medicare, and he continued to deplete the trust account by writing checks to himself and others. Although circumstantial evidence, it is nonetheless compelling. *See Pate*, 40 N.C. App. at 583-84, 253 S.E.2d at 269 (“It is not necessary, however, that the State offer direct proof of fraudulent intent, it being sufficient if facts and circumstances are shown from which it may be reasonably inferred.”).

Leonard contends that his many character witnesses, testimony he is a bad record keeper, and medical evidence of stress during the

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period of time in question negate a clear, cogent and convincing conclusion that his actions were criminal. This evidence may detract from the weight the DHC places on the compelling circumstantial evidence, but it does not support reversal. The DHC's findings of fact are supported by adequate evidence and those findings, in turn, support the DHC's conclusions of law that Leonard violated Rule 8.4(b) and (c) of the Rules of Professional Conduct.

"It is professional misconduct for a lawyer to: . . . (2) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects; (3) engage in conduct involving dishonesty, fraud, deceit or misrepresentation[.]" N.C. Admin. Code tit. 27, r. 2.8, Rule 8.4 (August 2005). A violation of this rule warrants discipline. *See* N.C. Gen. Stat. § 84-28(b)(2) (2005) (violation of the Rules of Professional Conduct constitutes misconduct "and shall be grounds for discipline"); *N.C. State Bar v. Mulligan*, 101 N.C. App. 524, 528-29, 400 S.E.2d 123, 126 (1991) ("Certainly, conduct sufficient to support a charge of embezzlement would also constitute conduct involving dishonesty.").

III.

[2] Aside from the aforementioned findings, Leonard also disputes several findings related to his actions with Olin Robinson. We have reviewed the record, exhibits, and supporting documents and conclude these findings are also supported by substantial and adequate evidence. The conclusions that Leonard violated Rule 1.1, dealing with competence and necessary preparation; Rule 1.3, mandating reasonable diligence and promptness; and Rule 1.4, requiring a lawyer to communicate and consult with their client, are all supported by the DHC's findings. *See* N.C. Admin. Code tit. 27, r. 2.0 (August 2005). These conclusions also support a determination that discipline is necessary under N.C. Gen. Stat. § 84-28.

Several disputed findings regarding Leonard's cases with Richard Mears are also substantially supported by the evidence presented. These findings of fact support DHC's conclusions of law that Leonard violated: 1) Rule 5.4 by sharing his legal fees with Mears, a nonlawyer; and 2) Rule 5.3 by failing to properly supervise Mears. *See* N.C. Admin. Code tit. 27, r. 2.5 (August 2005).

Leonard did not assign error or otherwise dispute the DHC's findings of fact regarding his "cost account." As such, these findings are deemed conclusive. *See Okwara v. Dillard Dep't Stores, Inc.*, 136 N.C. App. 587, 591, 525 S.E.2d 481, 484 (2000) ("Where findings of

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fact are challenged on appeal, each contested finding of fact must be separately assigned as error, and the failure to do so results in a waiver of the right to challenge the sufficiency of the evidence to support the finding.”).

5. By January 2000, Leonard had opened a trust account at Piedmont Federal which he designated as a “cost account” (“Piedmont Federal cost account”) to hold funds entrusted to him by clients whose traffic matters Leonard was handling.

6. From January 1, 2000 forward, Leonard regularly deposited into the Piedmont Federal cost account funds that had been paid to him by clients for the purpose of paying the clients’ court costs.

7. On 17 occasions between January 2000 and July 2001, Leonard paid his personal American Express bill with client funds in the Piedmont Federal cost account.

8. Leonard did not have his clients’ consent to use funds in the Piedmont Federal cost account for his personal benefit.

While these findings are not associated with particular conclusions of law, each supports the DHC’s conclusions that Leonard violated the Rules of Professional Conduct regarding trust accounts and willfully mismanaged client funds entrusted to him in a fiduciary capacity.

IV.

[3] Since the DHC did not err in its findings, and those findings support its conclusions regarding violations, it was not error for the DHC to discipline Leonard in some regard. We must now undertake a review of whether the DHC’s sanction of disbarment was warranted by the evidence, findings, and conclusions under the whole-record test. *See Talford*, 356 N.C. at 639, 576 S.E.2d at 314. Leonard makes numerous arguments on appeal regarding potential error in DHC’s determination that he be disbarred. These can be summarized as follows: a) the DHC erred by finding several aggravating factors and failing to find several mitigating factors; and b) the DHC’s order of disbarment lacks the appropriate findings of fact regarding harm to the public.

A.

As to the first of these, that the DHC erred in its finding of aggravating and mitigating factors, there is only slight merit. Pursuant to

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N.C. Gen. Stat. § 84-28, the North Carolina State Bar has adopted aggravating and mitigating factors that can be considered by a disciplinary hearing committee to arrive at an appropriate sanction.

The hearing committee may consider aggravating factors in imposing discipline in any disciplinary case, including the following factors:

- (A) prior disciplinary offenses;
- (B) dishonest or selfish motive;
- (C) a pattern of misconduct;
- (D) multiple offenses;
- (E) bad faith obstruction of the disciplinary proceedings by intentionally failing to comply with rules or orders of the disciplinary agency;
- (F) submission of false evidence, false statements, or other deceptive practices during the disciplinary process;
- (G) refusal to acknowledge wrongful nature of conduct;
- (H) vulnerability of victim;
- (I) substantial experience in the practice of law;
- (J) indifference to making restitution;
- (K) issuance of a letter of warning to the defendant within the three years immediately preceding the filing of the complaint.

N.C. Admin. Code tit. 27, r. 1B.0114(w)(1) (August 2005).

The DHC found aggravating factors B, C, D, I, G, and H were present in Leonard's case. While Leonard contends that the evidence is insufficient to support a finding of these aggravating factors, we disagree. The record is replete with evidence of these factors. However, the DHC did find the following aggravating factors not necessarily listed in the Rules:

10. Leonard's conduct is aggravated by the following facts:

...

d) He failed to make timely restitution

...

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h) Leonard was uncooperative with Bar Counsel's attempts to conduct discovery in this matter and failed to produce copies of his American Express monthly statements and related documents as commanded by a subpoena.

Leonard contends that these findings should not be allowed to enhance his sanction because the Code section should be strictly construed to include only the listed factors, similar to aggravating factors for capital murder. Even though the Code's plain language foremost allows consideration of aggravating factors, of which can *include* those listed, we nonetheless agree with Leonard.

Section 1B.0114(w)(1) of the Code specifically identifies "indifference" in making restitution as an aggravating factor. While "untimeliness" may be indicative of indifference, we do not see the two as synonymous. Further, this same section identifies that before an attorney's recalcitrant or sluggish response to an order can be an aggravating factor, a finding of "bad faith" and "intentional failure to comply" is necessary. The DHC's finding does not rise to that level and should not support an aggravating factor.

That said, neither of these two errant findings of aggravation diminish the other six clearly appropriate aggravating factors. And if those are sufficient in and of themselves to warrant an escalated sanction, there is no prejudice to Leonard from the DHC's error.

The DHC also found Leonard's clean disciplinary record and the fact that numerous "lawyers and judges from his home county and surrounding counties testified as to his good character" were mitigating factors. Despite evidence by Leonard of panic attacks and stress, the DHC did not find that Leonard suffered from "personal or emotional problems," or "physical or mental disability or impairment," two additional mitigating factors listed in N.C. Admin. Code tit. 27, r. 1B.0114(w)(2) (August 2005). Leonard contends that the DHC failed to consider these factors for which substantial evidence was presented and this failure was an abuse of discretion. Even if we were to agree with Leonard that the DHC could have found these mitigating factors, we cannot say that the DHC's potential error in not doing so amounted to an abuse of discretion—the standard of review Leonard admits is applicable to this determination.

Foremost though, the presence or absence of aggravating and mitigating factors is only one part of our evaluation of whether the DHC's decision to disbar Leonard was rationally based on the evi-

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dence, especially given the fact that these factors are not associated with a particular type of sanction.

B.

The Supreme Court in *Talford* held that:

in order to merit the imposition of ‘suspension’ or ‘disbarment,’ there must be a clear showing of how the attorney’s actions resulted in significant harm or potential significant harm to the entities listed in the statute, *and* there must be a clear showing of why ‘suspension’ and ‘disbarment’ are the only sanction options that can adequately serve to protect the public from future transgressions by the attorney in question.

Talford, 356 N.C. at 638, 576 S.E.2d at 313. Leonard contends that findings supporting these two necessary factors are absent from the DHC’s order and thereby warrant remand.

In *Talford* the Supreme Court reviewed a DHC order disbaring attorney Talford after discovery that he had for four years mismanaged his trust account in violation of the Rules of Professional Conduct. The Supreme Court found there was no evidence of clients losing money, and without something more, the State Bar had only demonstrated the potential for harm to Talford’s clients. Therefore the Court held that:

within the confines of defendant’s circumstances, we can find no grounds—from among either the underlying evidence or the DHC’s discipline-related findings of fact—that would support a conclusion that his misconduct resulted in either: (1) potential harm to clients beyond that attributable to any commingling of attorney and client funds, or (2) *significant* potential harm to clients.

* * *

Thus, in our view, the expressed parameters of the statute preclude the DHC on the facts of this case from imposing on defendant any sanction that requires such a showing.

Id. at 640-41, 576 S.E.2d at 315.

Notably though, *Talford* only dealt with mismanagement of a trust account. Here Leonard has been adjudicated responsible for vio-

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lating eight rules of Professional Conduct, including a criminal act that tarnishes Leonard's honesty, trustworthiness, or fitness as a lawyer. These violations cover a varied range of activities and a period of nearly four years. Implicit in a finding that Leonard has violated Rule 8.4(b) and (c) is a determination that his misconduct poses a *significant* potential harm to clients. Accordingly, based upon our review of the evidence, findings, and conclusions, we hold the DHC's ultimate decision to disbar Leonard has a rational basis in the evidence. *See e.g. N.C. State Bar v. Mulligan*, 101 N.C. App. 524, 400 S.E.2d 123 (1991); *N.C. State Bar v. Frazier*, 62 N.C. App. 172, 302 S.E.2d 648 (1983).

V.

[4] Leonard also raises an issue regarding the DHC's denial of his motion for a new trial. The basis for his motion is that one of the DHC panel members, M. Ann Reed, a Senior Deputy Attorney with the North Carolina Attorney General's Office, "failed to recuse herself on her own motion after learning that an attorney from the Attorney General's office had prepared an affidavit for one of the prosecuting witnesses, Carolyn Stover, and hearing evidence concerning the Attorney General's investigation of Mears."

We find no error, much less an abuse of discretion, in the DHC's denial of Leonard's motion on this basis. Carolyn Stover filed a grievance against Leonard with the State Bar regarding his interactions with Mears on a case involving her son, Larry Allred. Mears was under investigation by the Consumer Protection Division of the Attorney General's office and as a part of that investigation Ms. Stover signed a two-page affidavit, apparently prepared by a person within the Office of the Attorney General, summarizing the exact same statements she made in her grievance. Both documents were presented to the DHC. Nothing in the record suggests Ms. Reed was unable to render a fair and impartial decision on Leonard's interactions with his clients.

VI.

In conclusion, after reviewing the DHC's order under the whole-record test, we find substantial evidence supporting the lower body's findings and that those findings support its conclusions. We further determine that DHC's findings and conclusions support its ultimate decision to disbar Robert Leonard. Finally, we can discern no abuse of discretion in the DHC's denial of Leonard's motion for a new trial.

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Affirmed.

Judges McGEE and STEELMAN concur.

STATE OF NORTH CAROLINA v. LONG THANH NGUYEN

No. COA05-907

(Filed 18 July 2006)

1. Confessions and Incriminating Statements— Miranda warnings—Vietnamese translation

The trial court's conclusion that a Vietnamese defendant's waiver of his Miranda rights was knowing and voluntary was supported by the findings, to which he did not assign error. Although defendant finds fault with the use of a police officer to translate rather than a certified interpreter, there was no evidence that the officer was deceitful or acted improperly; furthermore, the officer was raised in Vietnam and could communicate clearly with defendant.

2. Criminal Law— instructions—prior acts of violence—limited to intended purpose

Questions in a first-degree murder prosecution about reports of domestic violence were within the scope of cross-examination of plaintiff's expert about his testimony regarding defendant's ability to form the intent to kill. An instruction limiting the testimony to its purpose was proper.

3. Criminal Law— prosecutor's closing argument—spousal abuse—statements repeated by expert

A prosecutor's closing argument about evidence of a first-degree murder defendant's abuse of his wife (the victim) were not grossly improper. The remarks referred to statements repeated by defendant's expert and properly admitted as impeachment of his conclusions, and the fact that the court had refused to allow the people who gave those statements to testify without stating reasons did not necessarily indicate that the evidence was prejudicial.

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4. Criminal Law; Constitutional Law—right to have consulate contacted on arrest—not raised at trial—not ineffective assistance of counsel

A first-degree murder defendant's claim that the State violated his right to have his consulate contacted upon his arrest was not reached because defendant did not raise the claim at trial. Defendant's contention that the failure to raise the claim constituted inadequate representation failed because he did not show how contacting the consulate would have changed the outcome of the case.

Appeal by defendant from judgment entered 24 September 2004 by Judge Steve A. Balog in Guilford County Superior Court. Heard in the Court of Appeals 22 March 2006.

Attorney General Roy Cooper, by Assistant Attorney General Daniel P. O'Brien, for the State.

Massengale & Ozer, by Marilyn G. Ozer, for the defendant-appellant

ELMORE, Judge.

Long Thanh Nguyen (defendant) was convicted of first degree murder and now appeals the judgment entered against him. The State's evidence tended to show that defendant, who was born and educated in Vietnam, came to the United States in 2001 after his marriage to Thu Nguyet-Thi Doan (Thu). Defendant and Thu fought often about their marriage, and Thu had previously told defendant that she wanted to separate from him.

On the morning of 13 April 2003, defendant and Thu had been arguing. After a heated oral altercation, defendant began hitting Thu. Thu initially hit defendant back, but she eventually sat down on the floor in the family's dining room. With Thu sitting on the floor, defendant retrieved a large knife from a drawer in the kitchen and approached Thu. After struggling for a while, Thu became tired and laid down on her back on the floor. As Thu lay in a prone position, defendant picked up the knife and stabbed her twelve times in her neck, arms, and chest. Thu died from exsanguination after the left and right carotid arteries and jugular veins in her neck were severed.

After stabbing Thu, defendant rinsed the knife and returned it to its kitchen drawer. Then, defendant grabbed his 18-month-old son

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and was attempting to exit the house when he was confronted by his brother-in-law, Minh Tran (Minh). Minh, having seen Thu lying on the floor injured, attempted to call an ambulance; however, defendant jerked the telephone wires out of the wall and exited the house. Minh eventually flagged down a passing motorist who called police.

Once outside, defendant placed his son in the family minivan, which was parked in their driveway. In an apparent attempt to kill himself, defendant opened the minivan's gas tank and tried to place a lit piece of tissue paper in the minivan's gas nozzle.

After the failed attempt, defendant climbed into the minivan and drove erratically down the highway. Defendant soon lost control of the vehicle, causing the minivan to leave the roadway, become airborne, and crash into an automobile traveling on the highway below. Defendant received only minor injuries from the accident, consisting of airbag burn on his lower arms and a cut on his right ankle. Police who arrived at the accident scene placed defendant in handcuffs and transported him to the Greensboro Criminal Investigation Department.

After defendant's arrest, Greensboro Police Detective Leslie Lejune (Officer Lejune) contacted Officer Hein Nguyen¹ (Officer Nguyen), also of the Greensboro Police Department (GPD), to interpret statements for defendant. Officer Nguyen was a Vietnamese native who grew up fifteen miles from defendant's home town of Saigon.

Upon his arrival, Officer Nguyen, speaking in Vietnamese, introduced himself to defendant as a police officer and informed defendant of his *Miranda* rights. Defendant, who appeared to be calm, orally indicated that he understood each of his rights and signed a *Miranda* waiver form, placing his initials next to each right to indicate his understanding. Defendant then gave a statement, translated by Officer Nguyen and written by Officer Lejune, in which he admitted to stabbing Thu. Defendant was offered but declined food and bathroom breaks and medical attention for the cut on his ankle until he had finished giving his statement.

Defendant was indicted on 7 July 2003 for first degree murder. On 16 April 2004 defendant filed a motion to suppress evidence of any and all statements made by him to the Greensboro Police Department. Defense counsel asserted that defendant did not know-

1. Officer Hein Nguyen is of no relation to defendant, Long Thanh Nguyen.

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ingly, intelligently, and voluntarily waive his *Miranda* rights, contending that, therefore, defendant's confession was made in violation of his United States and North Carolina Constitutional rights. Defendant's motion to suppress was denied in a court order dated 21 September 2004.²

At trial, defendant offered testimony by an expert, Dr. Michael Schaefer (Dr. Schaefer), a forensic psychologist. Dr. Schaefer interviewed defendant in prison one year after Thu's killing and reviewed documents from witnesses and people who knew defendant and his wife. Dr. Schaefer diagnosed defendant with an adjustment disorder with mixed anxiety and depressed mood, and dysthemic disorder, a type of "ongoing low-grade depression." Dr. Schaefer concluded that defendant's disorders, combined with the stressors leading up to 13 April 2003, rendered defendant incapable of forming a specific intent to kill Thu.

On cross-examination, Dr. Schaefer admitted that defendant's counsel had requested that the psychoanalysis be performed on defendant; also, Dr. Schaefer stated that the purpose of the evaluation was to find possible grounds for a diminished capacity defense, and that defendant was aware of this purpose.

Dr. Schaefer further admitted that some of the documents containing statements by persons who knew defendant "went against" defendant's responses to interview questions, including "reports of an ongoing pattern of domestic disturbance." However, Dr. Schaefer failed to conduct interviews with those persons who knew defendant and had made recorded statements regarding defendant's personality.³ Dr. Schaefer admitted that the statements made by these persons, if true, could change his diagnosis of defendant's condition.

Defendant admitted to the jury that he committed second degree murder in killing Thu. The only element of first degree murder that defendant disputed was that he killed with premeditation and deliberation. On 24 September 2004 a jury found defendant guilty of first degree murder. Defendant gave notice of appeal in open court on the same day.

2. Defense counsel also objected at trial when the State first moved to introduce defendant's confession into evidence; this objection was overruled.

3. Defendant's expert also failed to obtain and review defendant's medical records.

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I.

[1] By his first assignment of error, defendant argues that the trial court erred in failing to suppress defendant's confession in the face of evidence that defendant did not waive his *Miranda* rights understandingly, knowingly, and voluntarily. The trial court concluded as a matter of law that defendant "understandingly, knowingly, and voluntarily waived his *Miranda* rights" before being interviewed by Officer Nguyen.

In its landmark decision in *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966), the United States Supreme Court held that a suspect in the custody of police must be advised of the following specific rights:

(1) that the individual has the right to remain silent; (2) that as a consequence of foregoing the right to remain silent, anything the individual says may be used in court against the individual; (3) that the individual has the right to consult with an attorney in order to determine how best to exercise his or her rights prior to being questioned; and (4) that if the individual cannot afford an attorney, one will be appointed.

State v. Hyatt, 355 N.C. 642, 654, 566 S.E.2d 61, 69 (2002). Here, defendant does not contest the fact that he initialed and signed a form commonly used to waive a suspect's *Miranda* rights; rather, he argues that his waiver and subsequent written statement to police should have been suppressed because he did not understandingly, knowingly, and voluntarily waive his *Miranda* rights before making his statement.

In considering a motion to suppress a statement for lack of voluntariness, the trial court must determine whether the State has met its burden of showing by a preponderance of the evidence that the statement was voluntarily and understandingly given. *State v. Mlo*, 335 N.C. 353, 363-64, 440 S.E.2d 98, 102, *cert. denied*, 512 U.S. 1224, 129 L. Ed. 2d 841 (1994). On appeal, the findings of the trial court are conclusive and binding if supported by competent evidence in the record. *Id.* at 364, 440 S.E.2d at 102; *see also State v. Hyde*, 352 N.C. 37, 44, 530 S.E.2d 281, 287 (2000); *State v. James*, 321 N.C. 676, 685-86, 365 S.E.2d 579, 585 (1988).

Here, however, defendant failed to separately assign error to any of the numbered findings of fact in the trial court's order denying defendant's motion to suppress. Therefore, our Court's review of this

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assignment of error is “limited to whether the trial court’s findings of fact support its conclusions of law.” *State v. Cheek*, 351 N.C. 48, 63, 520 S.E.2d 545, 554 (1999).

In its pretrial order denying defendant’s motion to suppress, the trial court found that, before beginning defendant’s interview,

Officer H. Nguyen used the GPD Miranda rights form to advise the defendant of his rights pursuant to *Miranda v. Arizona* and to document defendant’s responses Officer H. Nguyen translated into Vietnamese the introductory paragraph: “Before asking you any questions, we want to advise you of your rights and determine that you understand what your rights are.”

Next Officer H. Nguyen translated into Vietnamese each of the five numbered rights on the form After each numbered right, before proceeding to the next one, [Officer Nguyen] asked the defendant if he understood that right. When the defendant responded as to each that he did understand it, his affirmative answer was recorded in the form in English as “yes.” To further indicate that he had been advised of these rights and that he understood them, the defendant signed the form beneath the fifth right.

Next Officer H. Nguyen read to the defendant in Vietnamese the WAIVER OF RIGHTS paragraph as set forth on the form. The defendant waived his rights and agreed to make a statement and confirmed this by signing the form below the Waiver of Rights paragraph.

The court also found that another qualified interpreter had been called by the GPD before the interview and had arrived approximately thirty minutes after the interview began. This interpreter, who would be paid by the GPD for his services, was released because defendant’s interview had already begun.

We must now determine whether these findings support the trial court’s conclusion that defendant’s *Miranda* waiver was understandingly, voluntarily, and knowingly made. “The trial court’s conclusion of law that defendant’s statements were voluntarily made is a fully reviewable legal question.” *Hyde*, 352 N.C. at 45, 530 S.E.2d at 288. “[T]he court looks at the totality of the circumstances of the case in determining whether [defendant’s] confession was voluntary.” *Id.* (quotation omitted). In making our determination, this Court must consider:

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whether defendant was in custody, whether he was deceived, whether his *Miranda* rights were honored, whether he was held incommunicado, the length of the interrogation, whether there were physical threats or shows of violence, whether promises were made to obtain the confession, the familiarity of the declarant with the criminal justice system, and the mental condition of the declarant.

Id. (quoting *State v. Hardy*, 339 N.C. 207, 222, 451 S.E.2d 600, 608 (1994)).

Applying these principles, we determined that the trial court did not err in concluding that defendant's *Miranda* waiver and confession were understandingly, voluntarily, and knowingly made. No evidence appears in the record that tends to show that defendant was deceived; that defendant was held incommunicado; that defendant was interrogated for an unreasonable length of time; or that any promises, physical threats, or shows of violence were made to obtain defendant's consent to waiver or his confession.

Defendant finds fault with the GPD's decision to use Officer Nguyen, a Greensboro police officer, in lieu of a certified Vietnamese interpreter to translate during the police investigation. However, defendant offers no evidence showing that Officer Nguyen was deceitful or acted in an otherwise improper manner during his dealings with defendant. To the contrary, the record tends to show the following: that neither Officer Nguyen nor Officer Lejune carried a firearm into the interview room; that neither officer raised his or her voice during the interview, and; that Officer Nguyen read defendant's entire statement back to defendant in Vietnamese and allowed defendant to make changes to his statement. Additionally, the evidence shows that Officer Nguyen, who was raised in South Vietnam, could communicate clearly with defendant. In summary, while defendant argues that Officer Nguyen was not a "neutral" interpreter because he was a police officer, he offers no legal authority to support his claim of error.

Defendant also asserts that his mental condition at the time of the interview precluded him from understandingly waiving his rights and making his confession. Defendant points to the fact that he had been in an automobile accident and had attempted suicide a few hours before making his statement. However, the trial court found that defendant was offered but declined medical treatment for his minor injuries until he concluded giving his statement. Defendant also

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declined food, beverage, and bathroom breaks offered during the interview. Finally, throughout the interview, defendant remained calm and unemotional, not crying or shaking. Based on these findings, defendant's argument is without merit.

In summary, the trial court's findings regarding defendant's motion to suppress support its conclusion that defendant's *Miranda* waiver and statement were made understandingly, knowingly, and voluntarily. See *Cheek*, 351 N.C. at 63, 520 S.E.2d at 554. None of defendant's federal or state constitutional rights were violated by his *Miranda* waiver or confession. See *id.* Defendant's assignments of error relating to the suppression of his confession are, therefore, overruled.

II.

[2] Next, defendant contends that the trial court erred in giving a jury instruction that limited the purpose of evidence introduced regarding defendant's prior bad acts.

Defendant's expert witness, Dr. Schaefer, testified that based on his interviews with defendant and information contained in various reports, defendant was not able to form specific intent to kill Thu. On cross-examination, however, Dr. Schaefer admitted that if defendant had ever hit his wife, such an act might signify an antisocial personality disorder, a condition which he did not originally diagnose. Without objection from defense counsel, the State questioned Dr. Schaefer about details from reports he had reviewed prior to reaching his conclusions regarding defendant's mental state. The State pointed to four instances in which persons familiar with defendant reported that defendant had threatened or physically assaulted Thu. Dr. Schaefer admitted that he did not perform personal interviews with any of the persons mentioned in the reports to ascertain whether the reported statements might be true; however, Dr. Schaefer admitted that if they were, then his diagnosis might change.

After cross-examining Dr. Schaefer, the State moved to call the persons who gave statements to testify at trial. Defendant objected to calling these witnesses, arguing that doing so would not help to prove any "substantive" facts. The judge refused to allow the testimony as evidence under Rule 403 but did not explain the specific reasoning behind his decision.

The relevant part of the contested jury instruction read as follows:

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Evidence has been received that may tend to show that on earlier occasions, the defendant slapped the victim; or the defendant stated that he would kill the victim, and just go to prison; or that the victim had a bruise on the back of her neck and said the defendant had hit her; or that the victim stated that the defendant tried to strangle her and hit her head against the wall, after she fainted. This evidence was received solely for the purpose of showing that the defendant had the intent, which is a necessary element of the crime charged in this case.

Defendant argues that the prior acts instructed on were not introduced as competent evidence before the jury. However, the questions by the prosecutor to Dr. Schaefer regarding statements of defendant's prior bad acts were within the proper scope of cross-examination of an expert witness.

Our Supreme Court has consistently stated that:

North Carolina Rules of Evidence permit broad cross-examination of expert witnesses. N.C. Gen. Stat. § 8C-1, Rule 611(b) (1992). The State is permitted to question an expert to obtain further details with regard to his testimony on direct examination, to impeach the witness or attack his credibility, or to elicit new and different evidence relevant to the case as a whole. “The largest possible scope should be given,’ and ‘almost any question’ may be put ‘to test the value of his testimony.’” 1 Henry Brandis, Jr., *Brandis on North Carolina Evidence* § 42 (3d ed. 1988) (footnotes omitted) (citations omitted).

State v. Gregory, 340 N.C. 365, 410, 459 S.E.2d 638, 663-64 (1995) (quoting *State v. Bacon*, 337 N.C. 66, 88, 446 S.E.2d 542, 553 (1994), *cert. denied*, 513 U.S. 1159, 130 L. Ed. 2d 1083 (1995)). The Court in *Gregory* concluded that the prosecutor's questions regarding the defense expert's nonreliance on certain statements were admissible to impeach his credibility. *Gregory*, 340 N.C. at 410, 459 S.E.2d at 664; *see also State v. Morganherring*, 350 N.C. 701, 728-29, 517 S.E.2d 622, 638 (1999) (“The degree of [the expert's] familiarity with the sources upon which he based his opinion is certainly relevant as to the weight and credibility the jury should give to [the expert's] testimony.”).

Here, the prosecutor called into question whether Dr. Schaefer adequately considered certain recorded statements in diagnosing defendant. The impeachment of testimony given by Dr. Schaefer on direct examination was within the broad scope of cross-examination

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allowed by our courts. *See Gregory*, 340 N.C. at 409-10, 459 S.E.2d at 663-64.

Defendant also argues that the challenged jury instruction referenced evidence that the court had previously excluded as prejudicial. Specifically, defendant contends that the trial court refused to allow the State to call persons who made statements to testify because their testimony would have been inadmissible. This argument is without merit, as the evidence of defendant's prior bad acts was admissible under Rule 404(b).

While evidence of a person's character or a trait of his character is generally not admissible, evidence of other wrongs or acts may be admissible for the purpose of proving intent. *See* N.C. Gen. Stat. § 8C-1, Rule 404(b) (2005); *see also State v. Scott*, 343 N.C. 313, 331, 471 S.E.2d 605, 616 (1996) (concluding that testimony about defendant's violent acts towards victim was admissible under Rule 404(b) to prove intent, malice, premeditation, and deliberation); *State v. Haskins*, 104 N.C. App. 675, 679, 411 S.E.2d 376, 380 (1991). Here, defendant offered Dr. Schaefer's testimony to show that defendant was unable to form the specific intent to kill Thu. To prove the disputed issue of defendant's intent to kill, the State elicited testimony on defendant's prior misconduct toward his wife. Dr. Schaeffer's testimony regarding the statements of defendant's prior bad acts was properly admitted under Rule 404(b). *See Scott*, 343 N.C. at 331, 471 S.E.2d at 616; *State v. Syriani*, 333 N.C. 350, 376-78, 428 S.E.2d 118, 132, *cert. denied*, 510 U.S. 948, 126 L. Ed. 2d 341 (1993).

Because Dr. Schaefer's testimony regarding certain statements was properly admitted as evidence of defendant's intent, we find no error in giving a jury instruction limiting Dr. Schaefer's testimony to that very purpose. In fact, in overruling this assignment of error, we note that the challenged limiting instruction likely proved favorable to defendant. *See Hyatt*, 355 N.C. at 662, 566 S.E.2d at 74-75 (stating that the trial court guarded against prejudice by giving limiting instruction regarding permissible uses of Rule 404(b)).

III.

[3] Next, defendant contends that the trial court erred in allowing the prosecutor to make statements about certain evidence during his closing statements. The evidence in question concerns Dr. Schaeffer's testimony on prior bad acts performed by defendant and statements by witnesses to these alleged acts.

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In his closing argument, the prosecutor made the following remarks, to which defendant assigns error:

What kind of a man slaps his wife? Keep going. What kind of a man tells his wife that he's going to just kill her and go to prison? He told that to Hang Doan, his sister. Hang Doan could have testified What kind of man hits his wife on the back of the neck and leaves bruises? Deborah Bettini could have told you about that.

Defense counsel did not object when these remarks were made by the prosecutor. In fact, before the prosecutor's closing remarks, defense counsel told the jury:

Dr. Schaefer testified that my client, Long Nguyen, slapped his wife on one occasion. . . . Dr. Schaefer said he read [that defendant had slapped his wife] in the report. Dr. Schaefer also mentioned the fact that one of Mr. Nguyen's . . . wife's coworkers saw bruises on Mr. Nguyen's wife. Dr. Schaefer testified to that. He wasn't trying to hide that from you.

Where, as here, a defendant fails to timely object to the prosecution's closing argument, this Court must determine whether the argument was so grossly improper that the trial court erred in failing to intervene *ex mero motu*. *State v. Walters*, 357 N.C. 68, 101, 558 S.E.2d 344, 364 (2003); *State v. Jones*, 355 N.C. 117, 133, 558 S.E.2d 97, 107 (2002). As a general rule, "counsel are given wide latitude in arguments to the jury and are permitted to argue the evidence that has been presented and all reasonable inferences that can be drawn from that evidence." *Jones*, 355 N.C. at 128, 558 S.E.2d at 105. To constitute reversible error:

the prosecutor's remarks must be both improper and prejudicial. Improper remarks are those calculated to lead the jury astray. Such comments include references to matters outside the record Improper remarks may be prejudicial either because of their individual stigma or because of the general tenor of the argument as a whole.

Id. at 133, 558 S.E.2d at 107-08. It is commonly recognized that it is *not* improper for the prosecutor to comment on a defendant's failure to produce witnesses. *See, e.g., State v. Ward*, 354 N.C. 231, 262, 555 S.E.2d 251, 271 (2001); *State v. Skeels*, 346 N.C. 147, 153, 484 S.E.2d 390, 393 (1997).

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A review of the record reveals that the prosecutor's remarks were not improper. Defendant first argues that the prosecutor's closing argument referenced facts outside the evidence. In closing, the prosecution referenced statements made by certain persons regarding defendant's prior acts. But these statements were properly admitted as impeachment of Dr. Schaefer's conclusions regarding defendant's mental state during the killing. In fact, defense counsel referred to these statements during her own closing argument. Therefore, these statements were not outside the record; rather, they represented evidence presented at trial. *See Bacon*, 337 N.C. at 93, 446 S.E.2d at 555-56 (concluding no error in overruling defense counsel's objection where prosecutor's argument was "based on testimony by the defendant's own witness . . . during cross-examination.")

Defendant next urges this Court to find the prosecutor's statements grossly improper because the trial judge denied the State's request to allow the persons who gave statements to testify. While relevant evidence may be excluded under Rule 403 due to the danger of unfair prejudice, such evidence may also be excluded because of considerations such as "undue delay, waste of time, or needless presentation of cumulative evidence." N.C. Gen. Stat. § 8C-1, Rule 403 (2005). Although the trial court did not state its reason(s) for refusing to allow the persons who made statements to testify, the court could have concluded that such testimony would have merely wasted time. Defendant's contention that this evidence was necessarily prejudicial is unpersuasive.

It was not improper for the prosecutor to call to the attention of the jury the fact that defendant chose not to have the persons who made statements about defendant testify at trial.⁴ *See Ward*, 354 N.C. at 261-62, 555 S.E.2d at 271. We hold that the prosecutor's statements were not grossly improper and the trial court's failure to intervene *ex mero motu* was not error.

IV.

[4] Defendant lastly contends that, as a citizen of a foreign country, he was entitled pursuant to Article 36 of the Vienna Convention on Consular Relations (the Vienna Convention) to have his consulate notified upon his arrest. This contention is without merit.

4. We note that it is unclear whether or not the prosecution's comments were in fact meant for this purpose. The prosecutor's closing comments may have simply been a final attempt to impeach Dr. Schaefer's testimony.

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Article 36 of the Vienna Convention states that, upon the arrest of a foreign national:

[United States] authorities . . . shall, without delay, inform the consular post of the [foreign State] if . . . a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested . . . shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph[.]

done at Vienna April 24, 1963, 21 U.S.T. 77, 100-01, 1969 U.S.T. LEXIS 284, 28-29. However, the applicability of the Vienna Convention to state court proceedings is often limited because while “states may have an obligation . . . to comply with the provisions of the Vienna Convention, the Supremacy Clause [of the United States Constitution] does not convert violations of treaty provisions . . . into violations of *constitutional* rights.” *Murphy v. Netherland*, 116 F.3d 97, 100 (4th Cir. 1997) (emphasis in original).

Here, we need not reach defendant’s Vienna Convention claim on its merits because defendant failed to raise this claim in his written motion to suppress, during the suppression hearing, or at any time during the trial proceedings. As a result, defendant has waived his right to appeal this issue to our Court. *See State v. Escoto*, 162 N.C. App. 419, 430, 590 S.E.2d 898, 906 (“Defendant’s final argument is based on the fact that defendant was not advised of his rights under the Vienna Convention upon his arrest. The record contains no evidence that defendant presented this issue to the trial court and the question is therefore not properly before this Court.”), *disc. review denied*, 358 N.C. 378, 598 S.E.2d 138 (2004).

Defendant alternatively contends that defense counsel’s failure to move to have his confession suppressed on Vienna Convention grounds constitutes ineffective assistance of counsel.

To prevail on a claim of ineffective assistance of counsel,

a defendant must first show that his counsel’s performance was deficient and then that counsel’s deficient performance prejudiced his defense. . . . Generally, to establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding

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would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

State v. Allen, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (2006) (internal quotations and citations omitted); *see also Strickland v. Washington*, 466 U.S. 668, 687-94, 80 L. Ed. 2d 674, 693 (1984).

Whether or not defense counsel's failure to raise the Vienna Convention issue constituted a "deficient performance," defendant's ineffective assistance of counsel claim must fail because defendant has not shown prejudice. First, defendant has failed to establish prejudice from the alleged violation because he is unable to explain how contacting the Vietnamese consulate would have changed the outcome of his case. *See Murphy*, 116 F.3d at 100-01. Defendant was advised of his right to an attorney and voluntarily waived that right. Even assuming that defendant would have contacted his consulate for assistance if notified of this right, it is unclear what assistance, if any, the Vietnamese consulate would have provided to defendant.

Second, even without defendant's confession to police, the physical evidence and eyewitness evidence presented during trial overwhelmingly supports the jury's verdict. In summary, the defendant has not met the burden of showing a reasonable probability that, but for defense counsel's failure to raise the Vienna Convention issue at trial, the result of his proceedings would have been different. *See Allen*, 360 N.C. at 316, 626 S.E.2d at 286. This assignment of error is overruled.

No error.

Judges STEELMAN and JACKSON concur.

STATE OF NORTH CAROLINA v. JOHNNY RAY BULLOCK

No. COA05-43

(Filed 18 July 2006)

1. Rape— child under thirteen—failure to repeat full instruction for each charge—plain error analysis

The trial court did not commit plain error in a multiple first-degree rape of a child under thirteen case by failing to repeat the full jury instructions for each of the eleven counts, because: (1)

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the trial court instructed the jury on each of the three elements of statutory rape as to each of the eleven offenses; and (2) the jury was charged as to the offenses contained in the indictment, including the alleged date of each offense.

2. Rape— child under thirteen—instruction—variation between allegation and proof as to time

The trial court did not err in a multiple first-degree rape of a child under thirteen case by allegedly instructing the jury on theories of guilt not alleged in one of the indictments, because: (1) variance between allegation and proof as to time is not material where no statute of limitations is involved, and particularly when allegations of sexual abuse of a child are involved; and (2) even assuming *arguendo* that a variation exists between the indictment and the charge, it does not require a new trial on this count.

3. Rape— child under thirteen—motion to dismiss—sufficiency of evidence

The trial court did not err in a multiple first-degree rape of a child under thirteen case by failing to dismiss the charges against defendant at the close of the State's evidence and the close of all evidence, because: (1) the State's evidence tended to show that for the entire period encompassed by the indictments defendant was having sexual intercourse with the victim more than twice a week; and (2) although defendant moved to another county from March 2001 until October 2001, the victim testified that he visited her home frequently, that defendant lived with them for a period during that time even though his address was in another county, and that their sexual contact did not diminish during this period.

4. Evidence— prior crimes or bad acts—failure to intervene ex mero motu—remoteness in time—common scheme or plan

The trial court did not err in a multiple first-degree rape of a child under thirteen case by admitting evidence of other bad acts under N.C.G.S. § 8C-1, Rule 404(b) including sexual acts with defendant's older daughter (the victim's half sister) and by failing to intervene *ex mero motu* when the State argued this evidence, because: (1) when the facts surrounding a prior act are sufficiently similar to those in a case at bar, it may be proper to admit the prior act evidence even if over ten years have passed (although the elapsed time in this case was actually around nine years); and (2) in light of the similarity of the incidents and in light of the unnatural character of a father raping his own preteen

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daughters, the evidence was properly admitted to show a common scheme or plan.

5. Evidence— DNA evidence—common plan scheme or plan to sexually abuse victim

The trial court did not err in a multiple first-degree rape of a child under thirteen case by admitting DNA evidence establishing a 99.99 percent probability that defendant was in fact the father of the victim's child even though the victim conceived the child after she left Wake County and thus after each of the incidents for which defendant was convicted in the instant case, because: (1) evidence that defendant engaged in other sexual acts with the victim is admissible to show that he had a common scheme or plan to sexually abuse the victim; and (2) contrary to defendant's assertion, statements made in the closing argument cannot alter the propriety of admitting the evidence under N.C.G.S. § 8C-1, Rule 404(b) at trial.

6. Constitutional Law— right to unanimous verdict—generic testimony

Defendant's right to a unanimous verdict was not violated by the trial court's submission to the jury of eleven counts of first-degree rape of a child under thirteen based on the victim's testimony that she was raped by defendant at least twice a week for ten months, because: (1) there was no indication that there was any confusion on the part of the jury on its duty to render a unanimous verdict based on the six factors enumerated by our Supreme Court; (2) although the victim gave specific testimony concerning only the first act of sexual intercourse, generic testimony can in fact support a conviction of a defendant and the number of convictions based upon generic testimony is not limited to one; and (3) there was no possibility that some jurors believed some of the rapes took place and some believed that they did not.

7. Rape— child under thirteen—short-form indictments—double jeopardy

The trial court did not err in a multiple first-degree rape of a child under thirteen case by entering judgment based on short-form indictments, because: (1) short-form indictments are specifically approved for this offense under N.C.G.S. § 15-144.1(b); and (2) the indictments in the instant case state they are limited to conduct defendant committed in Wake County, defendant was not tried for any acts that defendant may have committed in Harnett

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County, and thus these indictments pose no danger to defendant's rights under the double jeopardy clause.

8. Criminal Law— prosecutor's arguments—defendant vile, amoral, wicked, and evil

The trial court did not err in a multiple first-degree rape of a child under thirteen case by failing to intervene *ex mero motu* to limit certain remarks made by the State during its closing argument referring to defendant as vile, amoral, wicked, and evil, because: (1) the appellate courts of this state have declined to reverse convictions based on closing arguments referring to defendants in the same or similar language; and (2) there is nothing in the instant case to warrant departure from prior holdings.

Appeal by defendant from judgment entered 4 August 2004 by Judge Henry W. Hight, Jr. in Wake County Superior Court. Heard in the Court of Appeals 24 August 2005.

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

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

STEELMAN, Judge.

Defendant is the biological father of the victim, his daughter. The victim had little or no contact with defendant for the first eleven years of her life. When she was eleven, she, along with her mother and brother, moved from New York to Raleigh to live with defendant and his girlfriend. According to the victim's testimony, sometime in late 2000 she was sleeping in her room when defendant came in and started touching her inappropriately. Defendant removed her pants and underwear, and began to rape her. The victim told defendant to stop, but he refused and told her it would only hurt for a few minutes. Defendant threatened to kill or hurt someone she loved if she told anyone about what he had done.

Defendant continued to have vaginal intercourse with the victim "more than two times a week" from that first time in late 2000 until at least Spring of 2002. Defendant never used a condom during these assaults, and on 2 December 2002, the victim gave birth to defendant's child.

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After moving back to New York in February of 2003, the victim was approached by Richard Gerbino, a police investigator, and Kathy Bonisteel of child protective services, who had received information that defendant was the biological father of the victim's child. After initially denying this, the victim admitted that defendant was the child's father, and she fully discussed the circumstances surrounding the conception of the child. DNA testing confirmed that defendant is the child's father.

Defendant was charged with eleven counts of first-degree rape of a child under thirteen, and the cases were tried at the 2 August 2004 criminal session in Wake County Superior Court. The jury found defendant guilty on all counts on 4 August 2004, and defendant was sentenced to eleven consecutive active prison terms of 336 to 413 months. From these judgments defendant appeals.

[1] In his first argument, defendant contends that the trial court committed plain error in failing to instruct the jury on all the necessary elements of each charge. We disagree.

Defendant did not object at trial to the jury instructions, and does not now argue that the trial court incorrectly instructed the jury on the elements of first-degree rape. "A person is guilty of rape in the first degree if the person engages in vaginal intercourse: (1) With a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the victim[.]" N.C. Gen. Stat. § 14-27.2(a)(1) (2005). Defendant argues that the trial court erred by not repeating the full jury instructions for each individual count. The trial court instructed on the eleven counts of first-degree rape as follows:

The defendant had been charged with 11 counts of first degree rape. For you to find the defendant guilty of this offense, the State must prove three things beyond a reasonable doubt:

First, that the defendant engaged in vaginal intercourse with the victim. Vaginal intercourse is penetration, however slight, of the female sex organ by the male sex organ. The actual emission of semen is not necessary.

Second, the State must prove that at the time of the alleged acts, the victim was a child under the age of 13 years.

And third, that at the time of the acts alleged, the defendant was at least 12 years old and was at least four years older than the victim.

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The trial court further instructed as to the specific counts:

Count number 1, if you find from the evidence beyond a reasonable doubt between October 1, 2000 and December 31, 2000, the defendant engaged in vaginal intercourse with [the victim] and at the time [the victim] was a child under the age of 13 years and that the defendant was at least 12 years old and was at least four years older than [the victim], it would be your duty to return a verdict of guilty as to count number 1.

If you do not so find or if you have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty as to count number 1.

The trial court then repeated the above two paragraphs ten times, only changing the count numbers and the dates to coincide with the corresponding indictments. The trial court also distributed written copies of its instructions to the jury. It is clear from the trial court's charge that the initial instruction on the elements of first-degree rape applied to all 11 counts. The trial court's instructions on each count contained all three of the elements of first-degree rape and the requirement that the jury find each element beyond a reasonable doubt. Defendant's reliance upon the cases of *State v. Bowen*, 139 N.C. App. 18, 533 S.E.2d 248 (2000) and *State v. Williams*, 318 N.C. 624, 350 S.E.2d 353 (1986) is misplaced. In *Bowen*, the trial court failed to instruct the jury on the necessary elements of one of the charges. In this case, the trial court instructed the jury on each of the three elements of statutory rape as to each of the eleven offenses. In *Williams*, the trial court charged the jury on an offense that was different from that charged in the indictment. In this case, the jury was charged as to the offenses contained in the indictment, including the alleged date of each offense. We hold that the trial court properly instructed the jury on all eleven counts. This argument is without merit.

[2] In his second argument, defendant contends that the trial court erroneously instructed the jury on theories of guilt not alleged in one of the indictments. We disagree.

Defendant argues that though the indictment for count number one states the offense occurred "on or about the 1st day of October, 2000, and continuing through the 31st day of December, 2000," the jury was charged concerning that count using the language "between October 1, 2000 and December 31, 2000."

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Defendant argues “continuing through” suggests an ongoing action, whereas “between” merely suggests an enclosing time frame, and therefore the charge to the jury demanded a lesser showing by the State than what was charged in the indictment. “[V]ariance between allegation and proof as to time is not material where no statute of limitations is involved.” *State v. Riggs*, 100 N.C. App. 149, 152, 394 S.E.2d 670, 672 (1990). This is particularly true when allegations of sexual abuse of a child are involved. *State v. Blackmon*, 130 N.C. App. 692, 696-97, 507 S.E.2d 42, 45-46 (1998). Therefore, even assuming *arguendo* a variation exists between the indictment and the charge, we hold that it does not require a new trial on this count. This argument is without merit.

[3] In defendant’s third argument, he contends the trial court erred in failing to dismiss the charges against him at the close of State’s evidence and the close of all the evidence because there was insufficient evidence to submit the charges to the jury. We disagree.

“Upon defendant’s motion for dismissal, the question for the [trial court] is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant’s being the perpetrator of such offense. If so, the motion is properly denied.” *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980) (citations omitted). Substantial evidence is 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) (citation omitted). When reviewing a motion to dismiss based on insufficiency of the evidence, this Court must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993). “In addition, the defendant’s evidence should be disregarded unless it is favorable to the State or does not conflict with the State’s evidence.” *State v. Fritsch*, 351 N.C. 373, 379, 526 S.E.2d 451, 455 (2000).

The State’s evidence tended to show that for the entire period encompassed by the indictments defendant was having sexual intercourse with the victim more than twice a week. Though defendant moved to Harnett County from March 2001 until October 2001, the victim testified that he visited her home frequently and that he lived with them for a period during that time even though his address was in Harnett County. She further testified that the frequency of their sexual contact did not diminish in this period. Viewing this evidence in the light most favorable to the State, and giving the State the ben-

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efit of all reasonable inferences, we hold that this evidence is sufficient to survive defendant's motions to dismiss the eleven counts of first-degree rape. *See State v. Bates*, 172 N.C. App. 27, 35, 616 S.E.2d 280, 286 (2005); *see also State v. Wiggins*, 161 N.C. App. 583, 589 S.E.2d 402 (2003). This argument is without merit.

[4] In defendant's fourth argument, he contends that the trial court erred in admitting evidence of other bad acts in violation of Rule 404(b) of the North Carolina Rules of Evidence, and further erred in failing to intervene *ex mero motu* when the State improperly argued this evidence to the jury. We disagree.

Defendant first contends that the trial court erred in allowing the testimony of defendant's older daughter (Cindy, the victim's half sister). Cindy testified that in 1991, when she was twelve years old, defendant came into her room while she slept, and began rubbing his penis against her leg. She left the room and took refuge with her sister. Later in 1991, defendant called Cindy to his room where he twice told her to lie down, then removed her clothes and attempted vaginal intercourse with her. Cindy started to cry and told defendant he was hurting her. She pushed defendant, and he stopped. Finally, at the end of 1991 defendant sent Cindy to the basement to put her puppy in a cage. Defendant followed her into the basement, told her to lie on the couch, and removed her clothes. On this occasion defendant successfully had vaginal intercourse with the twelve year old girl. Defendant never wore a condom during any of these encounters. Cindy told several family members what happened, and they told defendant. Defendant then beat Cindy with a sword. Authorities investigated the incident, and Cindy moved from defendant's house. At her aunt's (defendant's sister) insistence, Cindy called the authorities and told them she did not want her father to go to jail. Defendant was never charged for these acts.

The trial court allowed Cindy's testimony for the sole purpose of showing a common plan, scheme, system or design. "Recent cases decided by this Court under Rule 404(b) state a clear general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990). "Thus, even though evidence may tend to show other crimes, wrongs, or acts by the defendant and his propensity to commit them, it is admissible under Rule 404(b) so long as it also 'is relevant for

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some purpose other than to show that defendant has the propensity for the type of conduct for which he is being tried.’ ” *State v. Bagley*, 321 N.C. 201, 206, 362 S.E.2d 244, 247 (1987). “Additionally, our decisions, both before and after the adoption of Rule 404(b), have been ‘markedly liberal’ in holding evidence of prior sex offenses ‘admissible for one or more of the purposes listed [in the Rule] . . . , especially when the sex impulse manifested is of an unusual or “unnatural” character.’ ” *Coffey*, 326 N.C. at 279, 389 S.E.2d at 54. “Such evidence is relevant and admissible under Rule 404(b) if the incidents are sufficiently similar and not too remote.” *Bagley*, 321 N.C. at 207, 362 S.E.2d at 247-48.

Defendant contends that the time elapsed between the acts testified to by Cindy and those testified to by the victim is too great to be relevant in showing a common scheme or plan. We note that defendant argues that the elapsed time was over thirteen years; however, as the events testified to by Cindy occurred in 1991, and defendant’s first sexual contact with the victim occurred in 2000, the elapsed time is actually around nine years. When the facts surrounding a prior act are sufficiently similar to those in a case at bar, it may be proper to admit the prior act evidence even if over ten years have passed. *See State v. Penland*, 343 N.C. 634, 653-54, 472 S.E.2d 734, 744-45 (1996); *State v. Frazier*, 344 N.C. 611, 616, 476 S.E.2d 297, 300 (1996); *State v. Shamsid-Deen*, 324 N.C. 437, 447, 379 S.E.2d 842, 848 (1989).

In the instant case, both witnesses testified that defendant, their father, approached them in their rooms, pulled off their clothes while they lay on their beds, attempted vaginal intercourse despite being told to stop and that it hurt, and ultimately succeeded in having vaginal intercourse with each daughter, one of whom was eleven, and one of whom was twelve. Defendant never used a condom, and engaged in, or attempted intercourse on multiple occasions. There was also evidence that defendant threatened the victim in an effort to prevent her from telling anyone about the abuse; that the victim feared the defendant; that Cindy was also fearful of defendant; and that defendant in fact beat Cindy when she told someone of her abuse.

In light of the similarity of the incidents, and in light of the “unnatural character” of a father raping his own pre-teen daughters, we hold that this evidence was properly admitted under Rule 404(b) to show a common scheme or plan.

[5] Defendant next contends that the trial court improperly admitted DNA evidence establishing a 99.99 percent probability that he was in

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fact the father of the victim's child, because the victim conceived the child after she had left Wake County, and thus after each of the incidents for which defendant was convicted in the instant case. The State argued to the trial court at a *voir dire* hearing that this evidence should be admitted both to prove a common scheme or plan under Rule 404(b), and to corroborate the victim's testimony. The trial court admitted the evidence without giving an instruction as to the purposes of its admission. Defendant never requested a limiting instruction, and does not argue on appeal that the failure to give an instruction was error. We therefore do not consider that question. *State v. Stevenson*, 136 N.C. App. 235, 244, 523 S.E.2d 734, 739 (1999).

Evidence that defendant engaged in other sexual acts with the victim is admissible to show that he had a common scheme or plan to sexually abuse the victim. *See State v. Thompson*, 139 N.C. App. 299, 303-04, 533 S.E.2d 834, 838 (2000). We hold that the DNA evidence showing defendant is the father of the victim's child, and thus must have had sexual intercourse with her, was admissible to show a common scheme or plan.

Defendant further contends in his brief that the statements by the prosecutor in her closing argument show that this 404(b) evidence was admitted for improper purposes. Statements made in the closing argument cannot alter the propriety of admitting the evidence under Rule 404(b) at trial. Because defendant does not argue in his brief that the trial court committed reversible error by failing to intervene *ex mero motu* to strike the prosecutor's arguments, we do not address this issue on appeal. *Stevenson*, 136 N.C. App. at 244, 523 S.E.2d at 739; *see also State v. Oxendine*, 330 N.C. 419, 422, 330 N.C. 419, 422 (1991). This argument is without merit.

[6] In his fifth argument, defendant contends that the trial court erred in submitting the eleven counts of first-degree rape and the corresponding verdict sheet to the jury in violation of his right to a unanimous verdict. We disagree.

Defendant argues that there are three situations which trigger the possibility of a non-unanimous jury verdict: (1) generic testimony; (2) disjunctive jury instructions; and (3) where there is evidence of more incidents than there are criminal charges. No argument is made by defendant that a disjunctive jury instruction was given in this case, and we therefore do not address that issue.

We first address defendant's argument that there was evidence of more incidents than actual charges. Defendant's argument is based

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upon this Court's decision in *State v. Gary Lawrence*, 165 N.C. App. 548, 599 S.E.2d 87 (2004). Following the filing of defendant's brief the Supreme Court reversed that decision *per curiam*, *State v. Gary Lawrence*, 360 N.C. 393, 627 S.E.2d 615 (2006), in accordance with its opinion in *State v. Markeith Lawrence*, 360 N.C. 368, 627 S.E.2d 609 (2006). Both of these decisions were handed down on 7 April 2006.

The Court of Appeals in *Gary Lawrence* held that since there was evidence of many more sexual acts of the defendant than the number of charges submitted to the jury, and the trial court's instructions to the jury did not separate the individual criminal offenses, that the jury verdicts were ambiguous. Based upon this conclusion, a number of defendant's convictions were reversed. In reversing the Court of Appeals, the Supreme Court relied upon its decision in *Markeith Lawrence*. This opinion rejected the Court of Appeals rationale in *Gary Lawrence*, and adopted the rationale set forth in the case of *State v. Wiggins*, 161 N.C. App. 583, 589 S.E.2d 402 (2003), *disc. rev. denied*, 358 N.C. 241, 594 S.E.2d 34 (2004). In *Wiggins*, the victim testified the defendant had intercourse with her multiple times a week for an extended period of time, but she could only specifically identify four incidents. Defendant was charged with five counts of statutory rape (and two counts of statutory sex offense, for which the victim gave specific testimony). This Court held that "where seven offenses (two statutory sexual offense and five statutory rape) were charged in the indictments, and based on the evidence presented at trial, the jury returned seven guilty verdicts, there was no danger of a lack of unanimity between the jurors with respect to the verdict." *Id.* at 593, 589 S.E.2d at 409. In *Markeith Lawrence* The Supreme Court stated: "We find the reasoning of *Wiggins* persuasive." The Supreme court went on to enumerate six factors that it considered in upholding defendant's convictions:

- (1) defendant never raised an objection at trial regarding unanimity;
- (2) the jury was instructed on all issues, including unanimity;
- (3) separate verdict sheets were submitted to the jury for each charge;
- (4) the jury deliberated and reached a decision on all counts submitted to it in less than one and one-half hours;
- (5) the record reflected no confusion or questions as to jurors' duty in the trial; and
- (6) when polled by the court, all jurors individually affirmed that they had found defendant guilty in each individual case file number.

Markeith Lawrence, 360 N.C. at 376, 627 S.E.2d at 613. In applying these factors to the present case, we find that:

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(1) Defendant raised no objections at trial concerning juror unanimity,

(2) The jury was instructed separately on each of the eleven counts of first-degree rape. The court in its instructions identified each count by date. The trial court separately charged the jury on the question of unanimity.

(3) The trial court submitted only one verdict sheet, but each of the eleven counts was broken out separately on the verdict sheet, and was identified by date.

(4) The jury commenced deliberations at 11:53 a.m., recessed for lunch at 1:03 p.m., resumed deliberations at 2:31 p.m., and returned its verdicts at 4:35 p.m. The total deliberation time for eleven counts of first degree rape was three hours and fourteen minutes.

(5) During deliberations, the jury sent two notes to the trial court. The first note requested the date of the victim's birth, the date of birth of the victim's child, and the date defendant moved from Wake County to Harnett County. These being factual questions, the trial court properly declined to answer them. Later the jury requested a transcript of the victim's testimony. The trial court declined to provide this. None of these questions indicate any confusion on the part of the jury as to its duty in the trial.

(6) There was no poll of the jury, as none was requested by any party.

None of these factors indicate that there was any confusion on the part of the jury on its duty to render a unanimous verdict. Under the rationale of *Markeith Lawrence*, the eleven convictions of defendant were unanimously returned by the jury.

We next turn to defendant's argument concerning "generic testimony." The decision of the Court of Appeals in *Gary Lawrence* discussed in great detail the concept of "generic testimony" where a victim recounts a long history of repeated acts of sexual abuse over a period of time, but does not give testimony identifying specific events surrounding each sexual act. In this case, the victim gave specific testimony concerning the first act of sexual intercourse, which occurred prior to Christmas of 2000 (first count). However, with respect to the remaining ten counts, the victim testified that defendant had sex with her "more than two times a week" during the time period that she

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resided in Wake County. Defendant was indicted for ten counts of first-degree statutory rape, with one count being identified as occurring in each of the months of January, 2001 through October, 2001.

We first note that while our previous appellate cases have discussed the concept of “generic testimony” in the context of juror unanimity issues, it is in reality a sufficiency of the evidence issue. The question is whether the State is required to present evidence of specific and unique details of each charge to the jury, or whether a count can be submitted to the jury based upon the victim’s testimony that repeated incidents occurred over a period of time. In discussing defendant’s third argument we have held that the State did present substantial evidence of each offense that was sufficient to withstand defendant’s motion to dismiss. We now discuss defendant’s “generic testimony” in the context of jury unanimity.

The Court of Appeals decisions in *Gary Lawrence* and *State v. Bates*, 172 N.C. App. 27, 616 S.E.2d 280 (2005) (see also *State v. Massey*, 179 N.C. App. 216, 621 S.E.2d 633 (2006)) held that generic testimony can only support one additional conviction over and above those instances for which there was event specific testimony. However, *Gary Lawrence* was reversed by the Supreme Court, and the holding in *Bates* was based entirely upon the Court of Appeals decision in *Gary Lawrence*. These decisions are no longer binding precedent on the question of “generic testimony.” Rather, we look for guidance to the earlier Court of Appeals decision in *Wiggins*, which was specifically cited with approval by the Supreme Court in *Markeith Lawrence*.

In *Wiggins*, the trial court submitted two counts of statutory sex offense and five counts of statutory rape to the jury. Defendant was convicted of all charges. The victim testified as to two specific instances of statutory sex offense, four specific instances of statutory rape, and in addition that the defendant had sexual intercourse with her five or more times a week over a two year period. The Court of Appeals held that under these facts, “there was no danger of a lack of unanimity between the jurors with respect to the verdict.” *Wiggins*, 161 N.C. App. at 593, 589 S.E.2d at 409. Implicit in this decision is that generic testimony can in fact support a conviction of a defendant. The Court of Appeals decisions in *Gary Lawrence* and *Bates* attempt to limit the number of convictions which can be based upon generic testimony to one. However, no authority is cited for this proposition other than “continuous course of conduct” statutes from other jurisdictions, which *Gary Lawrence* acknowledges are not in existence in

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North Carolina. We find no language in *Wiggins* which would limit the number of convictions based upon “generic testimony” to one. In this case, the testimony of the victim was that defendant had sexual intercourse with her more than twice a week over a ten month period. Defendant was only charged with eleven counts of statutory rape.

In holding that generic testimony can support more than one conviction, we note the realities of a continuous course of repeated sexual abuse. While the first instance of abuse may stand out starkly in the mind of the victim, each succeeding act, no matter how vile and perverted, becomes more routine, with the latter acts blurring together and eventually becoming indistinguishable. It thus becomes difficult if not impossible to present specific evidence of each event. In *State v. Dudley*, 319 N.C. 656, 659, 356 S.E.2d 361, 363 (1987), the Supreme Court cited with approval language from *State v. Small*, 31 N.C. App. 556, 230 S.E.2d 425 (1977): “Generally rape is not a continuous offense, but each act of intercourse constitutes a distinct and separate offense.” The General Assembly has criminalized each act of statutory rape, not a course of conduct. Any changes in the manner in which a course of criminal conduct is punished must come from the legislative branch and not from the judicial branch.

The evidence in this matter was that defendant raped the victim at least twice a week for ten months. With respect to the offenses occurring in January 2001 through October 2001, there was no testimony distinguishing any of these events. Either the jury believed the testimony of the victim that these rapes occurred, or they did not. There was no possibility that some of the jurors believed that some of the rapes took place, and some believed that they did not. Thus, defendant’s right to an unanimous verdict under Article I, § 24, and N.C. Gen. Stat. § 15A-1201 and § 15A-1237(b) was not violated. This argument is without merit.

[7] In his sixth argument, defendant contends that the trial court erred by entering judgment on fatally defective “short form” indictments. We disagree.

Short form indictments are specifically approved for this offense under N.C. Gen. Stat. § 15-144.1(b):

If the victim is a female child under the age of 13 years it is sufficient to allege that the accused unlawfully, willfully, and feloniously did carnally know and abuse a child under 13, naming her, and concluding as aforesaid. Any bill of indictment contain-

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ing the averments and allegations herein named shall be good and sufficient in law as an indictment for the rape of a female child under the age of 13 years and all lesser included offenses.

Defendant makes no argument that the indictments in the instant case failed to meet the statutorily required allegations, and our review of the record shows the instant indictments are not defective in this regard. Defendant further argues that his constitutional right against being put twice in jeopardy was violated because some of the indictments covered a period of time when he resided in Harnett County; he faces additional charges in Harnett County; and thus he is in danger of being convicted in both Wake and Harnett Counties for the same conduct. The indictments in the instant case clearly state that they are limited to conduct defendant committed in Wake County. Defendant was not tried for any acts he may have committed in Harnett County, and thus the Wake County indictments pose no danger to his rights under the double jeopardy clause. This argument is without merit.

[8] In his seventh argument, defendant contends that the trial court erred by failing to intervene *ex mero motu* to limit certain remarks made by the State in its closing argument. We disagree.

Because defendant failed to object to this argument at trial, our review is limited to whether the argument was so grossly improper as to warrant the trial court's intervention *ex mero motu*. Under this standard, "only an extreme impropriety on the part of the prosecutor will compel this Court to hold that the trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument that defense counsel apparently did not believe was prejudicial when originally spoken." "Defendant must show that the prosecutor's comments so infected the trial with unfairness that they rendered the conviction fundamentally unfair."

State v. Anthony, 354 N.C. 372, 427-28, 555 S.E.2d 557, 592 (2001).

In the instant case, the State opened its closing argument with the following:

Not one of us in this courtroom wants to believe that any man is capable of doing what this defendant is charged with doing. No one wants to believe that such a vile, such a amoral, wicked, evil man might live in that community.

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But ladies and gentlemen, such a man lives here in Wake County. Such a man is seated at the table and his name is Johnny Ray Bullock.

Defendant did not object to this argument at trial, but now contends for the first time on appeal that the language referring to defendant as “vile”, “amoral”, “wicked” and “evil” requires that we reverse the verdict of the jury. The appellate courts of this State have declined to reverse convictions based on closing arguments referring to defendants in the same or similar language. *State v. Flowers*, 347 N.C. 1, 37-38, 489 S.E.2d 391, 412 (1997); *State v. Larrimore*, 340 N.C. 119, 163, 456 S.E.2d 789, 812-13 (1995); *State v. Riley*, 137 N.C. App. 403, 412-13, 528 S.E.2d 590, 596-97 (2000); *State v. Frazier*, 121 N.C. App. 1, 16, 464 S.E.2d 490, 498 (1995). We find nothing in the instant case to warrant departure from these prior holdings. This argument is without merit.

NO ERROR.

Judges HUNTER and TYSON concur.

JAMES S. RHEW, PLAINTIFF-APPELLANT v. LUETTA FELTON, DEFENDANT-APPELLEE

No. COA05-402

(Filed 18 July 2006)

1. Divorce— alimony—remand—reliance on original findings—changed circumstances in intervening period

The trial court was within its discretion in relying on the original evidence on remand of an alimony case where the remand was for insufficient findings, with the evidence being held sufficient. However, the trial court exceeded its mandate on remand by awarding a lump sum for the interval without considering evidence of possible changes in circumstances during that time.

2. Divorce— alimony—remand—delay—new evidence

The delay between an initial alimony award and a rehearing after remand was not controlled by *Wall v. Wall*, 140 N.C. App. 303, (which held that a delay was not de minimis and required new evidence). This case involved alimony rather

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than equitable distribution, and the delay here resulted from an appeal and remand.

3. Divorce— alimony—supporting spouse—evidence and findings—sufficiency

The evidence and findings in an alimony case supported the trial court's determination that plaintiff is a supporting spouse and defendant a dependent spouse.

4. Divorce— alimony—remand—original evidence—changed circumstances meanwhile

The trial court did not abuse its discretion in determining alimony on remand based solely on evidence from the original 1998 hearing. However, the trial court on remand will redetermine the amount of the award and plaintiff's ability to pay if it finds a substantial change of circumstances.

5. Divorce— alimony—contempt

A finding of contempt for not paying a lump sum alimony award was vacated where the award itself was vacated.

6. Costs; Divorce— alimony—attorney fees

The unchallenged findings were sufficient to support an award of attorney fees in an alimony case. There was no abuse of discretion in the amount awarded.

7. Divorce— alimony—retirement account—execution

The trial court in an alimony action did not err by denying plaintiff's motion to exempt his retirement account from execution. N.C.G.S. § 1C-1601(e)(9) clearly provides that the exemption for retirement accounts does not apply to claims for alimony. The question of whether the account was exempt from execution pursuant to 29 U.S.C. § 1056(d)(1) (2005) was premature, as the statute involves assignments, which has not happened here.

8. Evidence— offer of proof—court not required to receive personally

No binding authority was found which would require a trial court to personally take an offer of proof, and there was no prejudice in this case from the court's failure to personally take plaintiff's offer of proof where the trial court allowed plaintiff to introduce excluded evidence into the record.

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9. Divorce— alimony—judicial notice of equitable distribution order

The trial court did not err by failing to take judicial notice of an equitable distribution order before entering its alimony order on remand. N.C.G.S. § 50-20(f) has no application because there was no existing alimony order to modify until after the effective date of the order issued on remand.

Appeal by plaintiff from amended order entered 15 January 2004, *nunc pro tunc* 26 February 2003, and orders entered 7 July 2004 by Judge Paul Gessner in District Court, Wake County. Heard in the Court of Appeals 9 January 2006.

Manning, Fulton & Skinner, P.A., by Michael S. Harrell, for plaintiff-appellant.

Wyrick Robbins Yates & Ponton, LLP, by K. Edward Greene and Heidi C. Bloom, for defendant-appellee.

McGEE, Judge.

James S. Rhew (plaintiff) and Luetta Felton (defendant) were married on 25 November 1966 and separated on 1 October 1995. Plaintiff filed a complaint for absolute divorce and equitable distribution on 13 August 1997. Defendant answered and counterclaimed for equitable distribution, postseparation support, alimony, attorney's fees, and resumption of maiden name on 27 October 1997. The parties were divorced on 31 October 1997. The trial court held a hearing on defendant's claims for alimony and attorney's fees on 13 May 1998, and denied these claims in an order entered 6 October 1998.

Defendant appealed the order of the trial court to this Court. In an opinion filed 20 June 2000, we held that the evidence introduced at the 13 May 1998 hearing

was sufficient to enable the trial court to consider the relevant factors and make specific findings of fact required by N.C. Gen. Stat. § 50-16.3A. However, the actual findings of fact made by the trial court . . . are insufficiently detailed or specific. Other than the parties' contributions to retirement and stock, the trial court made no findings regarding the parties' standard of living during the marriage, and beyond a finding that "defendant . . . has had minimal expenses," the trial court made no findings regarding the parties' respective living expenses since the separation.

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Rhew v. Rhew, 138 N.C. App. 467, 472, 531 S.E.2d 471, 474 (2000) (*Rhew I*). Therefore, our Court “vacate[d] the order and remand[ed] this case to the [trial] court for a redetermination of defendant’s dependency and entry of judgment containing findings of fact sufficiently specific to show that the [trial] court properly considered the statutory requirements.” *Id.* at 472, 531 S.E.2d at 475. Our Court further stated that “[o]n remand, the [trial] court in its discretion may receive additional evidence or enter a new order on the basis of evidence already received.” *Id.*

Defendant filed a notice of hearing, signed 11 February 2003, which provided that “on February 18, 2003 at 9:00 a.m., or as soon thereafter as the Court can hear this matter, the undersigned will bring on the following for hearing: Pretrial Conference.” Defendant filed this notice of hearing nearly two years and eight months after *Rhew I* had been filed. The trial court conducted the alimony hearing on remand on 26 February 2003. At the hearing, plaintiff argued that he should be permitted to introduce evidence regarding events which had occurred since the 13 May 1998 hearing. Plaintiff argued that, as a result of a change in circumstances since May 1998, he no longer had the ability to pay alimony. The trial court elected not to receive additional evidence and proceeded solely upon the evidence presented at the original 13 May 1998 hearing. Plaintiff sought to make an offer of proof regarding the excluded evidence and requested that the trial court personally observe the presentation of his offer of proof. The trial court allowed plaintiff to make his offer of proof, but denied the request that the judge be present during the offer of proof. Instead, the trial court allowed plaintiff to make a tape recording of his offer in the presence of a courtroom clerk.

The trial court entered an order on 30 July 2003, *nunc pro tunc* 26 February 2003 (the 30 July 2003 alimony order), in which the trial court made extensive findings of fact and concluded that plaintiff was a supporting spouse and that defendant was a dependent spouse entitled to alimony. The trial court ordered plaintiff to pay \$1,200.00 per month in alimony starting 1 June 2003 and continuing until either: (1) the death of plaintiff, (2) the death of defendant, (3) the remarriage of defendant, or (4) the cohabitation of defendant, whichever event first occurred. The trial court also ordered plaintiff to pay defendant \$79,200.00 plus interest, being past due alimony for the period from 1 November 1997 through 1 May 2003.

Plaintiff filed a Rule 59 motion for new trial or to alter or amend the 30 July 2003 alimony order, on 11 August 2003. Plaintiff also filed

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a motion in the cause to modify the 30 July 2003 alimony order on 12 September 2003. In an order filed 15 January 2004, the trial court denied plaintiff's Rule 59 motion in its entirety, except the trial court ordered that a sentence in paragraph two of the ordering clause of the alimony order be struck and deleted. The trial court entered an amended alimony order, with this minor change, on 15 January 2004, *nunc pro tunc* 26 February 2003. The amended alimony order was in all other respects the same as the original 30 July 2003 alimony order. The trial court never ruled upon plaintiff's motion in the cause to modify the 30 July 2003 alimony order.

Plaintiff filed a motion for stay pending appeal on 16 February 2004. Defendant filed a motion signed 25 February 2004 requesting that the trial court require plaintiff "to appear and show cause why [plaintiff] should not be held in contempt for not complying with . . . prior orders of [the trial] court dated July 30, 2003 and January 15, 2004." The trial court entered an order to show cause on 4 March 2004. Plaintiff filed a motion to claim exempt property on 29 March 2004, seeking to exempt his clothing, vehicle, computer and IBM retirement account from execution by defendant under the alimony order. Defendant also filed a motion for attorney's fees. The trial court held a hearing on all four motions on 6 April 2004.

The trial court entered the following orders on 7 July 2004: (1) an order holding plaintiff in contempt for failing to make alimony payments pursuant to the amended order; (2) an order denying plaintiff's motion to stay and motion for exempt property; and (3) an order awarding defendant \$15,000.00 in attorney's fees. Plaintiff appeals from these three orders and the amended alimony order entered 15 January 2004, *nunc pro tunc* 26 February 2003.

I.

[1] Plaintiff argues the trial court abused its discretion by failing to consider plaintiff's proffered evidence regarding changed circumstances during the period between the 13 May 1998 hearing and the hearing on remand in February 2003. We find the trial court did not abuse its discretion by relying solely upon the May 1998 evidence in making its determinations regarding entitlement and amount of alimony. However, we find the trial court abused its discretion by not considering alleged changes of circumstances occurring after May 1998, before entering a lump sum retroactive alimony award.

Our Court reviews a trial court's decision regarding the manner of payment of an alimony award for abuse of discretion. *Whitesell v.*

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Whitesell, 59 N.C. App. 552, 553, 297 S.E.2d 172, 173 (1982), *disc. review denied*, 307 N.C. 583, 299 S.E.2d 653 (1983).

Our Supreme Court has held that “[u]pon appeal our mandate is binding upon [the trial court] and must be strictly followed without variation or departure. No judgment other than that directed or permitted by the appellate court may be entered.” *D & W, Inc. v. Charlotte*, 268 N.C. 720, 722, 152 S.E.2d 199, 202 (1966).

In *Rhew I*, our Court directed the trial court to (1) make a new determination of defendant’s dependency and (2) enter a judgment with specific findings of fact on the relevant statutory criteria, including the parties’ standard of living during marriage and the parties’ living expenses since separation. *Rhew*, 138 N.C. App. at 472, 531 S.E.2d at 474-75. Because our Court held that the evidence that had been introduced at the May 1998 alimony hearing was sufficient to have enabled the trial court to make the required findings, it was reasonable and appropriate on remand for the trial court to rely solely upon that evidence. *See Rhew*, 138 N.C. App. at 472, 531 S.E.2d at 474. As we discuss in sections III and IV of this opinion, on remand the trial court made sufficient findings to support its determinations that plaintiff was a supporting spouse, and defendant was a dependent spouse who was entitled to \$1,200.00 per month in alimony. However, the trial court exceeded our Court’s mandate on remand by entering a lump sum award for the period from 1 November 1997 until 1 May 2003 without considering possible changes of circumstances during that period of time.

Plaintiff argues in his motion in the cause to modify the 30 July 2003 alimony order, and on appeal, that the following three events, *inter alia*, which occurred between the 13 May 1998 hearing and the 26 February 2003 hearing on remand, are substantial changes of circumstances warranting a modification of the alimony award under N.C. Gen. Stat. § 50-16.9(a): (1) resolution of defendant’s claim for equitable distribution, (2) decrease in value of assets acquired by plaintiff in the equitable distribution settlement, and (3) plaintiff’s unemployment.

The trial court stated its reasons for denying plaintiff the opportunity to present new evidence on remand as follows:

My look on this and the cleanest thing, in light of the case law—the cleanest way to do this is to go back to 1998, clean up or straighten up what the Court of Appeals said the

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mistakes that were made—or the errors in law that were made from 1998.

And just as we had suggested in court the other day, if [defendant's counsel] doesn't like it because I didn't order alimony or I order alimony and it's not enough, he can file an appropriate motion. Or if [plaintiff] doesn't like it and—for whatever reason, [plaintiff] can file the appropriate motion in the cause and move it along that way. That was my understanding the other day, and I think that is the cleanest way to do it.

The trial court further stated that if it allowed the introduction of new evidence on remand, it would be “redoing the alimony trial and hearing motions to modify at the same time,” which would result in confusion. The trial court therefore decided to proceed in stages, first deciding entitlement and amount of alimony, and then considering any motions to modify the alimony award.

The procedure envisioned by the trial court would have been proper had the trial court simply made its initial determinations that plaintiff was a supporting spouse and defendant was a dependent spouse, who was entitled to \$1,200.00 per month in alimony, and then considered motions in the cause alleging a change of circumstances. However, the trial court failed to follow its own procedure when it awarded a lump sum payment, without considering a change of circumstances.

Because the trial court abused its discretion by failing to consider plaintiff's evidence regarding changed circumstances, we must vacate the lump sum award and remand the matter to the trial court to allow presentation of evidence of a substantial change of circumstances between the time of the 13 May 1998 hearing and the hearing on remand in February 2003. On remand of this appeal, the trial court shall redetermine the amount of alimony, and plaintiff's ability to pay, at each point in time that plaintiff carries his burden of proving a substantial change of circumstances. The trial court shall then enter an appropriate award. If the trial court finds there has not been a substantial change of circumstances, the trial court should enter an award of alimony based upon the monthly award of \$1,200.00. The trial court should also consider any motions for modification for the period from the 26 February 2003 hearing until the time this case is heard on remand.

We recognize this is an unusual procedure based upon the unique facts of this case; however, in the interest of justice, we are con-

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strained to allow plaintiff to present evidence of changed circumstances through a motion for modification. *See Barham v. Barham*, 127 N.C. App. 20, 27, 487 S.E.2d 774, 778 (1997), *aff'd per curiam*, 347 N.C. 570, 494 S.E.2d 763 (1998) (recognizing that fairness to the parties is the overriding principle in cases determining whether an alimony award was proper). The trial court's alimony award became effective on 26 February 2003. However, the trial court's order awarded alimony back to 1 November 1997. If, on remand from this appeal, plaintiff were not afforded the chance to present new evidence of changed circumstances, plaintiff would be deprived of the statutory right to move for a modification of alimony based upon a change of circumstances for the five-year period from 1998 to 2003. *See* N.C. Gen. Stat. § 50-16.9 (2005). We further note that, during the five-year period from 1998 to 2003, plaintiff could reasonably have concluded that he would not ultimately be liable for alimony because of the trial court's 1998 ruling which denied defendant's alimony claim. For the reasons stated above, we vacate the lump sum award and remand for proceedings consistent with this opinion.

II.

[2] Plaintiff also argues the trial court violated his state and federal constitutional rights to due process by failing to consider his evidence regarding changed circumstances. In support of his argument, plaintiff cites *Wall v. Wall*, 140 N.C. App. 303, 536 S.E.2d 647 (2000). In *Wall*, our Court held, on the facts of that case, that a nineteen-month delay between the equitable distribution hearing and the disposition was more than a *de minimis* delay, and required the trial court to hear new evidence on remand and enter a new distribution order. *Id.* at 314, 536 S.E.2d at 654. However, *Wall* is clearly distinguishable from the present case. First, *Wall* dealt with an equitable distribution award, while the present case involves alimony. *See Id.* Second, while the challenged delay in *Wall* occurred between the date of the hearing and the date of the trial court's entry of judgment, the delay in the present case resulted from an appeal of the 1998 order and remand for a new hearing. *See Id.* We overrule this assignment of error.

III.

[3] Plaintiff argues the trial court erred by finding and concluding that plaintiff was a supporting spouse and defendant was a dependent spouse because the trial court, on remand, did not consider evidence of changed circumstances as of the February 2003 hearing. In deter-

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mining an award of alimony, a trial court engages in a two-part inquiry. *Barrett v. Barrett*, 140 N.C. App. 369, 371, 536 S.E.2d 642, 644 (2000). N.C. Gen. Stat. § 50-16.3A(a) (2005) provides that a trial court “shall award alimony to the dependent spouse upon a finding that one spouse is a dependent spouse, that the other spouse is a supporting spouse, and that an award of alimony is equitable after considering all relevant factors[.]” Once a trial court determines a dependent spouse is entitled to alimony, the trial court determines the amount of the alimony award. N.C. Gen. Stat. § 50-16.3A(b) (2005).

A trial court’s determination of entitlement to alimony is reviewed *de novo*. *Barrett*, 140 N.C. App. at 371, 536 S.E.2d at 644. Pursuant to N.C. Gen. Stat. § 50-16.1A(5) (2005), a supporting spouse is “a spouse, whether husband or wife, upon whom the other spouse is actually substantially dependent for maintenance and support or from whom such spouse is substantially in need of maintenance and support.” “A surplus of income over expenses is sufficient in and of itself to warrant a supporting spouse classification.” *Barrett*, 140 N.C. App. at 373, 536 S.E.2d at 645. A dependent spouse is “a spouse, whether husband or wife, who is actually substantially dependent upon the other spouse for his or her maintenance and support or is substantially in need of maintenance and support from the other spouse.” N.C. Gen. Stat. § 50-16.1A(2) (2005). A deficit between a spouse’s income and expenses supports a trial court’s classification of that spouse as dependent. *Barrett*, 140 N.C. App. at 372, 536 S.E.2d at 645. In *Barrett*, our Court further held that

the trial court’s order reflects that it considered other factors in addition to just [the] plaintiff’s income-expenses deficit. Specifically, the trial court considered the marital standard of living, [the] plaintiff’s relative earning capacity, and even her separate estate We hold that the evidence and findings support the trial court’s classification of [the] plaintiff as a dependent spouse.

Id. at 372, 536 S.E.2d at 645.

In the present case, as discussed previously, the trial court did not abuse its discretion by relying solely upon the May 1998 evidence in making its determination regarding defendant’s entitlement to alimony. The trial court found that plaintiff had a net monthly income of approximately \$5,400.00 and reasonable monthly expenses in the amount of \$4,200.00, yielding a surplus of \$1,200.00. The trial court further found that defendant had a net monthly income of approxi-

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mately \$2,400.00 and reasonable monthly expenses in the amount of \$3,800.00. Therefore, defendant's reasonable needs exceeded her income by approximately \$1,400.00. In accordance with our Court's mandate in *Rhew I*, the trial court made findings regarding the parties' living expenses after separation and made the following findings of fact regarding the standard of living of the parties during their marriage:

22. During the marriage, the parties traveled frequently and took several major vacations, including trips to Canada, New Orleans, Hawaii and Cancun. In addition, the parties owned a boat that they used regularly. The parties attended church and made regular contributions to their church. . . . Plaintiff played golf regularly and . . . Defendant enjoyed arts, crafts and making jewelry. The parties went out every Friday evening, and often went dancing. They went out to lunch every Sunday and saw movies several times a month. They saw friends every weekend and regularly entertained in their home. Occasionally, the parties engaged the services of a housekeeper.

23. Throughout the marriage, the parties set aside significant portions of their income for savings and retirement. They each invested approximately ten percent (10%) of their incomes in stock and participated in IBM deferred savings plans to the maximum amount allowed.

Plaintiff did not assign error to these findings of fact and we therefore treat them as supported by competent evidence. *See Fitzgerald v. Fitzgerald*, 161 N.C. App. 414, 421, 588 S.E.2d 517, 522 (2003). Accordingly, we hold that the evidence and the findings support the trial court's determination that plaintiff is a supporting spouse and defendant is a dependent spouse. *See Barrett*, 140 N.C. App. at 372-73, 536 S.E.2d at 645.

IV.

[4] Plaintiff also argues the trial court erred by failing to make findings of fact to support the duration and manner of payment of the alimony award. In essence, plaintiff argues the trial court should have determined plaintiff's ability to pay the alimony award based on new evidence as of the February 2003 hearing, rather than on the basis of the evidence introduced at the 13 May 1998 hearing. Pursuant to N.C. Gen. Stat. § 50-16.3A(c) (2005), a trial court must set forth the reasons for the amount, duration, and manner of payment of an alimony award. A supporting spouse's ability to pay an alimony award is

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generally determined by the supporting spouse's income at the time of the award. *Quick v. Quick*, 305 N.C. 446, 453, 290 S.E.2d 653, 658 (1982). Decisions regarding the amount of an alimony award are left to the sound discretion of the trial court. *Barrett*, 140 N.C. App. at 371, 536 S.E.2d at 644.

In the present case, the trial court did not abuse its discretion by determining the amount of alimony to which defendant was entitled solely on the basis of the May 1998 evidence. The trial court found that plaintiff's income exceeded his expenses by \$1,200.00 and that defendant's needs exceeded her income by \$1,400.00. Therefore, the trial court did not abuse its discretion by determining plaintiff was able to pay \$1,200.00 per month in alimony as of 1 November 1997. Pursuant to the procedure set forth in section I of this opinion, the trial court will redetermine the amount of the award and plaintiff's ability to pay alimony if it finds that plaintiff proves a substantial change of circumstances.

V.

[5] Plaintiff also argues the trial court erred by holding plaintiff in contempt for failing to pay the lump sum alimony award. Because we vacate the lump sum alimony award, we vacate the order finding plaintiff in contempt. *See Bridges v. Bridges*, 29 N.C. App. 209, 212, 223 S.E.2d 845, 847 (1976) (holding that "[a]n invalid judgment or order may not be the basis of a proceeding in contempt.").

VI.

[6] Plaintiff argues the trial court erred by awarding attorney's fees to defendant. We disagree. "A spouse is entitled to attorney's fees if that spouse is (1) the dependent spouse, (2) entitled to the underlying relief demanded (e.g., alimony and/or child support), and (3) without sufficient means to defray the costs of litigation." *Barrett*, 140 N.C. App. at 374, 536 S.E.2d at 646; *see also* N.C. Gen. Stat. § 50-16.4 (2005). We review a trial court's determination regarding entitlement to attorney's fees *de novo*. *Barrett*, 140 N.C. App. at 374, 536 S.E.2d at 646.

In the present case, we uphold the trial court's determination that defendant was a dependent spouse who was entitled to alimony. Therefore, defendant was entitled to attorney's fees if she was without sufficient means to defray the costs of litigation. In making this determination, a trial court should generally rely on the dependent spouse's disposable income and estate. *Barrett*, 140 N.C. App. at 374, 536 S.E.2d at 646. In the present case, the trial court found that

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“[d]efendant has borrowed substantial monies from her family members to pay her legal expenses; she has limited funds in her bank and savings accounts; and she was forced to sell her home and therefore owns no real property.” The trial court also found that “[d]efendant [was] without sufficient means whereon to subsist during the prosecution of this action and to defray the necessary expenses of this action.” We hold these unchallenged findings were sufficient to support defendant’s entitlement to attorney’s fees.

Once it is determined that a dependent spouse is entitled to an award of attorney’s fees, we next determine whether the amount of the award was proper. *Barrett*, 140 N.C. App. at 375, 536 S.E.2d at 647. “The amount awarded will not be overturned on appeal absent an abuse of discretion.” *Id.* An order awarding attorney’s fees “must contain findings as to the basis of the award, including the nature and scope of the legal services, the skill and time required, and the relationship between the fees customary in such a case and those requested.” *Holder v. Holder*, 87 N.C. App. 578, 584, 361 S.E.2d 891, 894 (1987). In the present case, defendant’s attorneys submitted affidavits for attorney’s fees and detailed records of the time expended on defendant’s case. The trial court found that

[d]efendant accrued attorney’s fees to Tharrington Smith up through the summer of 2001 in the amount of approximately \$26,000.00 and to Wyrick, Robbins, Yates & Ponton in the amount of \$35,000.00 In view of the complexity of the issues and the duration of this case, the [Trial] Court finds that these fees are reasonable based upon the skills required and services rendered in this case.

The trial court ordered plaintiff to pay defendant \$15,000.00 in attorney’s fees. We hold the trial court did not abuse its discretion by ordering plaintiff to pay a portion of defendant’s attorney’s fees.

VII.

[7] Plaintiff next argues that pursuant to state and federal law, the trial court erred by denying plaintiff’s motion to exempt his IBM retirement from execution by defendant. Pursuant to N.C. Gen. Stat. § 1C-1601(a)(9) (2005):

Each individual, resident of this State, who is a debtor is entitled to retain free of the enforcement of the claims of creditors:

- (9) Individual retirement plans as defined in the Internal Revenue Code and any plan treated in the same manner

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as an individual retirement plan under the Internal Revenue Code[.]

However, N.C. Gen. Stat. § 1C-1601(e)(9) (2005) provides:

The exemptions provided in this Article are inapplicable to claims:

- (9) For child support, *alimony* or distributive award order pursuant to Chapter 50 of the General Statutes[.]

(emphasis added).

In the present case, plaintiff sought to exempt his retirement account from defendant's execution under the alimony order. N.C.G.S. § 1C-1601(e)(9) clearly provides that the exemption for retirement accounts does not apply to claims for alimony. Therefore, the trial court did not err in denying plaintiff's motion on this ground.

Plaintiff also argues his retirement account was exempt from execution pursuant to 29 U.S.C. § 1056(d)(1) (2005), which provides: "Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated." 29 U.S.C. § 1056(d)(3)(A) (2005) includes an exception to this rule:

Paragraph (1) shall apply to the creation, assignment, or recognition of a right to any benefit payable with respect to a participant pursuant to a domestic relations order, *except that paragraph (1) shall not apply if the order is determined to be a qualified domestic relations order.*

(emphasis added). Plaintiff argues that because the trial court's order was not in the form of a qualified domestic relations order, his retirement account was exempt from execution by defendant. However, plaintiff's argument is premature. The trial court did not order the assignment of plaintiff's retirement account. The trial court only ruled that plaintiff's retirement account was not exempt from execution by defendant. Accordingly, we overrule defendant's assignment of error.

VIII.

[8] Plaintiff also argues the trial court committed reversible error by failing to personally consider his offer of proof regarding changed circumstances at the time of the hearing on remand. Plaintiff relies upon N.C. Gen. Stat. § 1A-1, Rule 43(c) (2005), which provides as follows:

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In an action tried before a jury, if an objection to a question propounded to a witness is sustained by the court, the court on request of the examining attorney shall order a record made of the answer the witness would have given. The court may add such other or further statement as clearly shows the character of the evidence, the form in which it was offered, the objection made and the ruling thereon. In actions tried without a jury the same procedure may be followed, *except that the court upon request shall take and report the evidence in full*, unless it clearly appears that the evidence is not admissible on any grounds or that the witness is privileged.

(emphasis added).

“Rule 43(c) thus requires the trial court, upon request, to allow the insertion of excluded evidence in the record.” *Nix v. Allstate Ins. Co.*, 68 N.C. App. 280, 282, 314 S.E.2d 562, 564 (1984). In the present case, the trial court allowed plaintiff to introduce the excluded evidence into the record. Plaintiff cites no binding authority, and we find none, that requires a trial court to personally take an offer of proof. Therefore, the trial court’s failure to personally consider plaintiff’s offer of proof was not prejudicial.

IX.

[9] Plaintiff argues that, pursuant to N.C. Gen. Stat. § 50-20(f), the trial court erred by failing to take judicial notice of its equitable distribution order upon plaintiff’s request prior to entering its alimony order on remand. N.C. Gen. Stat. § 50-20(f) (2005) requires: “After the determination of an equitable distribution, the [trial] court, upon request of either party, shall consider whether an order for alimony or child support should be modified or vacated pursuant to G.S. 50-16.9 or 50-13.7.” However, this statute has no application here because there was no existing alimony order to modify until 26 February 2003, the effective date of the alimony order. Therefore, plaintiff’s request that the trial court take judicial notice of the equitable distribution order before the entry of the alimony order was ineffectual and we overrule this assignment of error.

Affirmed in part, vacated and remanded in part.

Chief Judge MARTIN and Judge STEELMAN concur.

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ELIZABETH S. BARNES AND KATHRYN ANN CLARY, PLAINTIFFS v. WANDA MONICAL KOCHHAR, ANIL KOCHHAR, OUTCOMES, INC., ODIS, LLC AND PRECISION ABSTRACTIONS, INC., DEFENDANTS

No. COA05-1452

(Filed 18 July 2006)

1. Appeal and Error— appealability—appointment or denial of receiver

The appointment or denial of a receiver is a matter of discretion under current jurisprudence, to be reviewed under statutes dealing with interlocutory appeals, which allow an immediate appeal for the loss of substantial rights.

2. Appeal and Error— appealability—denial of appointment of receiver—substantial rights

The denial of plaintiffs' motion for appointment of a receiver was immediately appealable. Plaintiffs' right to preservation of assets and corporate opportunities of the company founded by plaintiff Barnes and defendant Wanda Kochhar (Precision) was substantially affected by the denial of a receiver. The failure to appoint a receiver for questions involving the management of a related company (Outcomes) to which Kochhar allegedly transferred Precision's corporate opportunities did not involve a substantial right since plaintiffs are not shareholders of Outcomes.

3. Receivership— appointment—not established as matter of right

The appointment or denial of a receiver is within the discretion of the court. Plaintiffs were not entitled to a receiver as a matter of law even if they had, as they argued, established that defendant Kochhar had usurped corporate opportunities.

Appeal by plaintiffs from order entered 16 June 2005 by Judge Richard D. Boner in Mecklenburg County Superior Court. Heard in the Court of Appeals 17 May 2006.

Bishop, Capitano & Moss, P.A., by J. Daniel Bishop, for plaintiffs-appellants.

Arthur A. Vreeland for defendants-appellees Anil Kochhar and ODIS, L.L.C.

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Guthrie, Davis, Henderson & Staton, P.L.L.C., by Dennis L. Guthrie and Kevin W. Tydings, for defendants-appellees Wanda Monical Kochhar and Outcomes, Inc.

CALABRIA, Judge.

Elizabeth S. Barnes (“Barnes”) and Kathryn Ann Clary (“Clary”) (collectively “plaintiffs”) appeal from an order denying their motions for partial summary judgment and appointment of a receiver. We affirm.

In their complaint, plaintiffs alleged the following facts pertinent to this appeal:

5. Barnes approached [Wanda Monical Kochhar (“Kochhar”)] in October 2000 to seek her advice about starting a business to engage in furnishing nurse-conducted medical record abstracting/investigating and reporting services for Managed Care Organizations (MCOs) and Pharma companies in connection with HEDIS and Health Outcome Studies. HEDIS studies are performed annually by MCOs for the purpose of becoming/remaining competitive within their market and/or acquiring and then maintaining national accreditation. . . .

6. Working together, Barnes and Kochhar identified the requirements for starting such a business. Kochhar suggested that \$100,000 of startup capital would be required, and expressed interest in being involved in such a business with Barnes, but made it clear that she would not furnish any capital. Barnes and another prospective owner raised from relatives and/or personally furnished \$100,000 of operating capital to fund the business, which they decided to name Precision Abstractions. Of the \$100,000 total, Clary provided \$30,000 in the form of a loan. Kochhar undertook to form Precision Abstractions as a North Carolina corporation, which it remains at the filing of this complaint. Kochhar, Barnes[,] and Cathy Donnelly each received one-third of the originally issued shares of Precision Abstractions’ stock.

7. The new business met with considerable success from its inception, generating approximately \$350,000 in revenues in the first season. . . . In general, Kochhar furnished sales and administrative services and Barnes managed operations. Donnelly acted as one of the Company’s nurse-abstractors.

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8. After the company's first season, Donnelly withdrew in a negotiated buyout.

9. Also at the conclusion of the company's first season, Precision Abstractions repaid all outstanding loans, with interest. This included Clary's loan of \$30,000. Immediately thereafter, however, Clary reinvested the \$30,000 by purchasing from Kochhar and Barnes shares equal to five percent of nonvoting stock of Precision Abstractions. . . .

10. As of July 2001, following Donnelly's withdrawal, Kochhar and Barnes each held 50% of the voting shares of Precision Abstractions. They also each owned 47.5 percent of nonvoting shares, with Clary owning five percent. Since August 2001, Kochhar has held the titles of president and secretary of the corporation, and Barnes has been vice president and assistant secretary. Kochhar and Barnes have also been Precision Abstractions' sole directors.

11. From the commencement of Precision Abstractions' operations, Barnes trusted Kochhar to tend to such executive management matters on behalf of Precision Abstractions as maintaining internal accounting and procuring outside professional services because Kochhar claimed and possessed greater experience and knowledge of such matters. With respect to sales functions, Barnes participated in limited ways, but again trusted Kochhar to handle the responsibility in accordance with their general division of labor. Barnes expected Kochhar to conduct all of her activities with due regard for and loyalty to Precision Abstractions. She also expected, by virtue of her half-ownership of the voting shares and her equal representation on the Board of Directors, to be consulted, fully informed, and asked to consent to any transaction effecting a material change in Precision Abstractions' business.

12. In May 2001, without any advance notice to Barnes, Kochhar . . . formed another North Carolina corporation under the name Monical and Associates, Inc. In July 2001, ostensibly for purposes of managing taxable income, Kochhar stated to Barnes that Monical and Associates would "enter into an agreement with Precision to provide management and development services for 2001." Kochhar told Barnes that "Monical and Associates" was a trade name she had used for years for consulting. Kochhar did not disclose that the business had been newly incorporated.

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13. Kochhar represented that by contracting to prepay fees to Monical and Associates for management and sales services for the next HEDIS season, Precision Abstractions could minimize taxable income resulting from the completed 2000-2001 season. Otherwise, Kochhar explained, greater taxable income would be imputed to Barnes and Kochhar because Precision Abstractions had elected Subchapter S status under the Internal Revenue Code.

14. In an e-mail, Kochhar also suggested that an agreement be reached in the following year “with Precision for subcontracting nurses.” Barnes was not asked for her consent to this proposal at this time or thereafter and, to her knowledge, an early draft of a services agreement with Monical and Associates was never finalized or executed. Nevertheless, Kochhar assured Barnes that the arrangement she contemplated would return to Precision Abstractions “a fair profit margin to be distributed to the partners on a pro rata basis.” Barnes is unaware of any express agreement under which Precision Abstractions subcontracted nursing services to Monical and Associates or vice versa.

15. In August 2001, following discussions about the need for a more recognizable trade name, Kochhar presented to Barnes the name “Outcomes,” together with logo artwork. Kochhar suggested that Precision Abstractions’ services be sold under the Outcomes name. Barnes understood Kochhar’s proposal as a branding concept to promote the business of Precision Abstractions. Barnes thought the trade name was a good idea and had no notice or understanding that it would be used in any way other than to promote the business and best interests of Precision Abstractions.

16. Upon information and belief, Kochhar used the name Outcomes to promote HEDIS-related services rendered by Precision Abstractions and contracted under that name for the rendition of such services. Unbeknownst to Barnes at that time, however, Kochhar had caused Monical and Associates to change its corporate name to Outcomes on August 1, 2001.

17. In late 2001, Kochhar made reference in one or more writings to the notion that she shared ownership of Precision Abstractions with Barnes and Clary, but that she owned Outcomes herself. When Barnes challenged or questioned such statements, Kochhar

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claimed to mean only that Outcomes was the entity through which she engaged in her consulting practice independent of the nurse-abstracting business.

18. In Precision Abstractions' second season, concluding in June 2002, upon information and belief, HEDIS-related revenues were approximately \$750,000. Kochhar, who lived and conducted her business activities in Charlotte, maintained exclusive knowledge and control of the receipt and disposition of revenues and accounting therefor. Barnes, who lived and worked in Kentucky with periodic visits to Charlotte, received no reports or data concerning the results of operations of either Precision Abstractions or Outcomes in the second season until June 2003. At that time, Barnes received from Kochhar copies of income tax returns prepared for Precision Abstractions, reporting its revenues for 2002 at slightly in excess of \$300,000. Accordingly, upon information and belief, approximately \$450,000 of HEDIS-related revenues for the second season were paid over to or retained by Outcomes. Barnes was not advised or consulted concerning any allocation of revenues as between Precision Abstractions and Outcomes, nor was she given an opportunity to approve or disapprove any payment or diversion of funds to Outcomes.

19. For the third season, end[ing] in June 2003, upon information and belief, Kochhar caused client contracts again to be made in the name of Outcomes for the services provided by Precision Abstractions. Upon information and belief, HEDIS-related revenues of approximately \$3.5 million were anticipated based upon third-season contracts.

20. Although Kochhar and Barnes remained officers and directors of Precision Abstractions, Kochhar also referred to Barnes in written communications as holding various executive offices of Outcomes. When Barnes inquired of Kochhar the meaning of such designations, Kochhar assured her that they were only for the purpose of presenting a proper marketing image and otherwise insignificant. Barnes was unconcerned with titles, but generally expected the right to participate in and to exercise equal voice in all significant management decisions of the business. Kochhar generally appeared to accord Barnes such status, informing her of proposed actions and abandoning some that Barnes resisted.

. . .

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22. Increasingly throughout Fall 2002, however, Kochhar began adopting a condescending and progressively unilateralist tone in e-mail communications with Barnes. . . . Kochhar also then designated her husband, Anil Kochhar, as CEO and president of Outcomes, and instructed Barnes that she would report to him. Kochhar also paid compensation to her daughter, who was a full-time student, and did not, to Barnes' knowledge, render substantial services to the business. Kochhar did not ask for or receive Barnes' consent for these actions.

23. Barnes confronted Kochhar about these actions in December 2002. At that time, Kochhar told Barnes that Outcomes was her company with its own Board of Directors to which Barnes did not belong. Barnes asked Kochhar how Precision Abstractions' interests would be protected if that were true. Kochhar assured her that they would be.

24. For the duration of the third-season HEDIS work, Barnes performed her responsibilities and awaited the fulfillment of Kochhar's promise to protect the interests of Precision Abstractions. Finally, in early June 2003, Kochhar told Barnes that she believed their partnership was not working out and that she was going to dissolve the relationship between Outcomes and Precision Abstractions. She invited Barnes to buy out her interest in Precision Abstractions. She requested Barnes' consent and prompt response. Before receiving any response, Kochhar instructed an attorney whom she had selected for Precision Abstractions that she and Barnes had agreed in principle to dissolve Precision Abstractions and requested documents be prepared for signature.

25. By letter dated June 13, 2003, Kochhar sent Barnes a letter stating, "effective immediately, Outcomes, Inc. is terminating its business relationship(s) with Precision Abstractions, Inc.," and demanding return of "information proprietary to Outcomes." Kochhar also transmitted proposed shareholders and directors consents for the dissolution of Precision Abstractions and the 2002 internal financial reports, tax returns and K-1's for Precision Abstractions referenced previously. Barnes has not agreed to Precision Abstractions' dissolution nor executed the proposed shareholders/directors consents.

26. Kochhar has failed to consult with Barnes or obtain her consent for any allocation of revenues among Outcomes and

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Precision Abstractions in respect of the second and third HEDIS seasons. Upon information and belief, Kochhar has caused Outcomes to retain substantially all of the profits from these business activities.

27. After preliminary communications in opposition to these actions were ignored, Barnes, through counsel, made demand upon Kochhar, in her capacity as officer and director of Precision Abstractions to initiate and cooperate in all respects with all available actions to restore to Precision Abstractions the benefit of all corporate opportunities unlawfully usurped by her for the benefit of Outcomes. . . .

Based on these allegations, on 7 November 2003, plaintiffs filed a complaint against Kochhar, Outcomes, Inc., and Precision Abstractions, Inc. (collectively “defendants”), with claims for relief based upon, *inter alia*, fraud, usurpation of corporate opportunities, fraudulent conveyances, and unfair and deceptive trade practices. In the complaint, plaintiffs also claimed that Outcomes is an alter ego of Precision Abstractions, and plaintiffs sought restitution, a resulting trust, and a constructive trust. Defendants filed a counterclaim, claiming breach of fiduciary duties by Barnes, and requested judicial dissolution of Precision Abstractions, Inc. as well as recovery of reasonable expenses including counsel fees. On 4 August 2004, plaintiffs filed motions, *inter alia*, for appointment of a receiver for Outcomes¹ and to amend the complaint in order to join as additional defendants Anil Kochhar and ODIS, LLC. Appellees consented to the amended complaint. On 28 March 2005, plaintiffs renewed the motion for appointment of a receiver, and the trial court denied the motion on 16 June 2005. Plaintiffs gave notice of appeal from the denial of the appointment of a receiver on 18 July 2005. Defendants subsequently filed motions to dismiss the appeal as interlocutory.

[1] Plaintiffs argue the denial of an appointment of a receiver is not interlocutory and direct this Court to our Supreme Court’s holding in *Jones v. Thorne*, 80 N.C. 72 (1879). In *Thorne*, our Supreme Court reviewed and affirmed an order *denying* a receiver; thus, when an appellant appealed the subsequent *appointment* of a receiver on

1. Defendants Anil Kochhar and ODIS, LLC, have filed a reply brief in this case arguing against appointment of a receiver for ODIS, LLC. From our review of the motions in this case, it is unclear that plaintiffs ever requested a receiver for ODIS, LLC. However, even if plaintiffs did request a receiver for ODIS, LLC, it has abandoned the issue on appeal by failing to argue any error regarding denial of the appointment of a receiver for ODIS, LLC. See N.C. R. App. P. 28(b)(6) (2006).

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the same underlying facts, our Supreme Court held the previous determination was *res adjudicata*. *Id.*, 80 N.C. at 75. In that case, our Supreme Court stated the rule, “granting or refusing an order for . . . the appointment of a receiver is not a mere matter of discretion in the judge, and either party dissatisfied with his ruling may have it reviewed [immediately].” *Id.*, 80 N.C. at 75. Our Supreme Court made this, now dated, statement in 1879 prior to our General Assembly’s passage of statutes specifically dealing with the issue of interlocutory appeals. *See* N.C. Gen. Stat. §§ 1A-1, Rule 54(b); 1-277(a); 7A-27(d)(1) (2005). Additionally, under our current jurisprudence, when properly on appeal, we review orders concerning appointment or denial of a receiver under an abuse of discretion standard. *Williams v. Liggett*, 113 N.C. App. 812, 815, 440 S.E.2d 331, 333 (1994). In other words, the denial or appointment of a receiver is now “a mere matter of discretion.” *See Thorne, supra*.

Because of these jurisprudential changes, we revisit the issue of whether, on these facts, the *denial* of an appointment of a receiver is interlocutory under current statutory law as interpreted by our courts.² “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.” *Little v. Stogner*, 140 N.C. App. 380, 382, 536 S.E.2d 334, 336 (2000) (internal quotations omitted). “Generally, there is no right of immediate appeal from an interlocutory order.” *Abe v. Westview Capital*, 130 N.C. App. 332, 334, 502 S.E.2d 879, 881 (1998). However, an interlocutory order can be immediately appealed by either of two methods. *N.C. Dept. of Transp. v. Page*, 119 N.C. App. 730, 734, 460 S.E.2d 332, 334 (1995). First, an interlocutory order can be appealed pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b) (2005) if the trial court certifies the case for appeal and judgment is final as to some but not all claims. *Id.* Second, under N.C. Gen. Stat. §§ 1-277(a) and 7A-27(d)(1) an interlocutory order can be immediately appealed

2. Our courts have on several occasions considered interlocutory appeals of *appointments* of receivers without expressly addressing the issue of whether the appellant established a substantial right. *See, e.g., Lowder v. All Star Mills, Inc.*, 301 N.C. 561, 576-77, 273 S.E.2d 247, 256 (1981); *York v. Cole*, 251 N.C. 344, 345, 111 S.E.2d 334, 335 (1959); *Liggett*, 113 N.C. App. at 815, 440 S.E.2d at 333. *But see Barnes v. St. Rose Church of Christ, Disciples of Christ*, 160 N.C. App. 590, 591, 586 S.E.2d 548, 550 (2003) (holding, in part, on the facts of that case the appointment of a receiver was interlocutory). We do not address these cases in determining whether a substantial right exists on these facts both because the facts before us present the *denial* of a receiver and because whether there is a substantial right is normally assessed on a case-by-case basis. *Waters v. Personnel, Inc.*, 294 N.C. 200, 208, 240 S.E.2d 338, 343 (1978).

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if the trial court's holding: 1) deprives an appellant of a substantial right that would be lost without immediate appellate review, 2) "[i]n effect determines the action and prevents judgment from which appeal might be taken," 3) "[d]iscontinues the action," or 4) "[g]rants or refuses a new trial." *Lamb v. Lamb*, 92 N.C. App. 680, 683, 375 S.E.2d 685, 686 (1989) (citations omitted).

We consider whether plaintiffs have established a substantial right. In determining whether an issue affects a "substantial right," our Supreme Court has stated that "the 'substantial right' test for appealability of interlocutory orders is more easily stated than applied." *Waters*, 294 N.C. at 208, 240 S.E.2d at 343. Our courts apply a two-part test in determining whether a substantial right exists: 1) that the right in question qualifies as "substantial" and 2) that, absent immediate appeal, the right will be "lost, prejudiced or less than adequately protected by exception to entry of the interlocutory order." "A 'substantial right' is 'a legal right affecting or involving a matter of substance as distinguished from matters of form: a right materially affecting those interests which a man is entitled to have preserved and protected by law: a material right.'" *Schout v. Schout*, 140 N.C. App. 722, 725, 538 S.E.2d 213, 215 (2000). "It is usually necessary to resolve the question [of whether there is a substantial right] in each case by considering the particular facts of that case and the procedural context in which the order from which appeal is sought was entered." *Waters*, 294 N.C. at 208, 240 S.E.2d at 343.

[2] Plaintiffs claim that a substantial right is at issue because

despite being holder of 50% of the voting shares of Precision, [Plaintiff Barnes] has suffered complete and continuing impairment of her right to participate in the management of its corporate business and opportunities and to veto corporate decisions since Defendant Wanda Kochhar physically locked her out of the corporate offices and severed the relationship between Precision and Outcomes, Inc., to which Kochhar had transferred all of Precision's business opportunities.

In support of their argument that they have proven a substantial right based on impaired ability to manage, plaintiffs cite *Action Community Television Broadcasting Network, Inc. v. Livesay*, 151 N.C. App. 125, 129, 564 S.E.2d 566, 569 (2002), which recognized "a shareholder's ability to manage his or her own closely held corporation is significant." However, on the facts of this case, plaintiff Kochhar has lost no substantial right to the management of *Outcomes*

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since plaintiffs are not shareholders of Outcomes and have no right to manage Outcomes; rather, plaintiffs are shareholders of Precision.

Plaintiffs also argue that a substantial right exists because “by virtue of Kochhar’s control (through Outcomes) over all of the assets and business opportunities that originated with Precision, such property is subject to risk of loss or further removal.” Specifically, plaintiffs allege,

The continuing series of transactions in this case have already caused injuries and threaten to cause more. Large and increasing officer salaries, transfers of intellectual property rights and other assets, undertaking of debt and lease obligations, new business ventures, the prospect of business entanglements (such as grants of equity interests), the removal of [Outcomes’s] corporate headquarters from this State, and the individual defendants’ exclusive control over ongoing revenues and profits all threaten irreversible injuries to [plaintiffs].

Plaintiffs report, as examples: 1) While paying Precision no profit, Kochhar hired Anil Kochhar and her daughter (who was a full-time student) to work at Outcomes for salaries of \$200,000 and \$138,000 respectively; 2) “[a]fter Kochhar’s receipt of a derivative demand preliminary to the filing of this action in 2003, Outcomes transferred ownership of custom software developed with revenues from Precision’s business opportunities to a new limited liability company, ODIS, LLC [which is owned by Kochhar’s husband, Anil Kochhar],” and plaintiffs allege that Outcomes then licensed back the software for an annual fee more than four times the sale price; 3) “[a]ll of Outcomes’s investments were financed with cash from HEDIS revenues and proceeds of a line of credit secured by Outcomes’s receivables and HEDIS contract rights”; and 4) “Outcomes . . . bought over \$316,000 of equipment and leased equipment worth another \$211,792 [using what are alleged to be Precision’s assets].”

Based on the facts of this case, we hold that plaintiffs’ right to preservation of what they allege are Precision’s assets and corporate opportunities has been substantially affected by the trial court’s denial of the appointment of a receiver. *See Schout*, 140 N.C. App. at 726, 538 S.E.2d at 216 (recognizing that preservation of assets, on those facts by a custodian for a client’s benefit, can be a substantial right). Plaintiffs have also shown, absent immediate appellate review, that these substantial rights will be “lost, prejudiced or be less than adequately protected.” *Id.*, 140 N.C. App. at 725, 538 S.E.2d at 215

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(recognizing irreparable harm when a party could dispose of all or most of the assets before this matter comes to a full and final resolution). Although Outcomes is currently a solvent corporation, plaintiffs have provided concrete examples of irreparable harm including the depletion of assets that allegedly belong to Precision, the transfers of proprietary software allegedly developed with Precision's assets, the creation of lease agreements allegedly financed through Precision's assets, and purchases by Outcomes secured by Precision's assets. Accordingly, on these facts, in light of the alleged relationship between Precision and Outcomes, including the fact that the alleged assets of Precision may be in the hands of a faithless fiduciary, plaintiffs have established a substantial right to preservation of what are alleged to be Precision's assets.

[3] Holding that the trial court's denial of an appointment of a receiver can be immediately appealed on these facts, we next consider whether the trial court properly denied the appointment of a receiver. A receiver may be appointed by a trial court both pursuant to statute and the trial court's inherent authority. *Lowder*, 301 N.C. at 577, 273 S.E.2d at 256. North Carolina General Statutes § 1-502 (2005) states, in applicable part,

A receiver *may* be appointed—

(1) Before judgment, on the application of either party, when he establishes an apparent right to property which is the subject of the action and in the possession of an adverse party, and the property or its rents and profits are in danger of being lost, or materially injured or impaired; except in cases where judgment upon failure to answer may be had on application to the court.

(Emphasis added). Additionally, this Court has held, “the Supreme Court indicated that a court of equity has the ‘inherent power to appoint a receiver, notwithstanding specific statutory authorization.’” *Liggett*, 113 N.C. App. at 816, 440 S.E.2d at 333. On appeal from the appointment or denial of a receiver, we review the trial court's determination under an abuse of discretion standard. *Liggett*, 113 N.C. App. at 815, 440 S.E.2d at 333.

Plaintiffs initially argue that they “showed entitlement to a receiver by establishing as a matter of law that defendant Kochhar usurped corporate opportunities and that her defenses are legally insufficient.” We reject this argument because even assuming *arguendo* that plaintiffs had established that defendant Kochhar had

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usurped corporate opportunities as a matter of law,³ this would not necessarily result in entitlement to a receiver. Rather, appointment of a receiver is within the discretion of the trial court. *Murphy v. Murphy*, 261 N.C. 95, 101, 134 S.E.2d 148, 153 (1964) (standing for the proposition that receivership is a harsh remedy that will be granted only in the absence of another safe or expedient remedy). *See also Liggett*, 113 N.C. App. at 816, 440 S.E.2d at 333 (stating “a receiver should be appointed for a going, solvent corporation only in rare and drastic situations”). Accordingly, we hold that plaintiffs’ first argument on appeal is without merit.

We next consider plaintiffs’ second argument that “a receiver should have been appointed.” This second argument is based on plaintiffs’ first argument that they established liability as a matter of law and thus a receiver *must* have been appointed. Having previously rejected this argument, we likewise hold that plaintiffs’ second argument on appeal is without merit.

Plaintiffs have failed to argue their remaining assignments of error on appeal, and we deem them abandoned pursuant to N.C. R. App. P. 28(b)(6) (2006).

Affirmed.

Judges BRYANT and ELMORE concur.

LAURA M. KOENIG, TRUSTEE, AND SALVATORE P. RUSSO, TRUSTEE, PLAINTIFFS v. TOWN OF KURE BEACH, DEFENDANT, AND JOHN J. MCCABE; DOUGLAS YORK; JETTIE PAYNE; GENE BOWERS; AND ROBERT AND PAMELA FINLEY, INTERVENORS

No. COA05-653

(Filed 18 July 2006)

Easements— public prescriptive easement—lack of standing

The trial court did not err in a declaratory judgment action seeking to quiet title in a public access easement by granting plaintiffs’ motion to dismiss intervenors’ claim for a public prescriptive easement based on their lack of standing, because: (1)

3. We do not reach the issue of whether the trial court erred in denying plaintiffs’ motion for partial summary judgment because it is interlocutory and not essential to our resolution of whether the trial court erred in denying the appointment of a receiver.

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mere use is insufficient to show that use of an easement was hostile and without the owner's permission; (2) one's use of a purported prescriptive easement must be for a period of at least twenty years, and none of the intervenors testified that they used the purported easement for a period of more than a few years; (3) a judge's 15 December 2004 order ruling that intervenors did not have standing to bring their remaining claims was independent of another judge's earlier ruling and determinations, and thus did not constitute a modification, change, or overruling of a prior order of another superior court judge; (4) although plaintiffs did have record notice of an easement granting a public access easement over their property, this easement ceased to exist once the town passed the ordinance prohibiting sand paths over the beach dunes and plaintiffs began constructing an improvement on their property; (5) there is other beach access available to the public in the same general area as the purported easement; and (6) intervenors have not alleged, nor have they established, that they suffered any special injury that differed from that suffered by the public generally.

Appeal by intervenors from an order entered 15 December 2004 by Judge Jay D. Hockenbury in New Hanover County Superior Court. Heard in the Court of Appeals 10 January 2006.

William G. Wright and Gary K. Shipman, for plaintiff-appellees.

Dillow, McEachern & Associates, P.A., by Mary Margaret McEachern, for intervenor-appellants.

JACKSON, Judge.

In 1995, Linda and Peter Russo purchased a parcel of land in Kure Beach, North Carolina. Plaintiffs in this case, Laura Koenig and Salvatore Russo ("plaintiffs") are the trustees of the Linda A. Russo Qualified Personal Residence Trust and the Peter J. Russo Qualified Personal Residence Trust, and bring the instant action as trustees and owners of the Russos' property. The Russos' deed stated that they took the land "subject to a public access easement 10 feet in width, running parallel to and along the northern boundary of the lot." The public access easement was a sand path crossing over the Russos' property and a beach dune, providing beach access for non-oceanfront property owners in the "Kure By the Sea" development. In 1997,

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the Town of Kure Beach passed an ordinance prohibiting anyone from crossing over sand dunes to access the beach. In 1999, the Russos began construction of a house on their property, and in order to comply with the Town ordinance, they applied for and received a permit to construct a private walkway over the dunes to facilitate their access to the beach.

In April of 2003, the Town of Kure Beach announced its intention to construct a wood ramp and bridge over the public access easement, claiming that it had the authority to do so by virtue of language appearing in deeds of the Russos' predecessors in title and in the Russos' deed. Plaintiffs objected to the issuance of any permit to the Town for construction of the pedestrian beach access, however the Town was granted the permit on 12 May 2003. On 2 June 2003, plaintiffs filed a Third Party Hearing Request seeking a contested case hearing before the Coastal Resources Commission ("CRC") on the issue of the permit granted to the Town. Plaintiffs' hearing request was denied by the CRC on 17 June 2003.

On 30 July 2003 plaintiffs filed a complaint seeking declaratory judgment and to quiet title in the public access easement. Plaintiffs alleged that neither the Town nor the public had any interest in the purported easement, as the purpose for which the beach access originally was created no longer existed due to a separate beach access being constructed for non-oceanfront property owners. Plaintiffs also alleged that the beach access was never conveyed or dedicated to the Town, and that no public entity, including the Town, ever had taken the requisite steps to accept any alleged offer of dedication of the beach access for use by the general public.

On 14 October 2003, John McCabe, Douglas York, Bill and Jettie Payne, Gene and Linda Bowers, and Robert and Pamela Finley (collectively "intervenor") sought to intervene as defendants under Rule 24 of the North Carolina Rules of Civil Procedure. Intervenors alleged they had a prescriptive easement in the public access easement over plaintiffs' property, and that they also had a public prescriptive easement in the same public access easement. On 14 November 2003, the trial court allowed intervenors to intervene permissively pursuant to Rule 24(b) of our Rules of Civil Procedure. Intervenors Linda Bowers and Bill Payne's claims subsequently were dismissed with prejudice. Plaintiffs filed a motion to dismiss and for summary judgment on 22 October 2003, seeking summary judgment against all intervenors and to dismiss intervenors' claims based upon a lack of standing.

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In an order filed 15 December 2004, the trial court granted summary judgment against the remaining intervenors finding there were no genuine issues of material fact, and that plaintiffs were entitled to judgment as a matter of law on intervenors' claims for a prescriptive easement over plaintiffs' property. The trial court also dismissed intervenors' claims based upon a lack of standing, finding that intervenors did not suffer any special injury that was different in kind from that suffered by the general public. At a separate hearing, and in a separate order filed 7 January 2005, the trial court found that the Town of Kure Beach had not acquired any easement by dedication or otherwise in plaintiffs' property, and similarly had not acquired an interest in the property by any of the deeds in the Russos' chain of title. The trial court determined that the public access easement was not for the use or benefit of the Town of Kure Beach or the general public. Intervenors McCabe, York, Jettie Payne, Gene Bowers, and Robert and Pamela Finley appeal from the trial court's 15 December 2004 order. The Town of Kure Beach is not a party to the appeal.

Intervenors first contend the trial court erred in granting plaintiffs' motion for summary judgment against all intervenors.

In ruling on a motion for summary judgment, the trial court must determine whether based on the pleadings, depositions, and answers to interrogatories, together with the affidavits, "there exists any genuine issue of material fact." *Vincent v. CSX Transp., Inc.*, 145 N.C. App. 700, 702, 552 S.E.2d 643, 645 (quoting *Lowe v. Murchison*, 44 N.C. App. 488, 490, 261 S.E.2d 255, 256 (1980), citing N.C. Gen. Stat. § 1A-1, Rule 56(c)), *disc. review denied*, 354 N.C. 371, 557 S.E.2d 537 (2001). "When a trial court rules on a motion for summary judgment, 'the evidence is viewed in the light most favorable to the non-moving party,' and all inferences of fact must be drawn against the movant and in favor of the nonmovant." *Am. Gen. Fin. Servs. v. Barnes*, 175 N.C. App. 406, 408, 623 S.E.2d 617, 619 (2006) (internal citations omitted). "The burden upon the moving party is to establish that there is no genuine issue as to any material fact remaining to be determined. . . . This burden may be carried by a movant by proving that an essential element of the opposing party's claim is non-existent." *Gray v. Hager*, 69 N.C. App. 331, 333, 317 S.E.2d 59, 60 (1984) (citation omitted).

In the instant case, the trial court granted plaintiffs' motion for summary judgment against intervenors on their claims for a prescriptive easement over plaintiff's property.

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In order to establish the existence of a prescriptive easement, the party claiming the easement must prove four elements: “ ‘(1) that the use is adverse, hostile or under claim of right; (2) that the use has been open and notorious such that the true owner had notice of the claim; (3) that the use has been continuous and uninterrupted for a period of at least twenty years; and (4) that there is substantial identity of the easement claimed throughout the twenty-year period.’ ”

Cannon v. Day, 165 N.C. App. 302, 306-07, 598 S.E.2d 207, 211 (quoting *Perry v. Williams*, 84 N.C. App. 527, 528-29, 353 S.E.2d 226, 227 (1987)), *disc. review denied*, 359 N.C. 67, 604 S.E.2d 309 (2004). Mere use alone of a purported easement is not sufficient to establish the element of hostile use or use under a claim of right. *Id.* at 307, 598 S.E.2d at 211. Our state’s caselaw presumes that one’s use of another’s land is permissive or with the owner’s consent unless evidence to the contrary exists. *Id.* at 307, 598 S.E.2d at 211; *see also Orange Grocery Co. v. CPHC Investors*, 63 N.C. App. 136, 138, 304 S.E.2d 259, 260 (1983). “A ‘hostile’ use is simply a use of such nature and exercised under such circumstances as to manifest and give notice that the use is being made under claim of right.” *Dulin v. Faires*, 266 N.C. 257, 261, 145 S.E.2d 873, 875 (1966). “A mere permissive use of a way over another’s land, however long it may be continued, can never ripen into an easement by prescription.” *Dickinson v. Pake*, 284 N.C. 576, 581, 201 S.E.2d 897, 900 (1974). Further, the adverse or hostile use must be for a continuous and uninterrupted period of at least twenty years. *Cannon*, 165 N.C. App. at 307, 598 S.E.2d at 211.

In the present case, intervenors’ answer alleges they “have utilized the access easement by claim of right for an extended period of time.” This allegation alone is insufficient to establish that their use of the easement was hostile or by claim of right, or that their use was for a continuous and uninterrupted period of twenty years. A party against whom summary judgment is sought “may not rest upon the mere allegations or denials of his pleading, but must, by affidavit or otherwise, set forth specific facts showing that there is a genuine issue for trial.” *Enterprises v. Russell*, 34 N.C. App. 275, 278, 237 S.E.2d 859, 861 (1977) (citing N.C. Gen. Stat. § 1A-1, Rule 56(e)).

Although the record on appeal does not contain the complete depositions of the intervenors, those portions of the depositions included in the record are sufficient to support the trial court’s granting of summary judgment against all intervenors. As noted previously,

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mere use is insufficient to show that use of an easement was hostile and without the owner's permission. Each of the intervenors testified during their depositions regarding their use of the purported easement. None of the intervenors testified that their use was without the owner's permission, or that they knew they were not entitled to use the lot for beach access. Instead, all of the intervenors, with the exception of McCabe, testified that they had never spoken with anyone about using plaintiffs' property for beach access, had never received specific permission to use it, nor had they received any deed or conveyance of any easement. Further, evidence was presented indicating that one of plaintiffs' predecessors in title had given consent for people to use the lot for beach access for a period of about nine months from roughly August 1988 until May 1989. Thus, without more, there was insufficient evidence to survive plaintiffs' motion for summary judgment, as there was no genuine issue of material fact that the intervenors' use of the purported easement was not hostile and was with the owner's permission.

Further, one's use of a purported prescriptive easement must be for a period of at least twenty years. Intervenors McCabe, Payne, York, and Finleys each testified in their depositions as to how long they had used plaintiffs' lot for beach access. None of them testified that they used the purported easement for a period of more than a few years, and in fact intervenors McCabe and Payne both testified that they had *never* used plaintiffs' lot for beach access. Thus, summary judgment against each of these intervenors also was proper in that there was no genuine issue of material fact concerning their term of use of the purported easement. Intervenors' assignment of error is overruled.

Intervenors next contend the trial court erred in granting plaintiffs' motion for summary judgment against intervenor Bowers in that Bowers testified in his deposition, and stated in his affidavit, that he began using the beach access in 1971, thereby satisfying the twenty year use requirement. As we have held previously, however, that there was insufficient evidence to show that intervenors' use of the purported easement was without the owner's permission, and that the trial court's grant of summary judgment was proper, we need not address this issue, and intervenors' assignment of error is overruled.

Intervenors also contend that the trial court's granting of summary judgment against intervenor Payne was improper due to the fact that Payne should have been able to tack her use with that of her

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predecessors in title, thereby satisfying the twenty year use requirement. As stated previously, Payne testified that she had never used the beach access, nor had she ever received a deed or written conveyance of the easement. Also, she testified that her predecessors in title never told her about any recorded easement granting her beach access. As the evidence was insufficient to show that Payne's purported use, or that of her predecessors in title was hostile or without the lot owner's permission, the trial court's granting of summary judgment against intervenor Payne was proper. This assignment of error also is overruled.

Intervenors next assert the trial court erred in granting plaintiffs' motion to dismiss intervenors' claims based on the intervenors' lack of standing. Intervenors contend the trial court improperly reversed an earlier decision of the trial court which allowed intervenors to intervene permissively pursuant to Rule 24(b) of the North Carolina Rules of Civil Procedure.

This Court previously has addressed this issue, and we have held that the requirements for a party to have standing and for a party to be allowed to intervene permissively in an action are separate issues, which may result in seemingly contradictory results. *See Bruggeman v. Meditrust Co., LLC*, 165 N.C. App. 790, 600 S.E.2d 507 (2004). In North Carolina "[t]he power of one judge of the Superior Court is equal to and coordinate with that of another." *Caldwell v. Caldwell*, 189 N.C. 805, 809, 128 S.E. 329, 332 (1925). Similarly, it also is well established in our state "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." *Calloway v. Motor Co.*, 281 N.C. 496, 501, 189 S.E.2d 484, 488 (1972). However, we may

[uphold] a subsequent order issued by a different judge in the same action where the subsequent order was "rendered at a different stage of the proceeding," did not involve the same materials as those considered by the previous judge, and did not "present the same question" as that raised by the previous order.

Bruggeman, 165 N.C. App. at 795, 600 S.E.2d at 511 (quoting *Smithwick v. Crutchfield*, 87 N.C. App. 374, 376, 361 S.E.2d 111, 113 (1987)).

In the present case, intervenors were permitted to intervene permissively into the original case involving plaintiffs and defendant

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Town of Kure Beach, pursuant to a 14 November 2003 order of Judge Russell J. Lanier, Jr. In order to be allowed to intervene permissively into a pending action, the potential intervenor's alleged claim or defense must have a question of law or fact in common with the pending action. N.C. Gen. Stat. § 1A-1, Rule 24(b)(2) (2003). However, in order for the intervenors then to have standing to assert their alleged claims, they must " 'have been injured or threatened by injury or have a statutory right to institute an action.' " *Bruggeman*, 165 N.C. App. at 795, 600 S.E.2d at 511 (quoting *In re Baby Boy Scarce*, 81 N.C. App. 531, 541, 345 S.E.2d 404, 410 (1986)); *see also* N.C. Gen. Stat. § 1-57 (2005). In ruling on a motion to intervene, a trial court may consider standing as a factor in whether or not to grant permissive intervention, but this factor may be considered only after all requirements for permissive intervention have been satisfied. *Id.* at 796, 600 S.E.2d at 511 (quoting *59 Am. Jur. 2d Parties* § 207 (2003)). Rule 24(b)(2) does not require a permissive intervenor to show "a direct personal or pecuniary interest in the subject of the litigation." *Scarce*, 81 N.C. App. at 541, 345 S.E.2d at 410.

The issue in determining whether a party has standing to bring an action boils down to " 'whether there is a justiciable controversy being litigated amongst adverse parties with substantial interest affected[.]' " *Bruggeman*, 165 N.C. App. at 795, 600 S.E.2d at 511 (quoting *Texfi Industries v. City of Fayetteville*, 44 N.C. App. 268, 269-70, 261 S.E.2d 21, 23 (1979), *aff'd*, 301 N.C. 1, 269 S.E.2d 142 (1980)). Therefore, the order allowing intervenors to intervene permissively constituted a determination only that they had a common question of law or fact that was being litigated between plaintiff and defendant. Judge Hockenbury's 15 December 2004 order ruling that intervenors did not have standing to bring their *remaining* claims was independent of Judge Lanier's earlier ruling and determinations, and thus did not constitute a modification, change, or overruling of a prior order of another superior court judge. Therefore, intervenors assignment of error is overruled.

Finally, intervenors argue the trial court erred in granting plaintiff's motion to dismiss intervenors' claims for lack of standing due to the fact that intervenors have alleged elements necessary to establish a public prescriptive easement pursuant to the holding in *Concerned Citizens v. Holden Beach Enterprises*, 329 N.C. 37, 404 S.E.2d 677 (1991). Intervenors contend they have asserted viable claims that they were using the public prescriptive easement under color of title, in that by working with the Town to attempt to construct a walkway

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over the beach dune, intervenors and the Town sought to improve and maintain the easement after plaintiff blocked the easement by constructing a home on the lot and beach access, and that they in no way abandoned their use of it.

Concerned Citizens involved a group of citizens who sought to establish a prescriptive easement based on public use of a pathway crossing over the shifting dunes of an area on our state's Outer Banks. One of the primary issues considered by the Court concerned whether a purported easement could be substantially identified if it had moved and changed location over time due to the shifting of the dunes. Our Supreme Court ruled that the change in location due to the shifting dunes was not in and of itself sufficient to cause the plaintiffs' claim for a prescriptive easement to fail. *Id.* at 49, 404 S.E.2d at 684. In *Concerned Citizens*, the defendant sought to block the public's use of the pathway by constructing multiple barricades over a span of roughly twenty years. The Supreme Court found that as defendant's efforts to block public use increased, so did the public's acts of disregard of the barricades and continued use of the pathway. *Id.* at 49-51, 404 S.E.2d at 685-86. The Court found that the acts of the public in disregarding the various barricades clearly established "the use as being 'hostile,' thus repelling any inference that it is permissive, or that the use be 'open,' thus giving notice to the owner that the use is adverse." *Id.* at 51, 404 S.E.2d at 686.

Although plaintiffs in the instant case did, in fact, have record notice of an easement granting a public access easement over their property, this easement ceased to exist once the Town passed the ordinance prohibiting sand paths over the beach dunes and plaintiffs began constructing an improvement on their property. Each of the intervenors who testified that they had used plaintiffs' property for beach access testified that they stopped using the beach access either when the Town passed the ordinance or when plaintiffs began construction on the property. As previously stated, intervenors did not present sufficient evidence or allegations that their use was hostile or without the owners' permission. Similarly, they did not present evidence showing that they continued to use the beach access even after the passage of the ordinance or the construction on the site, thus they did not satisfy the element of "hostile use" present in *Concerned Citizens*. The instant case is distinguishable from that of *Concerned Citizens*, in that in the instant case there is other beach access available to the public in the same general area as the purported easement, whereas in *Concerned Citizens* the easement sought was the

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sole access to the portion of beach to which access was sought. Additionally, in *Concerned Citizens*, the easement was used by many people over a span of more than sixty years, even though the path had moved and changed location over time due to storms and beach erosion. In the instant case, however, the evidence presented through intervenors' depositions indicated that at most, only one of them had used plaintiffs' lot for beach access for anything close to the required twenty year period.

As stated previously, the trial court properly found that intervenors lacked standing to bring their claims alleging a prescriptive easement over plaintiffs' property. Similarly, plaintiffs lack standing to bring their claim alleging a public prescriptive easement over the same property. "In the absence of statute and barring those instances where an individual may take action because of his special damage over and above that suffered by other members of the general public, '[t]he State is the proper party to complain of wrongs done to its citizens.'" *McLean v. Townsend*, 227 N.C. 642, 643, 44 S.E.2d 36, 36 (1947) (citation omitted). Intervenors admitted in their depositions that the purpose of their claims was to establish an easement for the public to use as beach access across plaintiff's property. However, intervenors have not alleged, nor have they established, that they suffered any special injury that differed from that suffered by the public generally.

Therefore, we hold that the instant case is distinguishable from *Concerned Citizens*, and the trial court thus acted properly in granting plaintiffs' motion to dismiss intervenors' claim for a public prescriptive easement based on their lack of standing.

Affirmed.

Judges WYNN and HUNTER concur.

RAUCH v. URGENT CARE PHARM., INC.

[178 N.C. App. 510 (2006)]

VIRGINIA RAUCH, PLAINTIFF v. URGENT CARE PHARMACY, INC.; R. KEN MASON, JR.; W. RAY BURNS; FIRSTHEALTH OF THE CAROLINAS, INC.; PROFESSIONAL COMPOUNDING CENTERS OF AMERICA, LTD., A/K/A PROFESSIONAL COMPOUNDING CENTERS OF AMERICA, LLP, F/K/A PROFESSIONAL COMPOUNDING CENTERS OF AMERICA, INC., D/B/A PCCA, DEFENDANTS

No. COA05-472

(Filed 18 July 2006)

1. Jurisdiction— motions for extension of time and substitution of counsel—not general appearances

Motions for an extension of time to answer and for substitution of counsel were not general appearances which waived an objection to personal jurisdiction. Defendant did not seek any determination on the merits nor did he participate in any actions invoking the adjudicatory powers of the court.

2. Appeal and Error— appealability—interlocutory order—oral certification—reviewed for loss of substantial right

An interlocutory order was reviewed for the loss of a substantial right where the trial court orally certified its ruling as immediately appealable but the record contains no written certification order.

3. Appeal and Error— appealability—lack of personal jurisdiction—lack of subject matter jurisdiction

The trial court's dismissal of plaintiff's claims based on a lack of personal jurisdiction was immediately appealable. However, the dismissal of plaintiff's alter ego claim based on lack of subject matter jurisdiction was not immediately appealable, and her request to treat her appeal as a petition for certiorari was denied because the request did not comply with N.C. Appellate Rule 21.

4. Appeal and Error— appealability—same factual issues, different legal issues—no substantial right

Plaintiff did not show that she would lose a substantial right without an immediate appeal based on inconsistent verdicts where there would be a correspondence between the factual issues but not the legal issues.

5. Jurisdiction— minimum contacts—president of company—contacts insufficient

Nonresident defendant pharmacy president did not have sufficient minimum contacts with North Carolina such that a court

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in North Carolina could exercise personal jurisdiction over him individually without violating his due process rights in a negligence and products liability action.

Appeal by plaintiff from judgment and orders entered 15 November 2004 and orders entered 29 November 2004 by Judge Mark E. Klass in Hoke County Superior Court. Heard in the Court of Appeals 7 February 2006.

The McLeod Law Firm, P.A., by William W. Aycock, Jr., for plaintiff-appellant.

Poyner & Spruill, LLP, by Timothy W. Wilson, for Urgent Care Pharmacy, Inc. and W. Ray Burns, defendant-appellees.

JACKSON, Judge.

On 9 January 2003, Virginia Rauch (“plaintiff”) filed a complaint alleging that she developed serious health problems, including fungal meningitis, as a result of receiving injections of contaminated methylprednisolone. The contaminated methylprednisolone had been compounded by Urgent Care Pharmacy, Inc. (“Urgent Care”), and sold to FirstHealth of the Carolinas, Inc. (“FirstHealth”) for use in FirstHealth’s hospital and pain clinic. As alleged by plaintiff, Urgent Care’s compounded methylprednisolone injections had been contaminated with a fungus which caused individuals receiving the injections to contract fungal meningitis and other serious health conditions.

Plaintiff’s complaint contained multiple claims against defendants Urgent Care and FirstHealth, Urgent Care’s president Ray Burns (“Burns”), Urgent Care’s head pharmacist Ken Mason (“Mason”), and Professional Compounding Centers of America, Ltd. (“PCCA”), the seller of raw materials used by Urgent Care in compounding the methylprednisolone. Plaintiff’s claims included: (1) negligence on the part of defendants Urgent Care, Mason, and Burns; (2) liability on the part of defendants Urgent Care, Mason, and Burns under North Carolina General Statutes, section 99B-6; (3) Urgent Care’s breach of the implied warranties of merchantability and fitness for a particular purpose; (4) negligence on the part of PCCA; (5) negligence on the part of FirstHealth; (6) FirstHealth’s breach of the implied warranties of merchantability and fitness for a particular purpose; and (7) a claim seeking to pierce Urgent Care’s corporate veil and hold defendant Burns liable as Urgent Care’s “alter ego.”

On 16 January 2003, Urgent Care filed for bankruptcy in South Carolina, and was appointed a bankruptcy trustee. An order lifting the automatic stay of plaintiff's claims against Urgent Care was entered 6 June 2003, permitting plaintiff to move forward with her claims, but limiting her recovery from Urgent Care to the funds available under Urgent Care's liability insurance policy.

Upon being served with plaintiff's complaint, defendant Burns sent a copy of the complaint to the attorneys at Poyner and Spruill, LLP who were representing defendants Burns and Urgent Care in a separate, similar action. Defendant Burns also notified his personal liability insurance carrier of the action. Unbeknownst to defendant Burns or his counsel at Poyner and Spruill, defendant Burns' personal liability insurance carrier retained attorney Melissa Garrell ("Garrell") of Teague, Campbell, Dennis and Gorham, LLP. Garrell filed a motion for extension of time to answer for defendant Burns on 24 February 2003, but failed to inform defendant Burns or Poyner and Spruill of her actions. Defendant Burns' counsel from Poyner and Spruill learned of Garrell's motion the following day, and shortly thereafter notified Garrell that Poyner and Spruill already was representing defendant Burns in a similar action, and also would be representing him in the present action. Counsel from Poyner and Spruill filed a motion for substitution of counsel on 28 March 2003, and a consent order allowing the motion was entered on 4 April 2003.

[1] We note initially that Garrell's motion for an extension of time to answer does not constitute a general appearance, and does not serve as a waiver of defendant Burns' objection to the trial court's exercise of personal jurisdiction over him. *See Williams v. Williams*, 46 N.C. App. 787, 789, 266 S.E.2d 25, 27 (1980); *Swenson v. Thibaut*, 39 N.C. App. 77, 89, 250 S.E.2d 279, 288 (1978). Similarly, we note that Poyner and Spruill's motion for substitution of counsel also does not constitute a general appearance thereby waiving defendant Burns' objection to personal jurisdiction. When a defendant "invokes the adjudicatory powers of the court in any other matter not directly related to the questions of jurisdiction, he has made a general appearance and has submitted himself to the jurisdiction of the court whether he intended to or not." *Swenson*, 39 N.C. App. at 89, 250 S.E.2d at 288. In the present case defendant did not seek any determination on the merits of the case nor did he participate in any actions invoking the adjudicatory powers of the court. Defendant Burns' motion for substitution of counsel was simply a ministerial action which did not constitute a participation by defendant Burns in the present action or

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general appearance for purposes of the trial court's exercising personal jurisdiction over him.

Defendant Burns answered plaintiff's claims on 30 March 2003, asserting numerous affirmative defenses and moving to dismiss plaintiff's claims for multiple reasons, including lack of subject matter and personal jurisdiction, and plaintiff's failure to comply with Rule 9(j) of our Rules of Civil Procedure. Defendant Urgent Care answered plaintiff's claims on 31 July 2003, also asserting numerous affirmative defenses and moving to dismiss plaintiff's claims for failure to comply with Rule (9)(j). On 11 October 2004, Urgent Care filed a separate motion to dismiss plaintiff's complaint, and in the alternative Urgent Care sought a grant of partial summary judgment on plaintiff's warranty claims.

A hearing on the parties' motions was held on 11 October 2004. At the hearing, the trial court granted summary judgment for PCCA, and plaintiff's claims against PCCA were dismissed with prejudice. Defendant Burns' motion to dismiss plaintiff's claims on the basis of a lack of personal jurisdiction over defendant Burns and a lack of subject matter jurisdiction over plaintiff's "alter ego" claim was also granted. The trial court found that due to Urgent Care being in bankruptcy proceedings, the bankruptcy trustee was the proper party to bring a claim to pierce Urgent Care's corporate veil and hold defendant Burns liable as its alter ego, thus plaintiff lacked standing to bring the claim herself. The trial court also found that defendant Urgent Care is a "health care provider" subject to the provisions of Article 1B of Chapter 90 of the North Carolina General Statutes, but that it was not a merchant or a seller of goods subject to the warranty provisions of the Uniform Commercial Code. Plaintiff's claims alleging Urgent Care's breach of the implied warranties of merchantability and fitness for a particular purpose were dismissed with prejudice as the trial court granted partial summary judgment in favor of Urgent Care. On 6 December 2004, plaintiff dismissed her claims against defendant FirstHealth with prejudice.

Following the orders entered by the trial court, arising out of the 11 October 2004 hearing, the only claims remaining for trial included plaintiff's claims for negligence against defendants Urgent Care and Mason, and the liability of defendants Urgent Care and Mason under North Carolina General Statutes, section 99B-6. On 9 December 2004 plaintiff gave notice of her appeal from the trial court's orders granting PCCA's motion for summary judgment, granting defendant Burns' motions to dismiss based on a lack of subject matter and personal

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jurisdiction, and granting partial summary judgment for Urgent Care on plaintiff's implied warranties claims. Plaintiff subsequently withdrew her appeal of the granting of summary judgment of PCCA, thus the issues on appeal only concern plaintiff's appeals regarding defendants Urgent Care and Burns.

[2] An interlocutory order is one which is “made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy.” *Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950). In contrast, a final judgment, which is immediately appealable, “disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court.” *Id.* at 361-62, 57 S.E.2d at 381. An interlocutory order is

appealable before entry of a final judgment if (1) the trial court certifies there is “no just reason to delay the appeal of a final judgment as to fewer than all of the claims or parties in an action” or (2) the order “affects some substantial right claimed by the appellant and will work an injury to him if not corrected before an appeal from the final judgment.’ ”

McCutchen v. McCutchen, 360 N.C. 280, 282, 624 S.E.2d 620, 623 (2006) (quoting *Dep't of Transp. v. Rowe*, 351 N.C. 172, 175, 521 S.E.2d 707, 709 (1999); see also N.C. Gen. Stat. §§ 1-277; 1A-1, Rule 54(b); 7A-27 (2005)). In the instant case, the trial court orally certified its ruling as immediately appealable at the 11 October 2004 hearing, however the record on appeal does not contain the trial court's Rule 54 certification in the form of a written order. Thus, we must determine whether defendants have a substantial right which would be lost absent an immediate review by this Court. See *Robins & Weill v. Mason*, 70 N.C. App. 537, 540, 320 S.E.2d 693, 695-96, *disc. review denied*, 312 N.C. 495, 322 S.E.2d 559 (1984) (“[N]o appeal lies to an appellate court from an interlocutory order unless the order deprives the appellant of a substantial right which he would lose absent a review prior to final determination.”); see also, *VisionAIR, Inc. v. James*, 167 N.C. App. 504, 507, 606 S.E.2d 359, 361 (2004).

[3] We note that plaintiff's appeal of the trial court's dismissal of her claims against defendant Burns based on a lack of personal jurisdiction is not interlocutory, and is immediately appealable and reviewable by this Court. See N.C. Gen. Stat. § 1-277(b) (2005) (“Any interested party shall have the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property

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of the defendant . . .”); *Robinson v. Gardner*, 167 N.C. App. 763, 606 S.E.2d 449, *disc. review denied*, 359 N.C. 322, 611 S.E.2d 417 (2005). However, plaintiff’s appeal of the trial court’s dismissal of her alter ego claim against defendant Burns based on a lack of subject matter jurisdiction is not immediately appealable pursuant to section 1-277(b), and therefore is interlocutory. *See Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 327, 293 S.E.2d 182, 184 (1982) (Section 1-277(b) “does not apply to orders denying motions made pursuant to Rule 12(b)(1) to dismiss for lack of subject matter jurisdiction” as these orders are “not determinative of an action.”); *Shaver v. Construction Co.*, 54 N.C. App. 486, 487, 283 S.E.2d 526, 527 (1981) (“A trial judge’s order denying a motion to dismiss for lack of subject matter jurisdiction is interlocutory and not immediately appealable.”).

Plaintiff acknowledges that her appeal of the orders granting the remaining motions of defendants Burns and Urgent Care is interlocutory, in that claims against defendants Mason and Urgent Care for negligence are still pending; however, plaintiff has asked this Court to allow for an immediate appeal from the interlocutory orders which plaintiff believes affect a substantial right. In the alternative, plaintiff has asked this Court, in its discretion, to treat plaintiff’s appeal as a petition for a *writ of certiorari* pursuant to Rule 21 of our Rules of Appellate Procedure, thereby allowing us to address the appeal on its merits.

Rule 21 of our appellate rules provides that a “*writ of certiorari* may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when . . . no right of appeal from an interlocutory order exists . . .” N.C. R. App. P. 21(a)(1) (2005). Our rules specify that a petition for *writ of certiorari* to this Court must be filed with the clerk of the Court of Appeals, and the petition must contain the following:

a statement of the facts necessary to an understanding of the issues presented by the application; a statement of the reasons why the writ should issue; and certified copies of the judgment, order or opinion or parts of the record which may be essential to an understanding of the matters set forth in the petition.

N.C. R. App. P. 21(b), (c) (2005). Plaintiff’s sole statement in her brief fails to comply with the requirements of Rule 21. “The North Carolina Rules of Appellate Procedure are mandatory and ‘failure to follow these rules will subject an appeal to dismissal.’” *Viar v. N.C. Dep’t of Transp.*, 359 N.C. 400, 401, 610 S.E.2d 360, 360 (citation omitted),

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reh'g denied, 359 N.C. 643, 617 S.E.2d 662 (2005). Further, “[i]t is not the role of the appellate courts . . . to create an appeal for an appellant.” *Id.* at 402, 610 S.E.2d at 361. Thus we decline to exercise our discretion and deny plaintiff’s petition for *writ of certiorari*.

[4] Plaintiff argues the trial court’s dismissal of her claims against defendants Urgent Care and Burns affects a substantial right in that overlapping factual issues between the dismissed claims and the remaining claims create the potential for inconsistent verdicts which could result from two trials on the same factual issues. In *Green v. Duke Power Co.*, our Supreme Court held that “‘the right to avoid the possibility of two trials *on the same issues* can be . . . a substantial right.’” 305 N.C. 603, 608, 290 S.E.2d 593, 596 (1982) (citation omitted) (emphasis in original).

Plaintiff argues that inconsistent verdicts could result if different juries were to hear the “myriad of factual issues common to all of the claims.” In *Stetser v. TAP Pharm. Prods. Inc.*, however, we held that “[a]n inconsistent verdict can only occur if the same issue is involved in two trials.” 165 N.C. App. 1, 29, 598 S.E.2d 570, 589 (2004). Here, plaintiff contends that the factual issues involved are common to all of plaintiff’s claims, thus there is the potential for inconsistent verdicts if multiple trials are held on all of the claims. However, claims alleging negligence and liability under North Carolina General Statutes, section 99B-6, and claims seeking to pierce a corporate veil and alleging a breach of implied warranties are very different, and require different evidence to satisfy the very different elements of each claim. A finding of liability under one claim and not another is not necessarily an inconsistent verdict, as the various claims do not involve the same issues, and each requires that different elements be proved. Although some of the *factual* issues would be the same in the trying of each of the trials, the *legal* issues would not.

Therefore, we hold plaintiff has not shown that she possibly would be subjected to two trials on the same issue or that inconsistent verdicts likely would result were she to be involved in multiple trials. Accordingly, as plaintiff has failed to demonstrate that a substantial right is affected, we hold plaintiff’s appeal is interlocutory and not immediately appealable. We therefore dismiss as interlocutory plaintiff’s appeal of the orders granting defendant Urgent Care’s motion for partial summary judgment on plaintiff’s warranty claims, and the order dismissing plaintiff’s alter ego claim against defendant Burns for a lack of subject matter jurisdiction.

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[5] Our review of the dismissal of plaintiff's claim against defendant Burns for a lack of personal jurisdiction is limited to a determination as to whether or not defendant Burns had sufficient "minimum contacts" with North Carolina to subject him to jurisdiction by the courts of this state. *See Love v. Moore*, 305 N.C. 575, 581, 291 S.E.2d 141, 146 (1982) ("[T]he right of immediate appeal of an adverse ruling as to jurisdiction over the person, under [N.C. Gen. Stat. § 1-277(b)], is limited to rulings on 'minimum contacts' questions, the subject matter of Rule 12(b)(2)."); *Robinson*, 167 N.C. App. at 767-68, 606 S.E.2d at 452.

Our Courts have adopted a two-part test to determine whether a court in this state may exercise personal jurisdiction over a nonresident defendant. The court first must determine whether our "long-arm" statute authorizes jurisdiction over the defendant. N.C. Gen. Stat. § 1-75.4 (2005). If the statute does authorize jurisdiction, the court next must "determine whether the court's exercise of jurisdiction over the defendant is consistent with due process." *Tejal Vyas, LLC v. Carriage Park Ltd. P'ship*, 166 N.C. App. 34, 37, 600 S.E.2d 881, 885 (2004), *aff'd*, 359 N.C. 315, 608 S.E.2d 751 (2005). North Carolina's long-arm statute provides that personal jurisdiction over defendant Burns is proper under the following provisions:

- (4) Local Injury; Foreign Act.—In any action for wrongful death occurring within this State or in any action claiming injury to person or property within this State arising out of an act or omission outside this State by the defendant, provided in addition that at or about the time of the injury either:
 - a. Solicitation or services activities were carried on within this State by or on behalf of the defendant;
 - b. Products, materials or thing processed, serviced or manufactured by the defendant were used or consumed, within this State in the ordinary course of trade;

N.C. Gen. Stat. § 1-75.4(4) (2005).

" 'When personal jurisdiction is alleged to exist pursuant to the long-arm statute, the question of statutory authority collapses into one inquiry—whether defendant has the minimum contacts with North Carolina necessary to meet the requirements of due process.' " *Tejal*, 166 N.C. App. at 38, 600 S.E.2d at 885 (quoting *Hivasse Stables, Inc. v. Cunningham*, 135 N.C. App. 24, 27, 519 S.E.2d 317, 320 (1999)). Our primary determination thus is whether defendant

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Burns had “‘certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend “traditional notions of fair play and substantial justice.”’ ” *Id.* (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 90 L. Ed. 95, 102 (1945)). A defendant will be found to have sufficient minimum contacts with North Carolina when he has

purposefully availed [himself] of the privilege of conducting activities within the forum state and invoked the benefits and protections of the laws of North Carolina. The relationship between the defendant and the forum state must be such that the defendant should “reasonably anticipate being haled into” a North Carolina court. The facts of each case determine whether the defendant’s activities in the forum state satisfy due process.

Id. at 38-39, 600 S.E.2d at 885-86 (internal citations omitted).

In the instant case, we hold defendant Burns did not have sufficient minimum contacts with the state of North Carolina, such that a court in our state could exercise personal jurisdiction over him individually without violating his due process rights. Defendant Burns signed and submitted defendant Urgent Care’s 2002 application to the North Carolina Board of Pharmacy, seeking privileges for Urgent Care to conduct pharmacy business in this state, however he signed the application in his capacity as president of defendant Urgent Care. There is no evidence in the record which suggests that defendant Burns participated in the filling of any prescriptions or compounding activities at Urgent Care during 2002 when the contaminated methylprednisolone injections were compounded. Similarly, defendant Burns had no direct involvement with the day-to-day operations of defendant Urgent Care in 2002. He also had no contact with anyone in North Carolina regarding Urgent Care’s compounding methylprednisolone injections, and in fact, was unaware that Urgent Care was compounding the drug until after Urgent Care was notified about the possible contamination. Defendant Burns then spoke, via telephone, to physicians and other individuals in North Carolina regarding the investigation and the recall of the contaminated injections, however he did so in his capacity as president of defendant Urgent Care. Defendant Burns also does not own any real or personal property in this state, nor has he lived here since he was eighteen years old. The evidence does suggest that he may have visited the state for personal reasons prior to 2002, and that during such visit he delivered Urgent Care’s application to the North Carolina Pharmacy Board.

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After a thorough review of the record, we hold there is competent evidence to support the trial court's conclusion that defendant Burns did not engage in the requisite minimum contacts to satisfy the Due Process Clause. U.S. Const. amend. V and amend. XIV, § 1. Therefore, we hold the trial court acted properly in granting defendant's motions to dismiss, therefore plaintiff's assignment of error is overruled.

Dismissed in part; affirmed in part.

Judges MCGEE and HUNTER concur.

EDWARD SMITH AND TAMMYE SMITH, PLAINTIFFS v. GREGG E. CREGAN, M.D., AND
ORTHOPAEDIC SPECIALISTS OF THE CAROLINAS, P.A., DEFENDANTS

No. COA05-1412

(Filed 18 July 2006)

Costs— expert witness fees—negligence action

The trial court did not abuse its discretion in a medical malpractice case by denying defendants' motion to tax expert witness fees against plaintiffs after a jury verdict was returned in favor of defendants because: (1) the General Statutes do not always require expert witness fees to be awarded to a prevailing party in a negligence action; (2) negligence cases are not listed among the types of actions in which costs must be awarded to a prevailing party under either N.C.G.S. § 6-18 or § 6-19, and thus the trial court's ruling is governed by N.C.G.S. § 6-20 where costs are in the discretion of the court; (3) with regard to expert witness fees that are related to the judgment entered in defendants' favor, although such expert witness fees were recoverable as a cost under N.C.G.S. §§ 7A-305(1) and 7A-314(d), these claims were in the discretion of the trial court under N.C.G.S. § 6-20 and defendants have not alleged an abuse of discretion; and (4) with regard to expert witness fees that are not related to the judgment entered in defendants' favor, the trial court has no discretion to award this expense as a cost when N.C.G.S. § 6-1 only permits costs to be awarded to the party for whom judgment was given.

Judge HUDSON concurs in result only.

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Appeal by defendants from an order entered 1 September 2005 by Judge William Z. Wood, Jr., in Forsyth County Superior Court. Heard in the Court of Appeals 11 May 2005.

The MacKenzie Law Firm, by James S. Gibbs, for plaintiff appellees.

Carruthers & Roth, P.A., by Kenneth L. Jones, for defendant appellants.

McCULLOUGH, Judge.

Defendants appeal from a superior court order denying their motion to tax costs against plaintiffs. We affirm.

Facts

On 18 December 2002, plaintiffs filed a medical malpractice action in which they alleged that they were injured by the negligence of defendants. Defendants filed an answer denying liability.

Plaintiffs' action was tried the week of 12 July 2004. Following this trial, the jury was unable to reach a verdict, and the court declared a mistrial.

A second trial was held the week of 18 April 2005 and resulted in a jury verdict for defendants. After the second trial, the court entered a judgment in favor of defendants.

Defendants thereafter filed a motion for costs. Specifically, defendants sought reimbursement for, *inter alia*, (1) \$2,100.00 they paid as an expert witness fee to Dr. Will E. Moorehead, one of plaintiffs' designated expert witnesses, for deposition testimony taken prior to the first trial; (2) \$1,500.00 they paid as an expert witness fee to Dr. Bryant A. Bloss, one of plaintiffs' designated expert witnesses, for deposition testimony taken prior to the first trial; (3) \$5,000.00 they paid as an expert witness fee to their own expert, Dr. Mark Earl Brenner, for his testimony in the first trial, which resulted in a mistrial; and (4) \$5,000.00 they paid as an expert witness fee to Dr. Brenner for his testimony in the second trial, which resulted in a verdict and judgment for defendants.

In an order entered 1 September 2005, the trial court denied defendants' motion for costs "in . . . exercise of the [court]'s discretion." From this order, defendants now appeal to this Court.

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Legal Discussion

On appeal, defendants contend that the trial court was required to allow their motion to tax expert witness fees against plaintiffs. This argument presents two issues: (I) whether the General Statutes always require expert witness fees to be awarded to a prevailing party in a negligence action and, if not, (II) whether the trial court erred by denying the present defendants' motion for expert witness fees.

I.

We first address whether the General Statutes always require expert witness fees to be awarded to a prevailing party in a negligence action. We hold that they do not.

Defendants contend that Section 6-1 of the General Statutes requires that expert witness fees be awarded to prevailing defendants following a negligence suit. Section 6-1 states: "To the party for whom judgment is given, costs shall be allowed as provided in Chapter 7A and this Chapter [6 of the General Statutes]." At issue is the interplay between section 6-1 and pertinent provisions of Chapters 6 and 7A of the General Statutes.

Within Chapter 6, sections 6-18, 6-19, and 6-20 govern whether an award of costs is appropriate. In certain cases, costs must be awarded to the prevailing party. Section 6-18 provides for a mandatory award of costs to prevailing plaintiffs:

Costs shall be allowed of course to the plaintiff, upon a recovery, in the following cases:

- (1) In an action for the recovery of real property, or when a claim of title to real property arises on the pleadings, or is certified by the court to have come in question at the trial.
- (2) In an action to recover the possession of personal property.
- (3) In an action for assault, battery, false imprisonment, libel, slander, malicious prosecution, criminal conversation or seduction, if the plaintiff recovers less than fifty dollars (\$50.00) damages, he shall recover no more costs than damages.
- (4) When several actions are brought on one bond, recognizance, promissory note, bill of exchange or instrument in writing, or in any other case, for the same cause of action against several parties who might have been joined as defendants in the same action, no costs other than disbursements shall be

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allowed to the plaintiff in more than one of such actions, which shall be at his election, provided the party or parties proceeded against in such other action or actions were within the State and not secreted at the commencement of the previous action or actions.

(5) In an action brought under Article 1 of Chapter 19A.

N.C. Gen. Stat. § 6-18 (2005). Section 6-19 provides for a mandatory award of costs to prevailing defendants: “Costs shall be allowed as of course to the defendant, in the actions mentioned in the preceding section [6-18] unless the plaintiff be entitled to costs therein.” N.C. Gen. Stat. § 6-19 (2005). Pursuant to section 6-20, the decision to award costs in other types of cases is consigned to the discretion of the trial court: “In other actions, costs may be allowed or not, in the discretion of the court, unless otherwise provided by law.” N.C. Gen. Stat. § 6-20 (2005).

Chapter 7A, section 7A-305 of the General Statutes sets forth the items which are available as costs in civil actions. Section 7A-305 lists the costs which must be assessed in all civil actions:

(a) In every civil action in the superior or district court, except for actions brought under Chapter 50B of the General Statutes, the following costs shall be assessed:

- (1) For the use of the courtroom and related judicial facilities, the sum of twelve dollars (\$12.00) in cases heard before a magistrate, and the sum of sixteen dollars (\$16.00) in district and superior court, to be remitted to the county in which the judgment is rendered, except that in all cases in which the judgment is rendered in facilities provided by a municipality, the facilities fee shall be paid to the municipality. Funds derived from the facilities fees shall be used in the same manner, for the same purposes, and subject to the same restrictions, as facilities fees assessed in criminal actions.
- (2) For support of the General Court of Justice, the sum of seventy-nine dollars (\$79.00) in the superior court, except that if a case is assigned to a special superior court judge as a complex business case under G.S. 7A-45.3, an additional two hundred dollars (\$200.00) shall be paid upon its assignment, and the sum of sixty-four dollars (\$64.00) in the district court except that if the case is assigned to a magistrate the sum shall be fifty-three dollars (\$53.00). Sums collected under this

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subdivision shall be remitted to the State Treasurer. The State Treasurer shall remit the sum of one dollar and five cents (\$1.05) of each fee collected under this subdivision to the North Carolina State Bar for the provision of services described in G.S. 7A-474.4, and ninety-five cents (\$.95) of each fee collected under this subdivision to the North Carolina State Bar for the provision of services described in G.S. 7A-474.19.

N.C. Gen. Stat. § 7A-305(a)(1)-(2) (2005). Section 7A-305(d) lists those items which are “assessable or recoverable” in accordance with sections 6-18, 6-19, or 6-20:

(d) The following expenses, when incurred, are also assessable or recoverable, as the case may be:

- (1) Witness fees, as provided by law.
- (2) Jail fees, as provided by law.
- (3) Counsel fees, as provided by law.
- (4) Expense of service of process by certified mail and by publication.
- (5) Costs on appeal to the superior court, or to the appellate division, as the case may be, of the original transcript of testimony, if any, insofar as essential to the appeal.
- (6) Fees for personal service and civil process and other sheriff’s fees, as provided by law. Fees for personal service by a private process server may be recoverable in an amount equal to the actual cost of such service or fifty dollars (\$50.00), whichever is less, unless the court finds that due to difficulty of service a greater amount is appropriate.
- (7) Fees of guardians ad litem, referees, receivers, commissioners, surveyors, arbitrators, appraisers, and other similar court appointees, as provided by law. The fee of such appointees shall include reasonable reimbursement for stenographic assistance, when necessary.
- (8) Fees of interpreters, when authorized and approved by the court.
- (9) Premiums for surety bonds for prosecution, as authorized by G.S. 1-109.

N.C. Gen. Stat. § 7A-305(d)(1)-(9) (2005).

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Thus, expert witness fees are permitted under section 7A-305(d)(1) “as provided by law.” Expert witness fees are specifically provided for by section 7A-314 of the General Statutes, which provides, in pertinent part:

(a) A witness under subpoena, bound over, or recognized, other than a salaried State, county, or municipal law-enforcement officer, or an out-of-state witness in a criminal case, whether to testify before the court, Judicial Standards Commission, jury of view, magistrate, clerk, referee, commissioner, appraiser, or arbitrator shall be entitled to receive five dollars (\$5.00) per day, or fraction thereof, during his attendance, which, except as to witnesses before the Judicial Standards Commission, must be certified to the clerk of superior court.

....

(d) An expert witness, other than a salaried State, county, or municipal law-enforcement officer, shall receive such compensation and allowances as the court, or the Judicial Standards Commission, in its discretion, may authorize. A law-enforcement officer who appears as an expert witness shall receive reimbursement for travel expenses only, as provided in subsection (b) of this section.

N.C. Gen. Stat. § 7A-314 (2005). Subsection (a) “makes a witness fee for any witness, except those specifically exempted therein, dependent upon his having been subpoenaed to testify . . . , and it fixes his fee at \$5.00 per day. As to expert witnesses, [subsection] (d) modifies [subsection] (a) by permitting the court, in its discretion, to increase their compensation and allowances.” *State v. Johnson*, 282 N.C. 1, 27-28, 191 S.E.2d 641, 659 (1972). An expert witness must be subpoenaed to testify for his fees to be taxed as costs against an unsuccessful party. *Id.*

The present case involves a negligence action. Negligence cases are not listed among the types of actions in which costs must be awarded to a prevailing party pursuant to either section 6-18 or section 6-19. Therefore, the trial court’s costs ruling was governed by section 6-20, and costs could “be allowed or not, in the discretion of the court.” N.C. Gen. Stat. § 6-20.

Defendants contend that section 6-1 converts section 6-20, which explicitly conveys discretionary authority, into a compulsory provision because section 6-1 states, “To the party for whom judgment is

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given, costs shall be allowed” This argument entirely ignores the qualifying language that immediately follows: “**as provided in Chapter 7A and this Chapter [6].**” N.C. Gen. Stat. § 6-1 (emphasis added). Read closely and in context, section 6-1 provides that, in a case governed by section 6-20, costs shall be allowed in the discretion of the court.

The provisions of section 7A-305 do not affect the interplay between sections 6-1 and 6-20. By its terms, section 7A-305(a) requires that certain court costs be assessed in almost every civil action. A trial court has no discretion in this regard. The costs referred to in section 6-20 are the items enumerated in section 7A-305(d). *Cosentino v. Weeks*, 160 N.C. App. 511, 515, 586 S.E.2d 787, 789 (2003). The plain language of section 7A-305(d) makes the items it sets forth “assessable or recoverable.” Accordingly, nothing in section 7A-305 requires a trial court to exercise its discretion under section 6-20 to award the items listed in section 7A-305(d).

To hold otherwise would be to ignore basic principles of statutory construction. “‘Statutes dealing with the same subject matter must be construed *in para materia*, and harmonized, if possible, to give effect to each.’ When the language of a statute is clear and unambiguous, the court must give it its plain and definite meaning.” *Lutz v. Board of Education*, 282 N.C. 208, 219, 192 S.E.2d 463, 471 (1972) (citation omitted). If adopted, defendants’ strained reading of sections 6-1 and 7A-305 would have the effect of eliminating section 6-20. We decline to adopt this interpretation.

II.

We next address whether the trial court erred by denying the present defendants’ motion for expert witness fees. We discern no error.

The present defendants’ motion for expert witness fees sought reimbursement for two different categories of expenses: (A) expert witness fees that are related to the judgment entered in defendants’ favor, and (B) expert witness fees that are not related to the judgment entered in defendants’ favor.

A.

We first consider expert witness fees that are related to the judgment entered in defendants’ favor, which include: the \$2,100.00 defendants paid as an expert witness fee to plaintiffs’ expert, Dr. Moorehead, to take his pretrial deposition; the \$1,500.00 defendants

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paid as an expert witness fee to plaintiffs' expert, Dr. Bloss, to take his pretrial deposition; and the \$5,000.00 defendants paid as an expert witness fee to Dr. Brenner for his testimony in the second trial, which resulted in verdict and judgment for defendants. The record tends to show that each of these experts was subpoenaed to testify, such that the expert witness fee paid to him was recoverable as a cost pursuant to sections 7A-305(1) and 7A-314(d). As plaintiffs' claims were for negligence, these expert witness fees could be awarded to the prevailing defendants in the discretion of the trial court under section 6-20. The appropriate standard of review is whether the trial court abused its discretion. *Cosentino*, 160 N.C. App. at 516, 586 S.E.2d at 789-90 ("The trial court's discretion to tax costs pursuant to N.C. Gen. Stat. § 6-20 is not reviewable on appeal absent an abuse of discretion.") (citation omitted). Defendants have not alleged, and we discern no abuse of discretion in the denial of defendants' request to be reimbursed for these expert witness fees.

B.

We next consider the expert witness fees that are not related to the judgment entered in defendants' favor, namely the \$5,000 defendants paid as an expert witness fee to their own expert, Dr. Mark Earl Brenner, for his testimony in the first trial, which resulted in a mistrial. The trial court had no discretion to award this expense as a cost.

Our Supreme Court has held that "[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) (citation omitted). Regrettably, panels of this Court have differed in their willingness to apply the Supreme Court's directive. Compare *Department of Transp. v. Charlotte Area Mfd. Housing, Inc.*, 160 N.C. App. 461, 586 S.E.2d 780 (2003) (applying the paramount precedent established by the Supreme Court and declining to recognize the non-statutory expenses which had been subsequently created by this Court), with *Lord v. Customized Consulting Specialty, Inc.*, 164 N.C. App. 730, 735-36, 596 S.E.2d 891, 895 (2004) (declining to follow the paramount precedent established by the Supreme Court as to certain non-statutory expenses which had been subsequently created by this Court). However, there is no disagreement that a trial court may not award non-statutory expenses that have not heretofore been authorized by this Court. See *Charlotte Area*, 160 N.C. App. at 469-70, 586 S.E.2d at 785; *Lord*, 164 N.C. App. at 734, 596 S.E.2d at 895.

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Significantly, section 6-1 only permits costs to be awarded “[t]o the party for whom judgment is given.” In the instant case, the first trial resulted in a mistrial, after which neither party received judgment. Therefore, the trial court had no authority, and therefore no discretion, to award defendants reimbursement for the \$5,000.00 they paid as an expert witness fee to Dr. Brenner for his testimony in the first trial. Accordingly, the trial court could not abuse its discretion by declining to award this expense to defendants as a “cost.”

For the foregoing reasons, the challenged order is

Affirmed.

Judge TYSON concurs.

Judge HUDSON concurs in result only.

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WACHOVIA BANK, NATIONAL ASSOCIATION, F/K/A WACHOVIA BANK, N.A. AND F/K/A WACHOVIA MORTGAGE COMPANY, GOVERNOR'S LANDING, LLC, CHARLES PASQUALE, AND JOANNE PASQUALE, PLAINTIFFS v. CLEAN RIVER CORPORATION AND PETER D. KOKE, DEFENDANTS AND ASSURANCE COMPANY OF AMERICA, ZURICH AMERICAN INSURANCE COMPANY, MARYLAND CASUALTY COMPANY, HOME BUILDERS INSURANCE COMPANY, HOME BUILDERS INSURANCE SERVICES, INC., HOME BUILDERS INSURANCE SERVICE, INC., AND ZURICH INSURANCE SERVICES, INC., DEFENDANTS/THIRD-PARTY PLAINTIFFS v. DAVID STEIGERWALD, BERNHARDT CONSTRUCTION GROUP, LLC, LENORD WERSAN, JOHN PAULSON, GLOBAL LOSS SERVICES, INC., AND ARTHUR WADDELL, THIRD PARTY-DEFENDANTS AND DAVID STEIGERWALD, PLAINTIFF v. CLEAN RIVER CORPORATION, AND PETER D. KOKE, DEFENDANTS AND ASSURANCE COMPANY OF AMERICA, ZURICH AMERICAN INSURANCE COMPANY, MARYLAND CASUALTY COMPANY, HOME BUILDERS INSURANCE COMPANY, HOME BUILDERS INSURANCE SERVICES, INC., HOME BUILDERS INSURANCE SERVICE, INC., AND ZURICH INSURANCE SERVICES, INC., DEFENDANTS/THIRD-PARTY PLAINTIFFS v. WACHOVIA BANK, NATIONAL ASSOCIATION, F/K/A WACHOVIA BANK, N.A. AND F/K/A WACHOVIA MORTGAGE COMPANY, GOVERNOR'S LANDING, LLC, CHARLES PASQUALE, JOANNE PASQUALE, BERNHARDT CONSTRUCTION GROUP, LLC, LENORD WERSAN, JOHN PAULSON, GLOBAL LOSS SERVICES, INC., AND ARTHUR WADDELL, THIRD-PARTY DEFENDANTS

No. COA05-1364

(Filed 18 July 2006)

Discovery— privileged material—work-product doctrine

The trial court did not abuse its discretion in a breach of contract, misrepresentation, breach of the duty of good faith and fair dealing, and breach of fiduciary duty case by compelling Zurich defendants' production of alleged privileged material, because: (1) defendants could have, but chose not to, produce the Group B documents for an in camera inspection as evidenced by their submission of Group A documents for in camera inspection; (2) no attorney-client privilege is at issue regarding the Group A documents; and (3) the trial court's determination that defendants retained the work-product privilege from 20 December 2001 and forward was reasonable, and the work-product doctrine covers documents respecting claim reserve data from 20 December 2001 forward.

Appeal by defendants from order entered 5 July 2005 by Judge Benjamin G. Alford in New Hanover County Superior Court. Heard in the Court of Appeals 10 May 2006.

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Maupin Taylor, P.A., by Daniel Lee Brawley and Smyth & Cioffi, LLP, by Theodore B. Smyth, for plaintiffs-appellees.

Nexsen Pruet Adams Kleemeier, PLLC, by James W. Bryan and Gary L. Beaver and Cozen O'Connor, P.C., by Kimberly Sullivan for defendants-appellants.

CALABRIA, Judge.

Assurance Company of America, Zurich American Insurance Company, Maryland Casualty Company, Home Builders Insurance Company, Home Builders Insurance Services, Inc., Home Builders Insurance Service, Inc., and Zurich Insurance Services, Inc. (“the Zurich defendants” or “Zurich”) appeal the discovery order compelling the production of alleged privileged material. We affirm.

On 3 February 2000, Bernhardt Construction Group, LLC, (“Bernhardt”) and Wildman & Bernhardt Construction, Inc. (“Wildman”) constructed a luxury townhouse community, referred to as Governor’s Landing Townhouse Project (“the project”), for plaintiff Governor’s Landing, LLC, (“Landing”), owner of real property at 2 Nun Street, Wilmington, North Carolina (“the property”). Plaintiffs Wachovia Bank, National Association (“Wachovia”), and Charles and Joanne Pasquale (“the Pasquales”) financed the project with loans secured by deeds of trust on the property. In addition, plaintiff David Steigerwald (“Steigerwald”), the project manager for Landing, provided financial assistance. The contract required Bernhardt to maintain builder’s risk insurance including coverage for Landing, Wachovia, and the Pasquales as additional insured parties. On 28 February 2000, the Builder’s Risk Policy (“the policy”), number BR96090395, Zurich issued identified only Bernhardt as the named insured.

On 27 October 2000, Bernhardt informed Zurich of potential water and mold damage to the property. Bernhardt claimed “wind driven rain” caused the damage. Further, Bernhardt claimed the damage occurred after the roof had been installed. Zurich’s investigation of Bernhardt’s claims revealed “the water damage and subsequent mold invasion . . . is a covered loss.” Steigerwald informed Zurich that plaintiffs should have been listed as additional insured parties under the existing policy. Plaintiffs contend certificates of insurance they signed, issued approximately one month prior to Zurich’s payment to Bernhardt, on 26 January 2001, are retroactive from 1 February 2000.

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However, Zurich contends plaintiffs were not insured. On 19 February 2001, Zurich issued a check to Bernhardt for \$430,000 as part of a release and settlement agreement.

Several months after Zurich settled with Bernhardt, Steigerwald communicated to Zurich he believed Bernhardt's claim was fraudulent. Steigerwald reported his belief that the water and mold damage occurred prior to the roof installation. In October of 2001, the North Carolina Department of Insurance ("the NCDOI") began investigating Steigerwald's fraud allegations. Zurich communicated with the NCDOI during their investigation.

On 20 December 2001, Kelly M. Toms ("Toms"), Steigerwald's attorney, wrote a letter to Zurich asserting a claim against the Zurich defendants under the policy. Further, on 21 and 27 February 2002, Wachovia, Landing, and the Pasquales each asserted claims against Zurich under the policy. On 3 June 2003, plaintiffs filed a complaint against the Zurich defendants asserting, *inter alia*, breach of contract, misrepresentation, breach of the duty of good faith and fair dealing, and breach of fiduciary duty. Zurich filed an answer and asserted multiple defenses as well as counterclaims, cross-claims, and a third-party complaint. On 13 June 2003, plaintiffs served Zurich a "first request for production of documents" to which Zurich partly complied and partly refused believing that certain documents were "confidential." On 26 May 2005, plaintiffs filed a "motion to compel and request for removal of confidential designations." Five days later, Zurich filed a "motion for protective order." The trial court heard the motions on 6 June 2005. Three days later, on 9 June 2005, the trial court conducted an *in camera* inspection of twelve documents ("the Group A documents") requested by the plaintiffs. However, nearly four-hundred-and-fifty (450) documents ("the Group B documents") were not produced for an *in camera* inspection. Zurich alleged those were privileged documents. On 5 July 2005, the trial court entered a discovery order compelling Zurich to produce documents requested by the plaintiffs. In its order, the trial court found the following: Zurich waived attorney-client privilege; the work-product doctrine did apply but only as to documents generated subsequent to 20 December 2001, the date set by the trial court as commencing the work-product privilege; and, documents submitted by Zurich to the NCDOI as well as claim reserve information were discoverable if produced prior to 20 December 2001. Zurich appeals.

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I. *Discovery Matters and Burden of Proof:*A. Documents not Submitted for *In Camera* Review:

Appellants argue the trial court erred and abused its discretion in ordering the discovery of alleged privileged documents. Appellants contend the trial court declined to conduct an *in camera* review. We disagree.

“[O]rders regarding discovery matters are within the discretion of the trial court and will not be upset on appeal absent a showing of abuse of that discretion.” *Nationwide Mut. Fire Ins. Co. v. Bourlon*, 172 N.C. App. 595, 601, 617 S.E.2d 40, 45 (2005), *aff’d*, 360 N.C. 356, 625 S.E.2d 779 (2006) (internal quotation marks and citation omitted). “To demonstrate an abuse of discretion, *the appellant* must show that the trial court’s ruling was manifestly unsupported by reason, or could not be the product of a reasoned decision.” *Id.* 172 N.C. App. at 601 (citations omitted) (emphasis added). “[Defendants] could have requested that the trial court review the documents *in camera* and then seal the documents for possible appellate review.” *Miller v. Forsyth Mem’l Hosp., Inc.*, 174 N.C. App. 619, 621, 625 S.E.2d 115, 116 (2005). “*In camera* review allows the trial court to direct that the requested information be produced under seal for determination by it of relevancy or potential for leading to discovery of admissible evidence.” *Id.* 174 N.C. App. at 621, 625 S.E.2d at 116-17. “Any material which the court determines not to be discoverable may then be preserved under seal for review on appeal should *further consideration by this Court* become necessary.” *Id.* 174 N.C. App. at 621, 625 S.E.2d at 117 (emphasis added). The party seeking either attorney-client privilege or work-product privilege bears the burden of proof. *Evans v. United Servs. Auto. Ass’n*, 142 N.C. App. 18, 29, 32, 541 S.E.2d 782, 789, 791 (2001).

In the instant case, appellants alleged approximately four-hundred-and-sixty-two (462) total documents were privileged. On 6 June 2005, the trial court heard appellees’ motion to compel and appellants’ motion for a protective order. At the hearing, counsel for appellants told the court that within the next week or two, appellants could produce certain alleged privileged documents relating to “factual information” as well as a privilege log in an effort to reduce the workload of the court. However, none of the alleged privileged documents were submitted to the trial court at that time. On 9 June 2005, appellants produced the Group A documents for an *in camera* inspection by the trial court, but did not produce the Group B docu-

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ments for an *in camera* inspection at that time. On 10 June 2005, appellants corresponded with the trial court via a letter containing, *inter alia*, a privilege log. However, appellants still did not produce the Group B documents for an *in camera* inspection at that time. Twenty days later, on 30 June 2005, appellants faxed a letter to the trial court requesting an *in camera* inspection of the Group B documents, however, these documents were not included with the fax. That same day, Judge Alford signed the discovery order.

Pursuant to *Evans* and *Nationwide, supra*, appellants bear the burden to illustrate the privilege alleged. Here, appellants communicated with the trial court on three separate occasions: the hearing, a letter, and a facsimile transmission in a twenty-four (24) day window, yet never produced the Group B documents for an *in camera* inspection. Appellants could have, but chose not to, produce the Group B documents for an *in camera* inspection, as evidenced by their prior submission of Group A documents on 6 June 2005. Consequently, appellants failed to carry their burden with respect to the Group B documents. We discern no abuse of discretion by the trial court in ordering the production of documents appellants failed to provide for an *in camera* review. Appellants' assignments of error with respect to the Group B documents are overruled.

B. Documents Submitted for *In Camera* Review:

Appellants carried their burden regarding the Group A documents by submitting them for an *in camera* inspection. Therefore, we turn our attention first to whether attorney-client privilege, work-product privilege, or statutory privilege attached to the Group A documents. After a thorough inspection of the Group A documents, we conclude that no attorney-client privilege is at issue. Further, all of the documents submitted by Zurich to the NCDOI were Group B documents and, thus, because appellants failed to carry their burden as to the Group B documents, no statutory privilege is at issue. However, that same inspection reveals that the work-product privilege attached. Thus, we must determine whether the trial court abused its discretion when it concluded appellants' work-product privilege existed from 20 December 2001 forward. We hold the trial court did not abuse its discretion.

The work-product doctrine "forbids the discovery of documents and other tangible things that are 'prepared in anticipation of litigation' unless the party has a substantial need for those materials and cannot 'without undue hardship . . . obtain the substantial equivalent

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of the materials by other means.’ ” *Long v. Joyner*, 155 N.C. App. 129, 136, 574 S.E.2d 171, 176 (2002) (quoting N.C. Gen. Stat. § 1A-1, Rule 26(b)(3) (2005)).

It is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client’s case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients’ interest.

State v. Dunn, 154 N.C. App. 1, 13, 571 S.E.2d 650, 658 (2002) (quoting *Hickman v. Taylor*, 329 U.S. 495, 510-11, 91 L. Ed. 451, 462 (1947)). Consequently, “[t]he [work-product] doctrine was designed to protect the mental processes of the attorney from outside interference and provide a privileged area in which he can analyze and prepare his client’s case.’ ” *State v. Prevatte*, 356 N.C. 178, 218, 570 S.E.2d 440, 462 (2002) (quoting *State v. Hardy*, 293 N.C. 105, 126, 235 S.E.2d 828, 841 (1977)).

“The protection given to matters prepared in anticipation of trial, or work product, is not a privilege, but a qualified immunity.” *Velez v. Dick Keffer Pontiac-GMC Truck, Inc.*, 144 N.C. App. 589, 594, 551 S.E.2d 873, 876 (2001) (citations and internal quotation marks omitted). Furthermore, while “[m]aterials . . . prepared in the ordinary course of business . . . are not protected by the work product immunity . . . work product containing . . . mental impressions, conclusions, opinions, or legal theories of an attorney . . . concerning the litigation in which the material is sought is not discoverable.” *Id.* 551 S.E.2d at 877 (citations and internal quotation marks omitted). Nevertheless, “[b]ecause work product protection by its nature may hinder an investigation into the true facts, it *should be narrowly construed* consistent with its purpose[,] which is to safeguard the lawyer’s work in developing his client’s case.” *Evans*, 142 N.C. App. at 29, 541 S.E.2d at 789 (emphasis added) (citations and internal quotation marks omitted).

In the instant case, the trial court concluded that appellants retained the work-product privilege from 20 December 2001 forward. Pursuant to *Nationwide, supra*, appellants must illustrate the trial court’s determination was “manifestly unsupported by reason, or

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could not be the product of a reasoned decision.” However, the trial court’s decision was reasonable. For instance, several Group A documents inspected by the trial court included three letters dated 17 July 2002 from Zurich to plaintiffs Steigerwald, Wachovia, Landing, and the Pasquales informing them Zurich believed their claims were not covered under the policy. Specifically, the letter from Zurich to Steigerwald acknowledged Toms asserted a claim under the policy in a letter to Zurich dated 20 December 2001. Toms stated, in pertinent part, “[r]egarding my client’s claims against Zurich and its agents, I am in the process of *completing a complaint which will be filed soon.*” (emphasis added). The letter to Wachovia acknowledged Wachovia asserted a claim under the policy on 21 February 2002. The letter to Landing and the Pasquales acknowledged both parties asserted a claim under the policy dated 27 February 2002. Therefore, pursuant to an abuse of discretion standard, *see Nationwide, supra*, the trial court reasonably determined the earliest date Zurich anticipated litigation from plaintiffs was 20 December 2001. Consequently, the trial court did not abuse its discretion.

Additionally, the trial court’s order required the Zurich defendants to supply documents regarding claim reserve information. The trial court noted “[a]ny information pertaining to [claim] reserves generated on or after December 20, 2001 is protected pursuant to the Work-Product Doctrine[.]” The trial court reasoned these documents were work-product items, but only from the date the trial court determined as the date the privilege was initiated. Since the trial court previously determined 20 December 2001 was the appropriate date for the inception of the work-product doctrine, we also hold the work-product doctrine covers documents respecting claim reserve data from 20 December 2001 forward. Furthermore, as to appellants’ argument claiming that reserve information is not reasonably calculated to lead to the discovery of admissible evidence, we discern no abuse of discretion in the trial court’s decision to deem these documents discoverable. Appellants’ assignments of error with respect to the Group A documents are overruled.

Affirmed.

Judges BRYANT and STEELMAN concur.

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BOMBARDIER CAPITAL, INC., PLAINTIFF v. LAKE HICKORY WATERCRAFT, INC.; MARK J. MARCHESE; LAUREN E. MARCHESE; JOHN T. ADAIR; HILMA S. ADAIR; AND SARA PETERS, DEFENDANTS, AND AS TO MARK J. MARCHESE AND LAUREN E. MARCHESE, DEFENDANTS/THIRD PARTY PLAINTIFFS v. JOE CARL ROWE, THIRD PARTY DEFENDANT

No. COA05-1049

(Filed 18 July 2006)

1. Guaranty— default by company after stockholder buyout— mitigation of damages

There were no issues of material fact concerning the failure of one of the three initial stockholders and guarantors of a business to mitigate his damages after the business defaulted and payment was sought from the guarantors.

2. Contracts— condition precedent—stock sale with indemnity clause—no condition in contract language

There was no genuine issue of material fact concerning the failure of a condition precedent in a stock sale contract with an indemnity clause. The plain language of the contract does not require a condition to occur before the contract is valid.

3. Contracts— indemnification—waiver

There were no genuine issues of material fact concerning a waiver by a former stockholder (Marchese) of the right to seek indemnification from the stockholder who had bought him out. A waiver is an intentional relinquishment or abandonment of a known right or privilege; neither the record nor the parties here indicate that Marchese expressly waived his right to indemnification, nor did he do so impliedly.

4. Appeal and Error— preservation of issues—argument not supported by authority

An argument not supported by authority was not properly before the Court of Appeals.

5. Costs— attorney fees—guaranty assumption in stock purchase agreement—indemnity

The trial court did not abuse its discretion in awarding attorney fees pursuant to N.C.G.S. § 6-21.2 of less than fifteen percent of the indemnity for breach of an assumption of a guaranty of payment in a stock purchase agreement where the agreement contained a provision for the payment of attorney fees and the

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amount of attorney fees awarded was supported by attorney testimony, affidavits and billing statements.

Appeal by third party defendant Joe Carl Rowe from the judgment entered 13 November 2003 by Judge Christopher M. Collier in Alexander County Superior Court. Heard in the Court of Appeals 22 February 2006.

The Law Firm of J. Richardson Rudisill, Jr., by Donna N. Price, for third party plaintiff-appellees.

Sigmon, Clark, Mackie, Hutton, Hanvey & Ferrell, P.A., by Warren A. Hutton and Stephen L. Palmer, for third party defendant-appellant.

JACKSON, Judge.

Third-party defendant Joe Carl Rowe (“Rowe”) appeals from the trial court’s entry of summary judgment and attorney fees award in favor of defendant/third-party plaintiff Mark J. Marchese (“Marchese”). On or about 8 December 1992, Lake Hickory Watercraft, Inc. (“Lake Hickory”) was incorporated in North Carolina, and Lake Hickory issued a total of three stock certificates of ninety shares each. John T. Adair (“Adair”), Stanley Peters (“Peters”), and Marchese each received one certificate. On 6 January 1993, Bombardier Capital, Inc. (“Bombardier”) and Lake Hickory entered into a security agreement pursuant to which Bombardier advanced funds to Lake Hickory in exchange for a security interest in Lake Hickory’s inventory. The following day, Adair, Peters, Marchese, and their respective wives each signed a guaranty providing that each signing party would “guarantee full and prompt payment to [Bombardier] of all obligations of [Lake Hickory] to [Bombardier].” (the “Guaranty”) Peters died sometime between signing the Guaranty and the date of this action.

On 24 June 1998, Marchese and Rowe entered into a contract for the sale of Marchese’s ninety shares of stock for nine thousand dollars (the “Contract”). The Contract contained the following two provisions:

2. . . . That as further consideration for this purchase, [Rowe] agrees to assume, and pay, and save [Marchese] harmless from any direct or indirect liability arising out of or through any indebtedness, obligation, or undertaking of . . . Bombardier Capital

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(Account number 691119) . . . including reasonable attorneys fees in defense of the same, and specifically, but not by way of limitation, any guarantees of either [Marchese], individually, or of . . . Bombardier Capital (Account number 691119).

3. That [Rowe] shall provide to [Marchese], at closing, written verification that [Marchese] has been released of any and all guarantees, notes, or obligations, of [Marchese] to . . . Bombardier Capital[.]

Notwithstanding the requirement of Contract provision 3, Rowe did not provide a written verification to Marchese that he had been released of any and all guarantees, notes, or obligations. Nonetheless, Marchese proceeded with the closing because he thought that the written verification “would be forthcoming.” In 1999, Lake Hickory failed to meet its obligations pursuant to the security agreement, therefore breaching the security agreement. As a result, on 4 April 2000, Bombardier filed a complaint against Lake Hickory, Marchese, Adair, and Peters’ wife (hereinafter collectively referred to as “defendants”) for, *inter alia*, breach of contract and breach of guaranty. On 26 July 2000, Marchese filed an answer and a third-party complaint against Rowe seeking indemnification and attorney fees pursuant to the Contract.

On 21 August 2002, Bombardier filed a motion for summary judgment against defendants. After a hearing on Bombardier’s summary judgment motion, the Honorable Christopher M. Collier entered summary judgment against defendants and awarded \$237,096.17 in damages and \$35,564.00 in attorney fees to Bombardier.

On 20 October 2003, Marchese filed a motion for summary judgment against Rowe alleging, *inter alia*, that there is no genuine issue of material fact as to Marchese’s claim for breach of contract and indemnification. On 13 November 2003, the Honorable Christopher M. Collier entered summary judgment in favor of Marchese, and ordered that Rowe pay Marchese \$165,000 and that Marchese’s application for attorney fees be addressed by separate order. Rowe appealed.

On 1 March 2005, this Court dismissed Rowe’s appeal as interlocutory because the trial court had not entered summary judgment in favor of Mrs. Marchese, had not ruled on Rowe’s motion for summary judgment, and had held open Marchese’s application for attorney fees in an unpublished opinion. *See Bombardier Capital, Inc. v.*

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Lake Hickory Watercraft, Inc., 168 N.C. App. 728, 609 S.E.2d 497 (2005) (unpublished opinion).

Marchese filed a motion for attorney fees against Rowe, and on 6 June 2005, the Honorable Christopher M. Collier ordered that Marchese was entitled to \$21,500 in attorney fees and \$1,780.24 in costs. Thereafter, Mrs. Marchese filed for voluntary dismissal. Rowe filed a timely appeal of the 13 November 2003 summary judgment order and 6 June 2005 order granting attorney fees and expenses.

On appeal, Rowe argues the trial court erred in granting summary judgment in favor of Marchese because genuine issues of material fact exist concerning (1) Marchese's failure to mitigate his damages; (2) the failure of a condition precedent in the Contract between the parties; (3) Marchese's waiver of the right to seek indemnification from Rowe; and (4) whether Mrs. Marchese was an intended beneficiary of the Contract between the parties such that any payment made to secure a release of Mrs. Marchese from the judgment should not be included in any amount determined to be owed to Marchese by Rowe. In addition, Rowe argues the trial court erred in awarding attorney fees on the grounds that the award is contrary to existing law and unsupported by the evidence. We first address the summary judgment issues, then proceed to the attorney fees issue.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2005). In deciding a motion for summary judgment, a trial court must consider the evidence in the light most favorable to the non-moving party. *See Summey v. Barker*, 357 N.C. 492, 496, 586 S.E.2d 247, 249 (2003). If there is any evidence of a genuine issue of material fact, a motion for summary judgment should be denied. *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 471, 597 S.E.2d 674, 694 (2004). We review an order allowing summary judgment *de novo*. *Id.* at 470, 597 S.E.2d at 693.

[1] Rowe first contends the trial court erred in granting summary judgment because genuine issues of material fact exist concerning Marchese's failure to mitigate his damages. Our Court has held that in an action for tort committed or breach of contract without excuse, it is a well settled rule of law that the party who is wronged is required to use due care to minimize the loss. *First Nat'l Pictures Distrib. Corp. v. Seawell*, 205 N.C. 359, 360, 171 S.E. 354, 355 (1933). However,

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“[t]he duty to mitigate damages arises only after a breach occurs.” *Strader v. Sunstates Corp.*, 129 N.C. App. 562, 575, 500 S.E.2d 752, 759, *disc. rev. denied*, 349 N.C. 240, 514 S.E.2d 275 (1998).

Here, Marchese’s liability under the Guaranty with Bombardier arose when Lake Hickory defaulted and Bombardier sought payment from the individual guarantors. Marchese satisfied his obligation to Bombardier under the Guaranty, and sought indemnification from Rowe pursuant to the Contract. Rowe’s argument that the breach occurred when Lake Hickory failed to comply with the security agreement is incorrect. In contrast, the breach complained of occurred when Rowe failed to indemnify Marchese pursuant to Contract provision 2, and Marchese mitigated damages by sending a letter informing the creditor of his stock sale Contract and by sending a letter to Rowe clearly expressing his intention to enforce the Contract’s indemnity clause. Therefore, Marchese mitigated damages, and is entitled to recover from Rowe under the Contract.

[2] Next, Rowe argues that the trial court erred in granting summary judgment because genuine issues of material fact exist concerning the failure of a condition precedent in the Contract between the parties. As a general rule, conditions precedent “‘are those facts and events, occurring subsequently to the making of a valid contract, that must exist or occur before there is a right to immediate performance, before there is a breach of contract duty, before the usual judicial remedies are available.’” *Farmers Bank, Pilot Mountain v. Michael T. Brown Distrib., Inc.*, 307 N.C. 342, 350, 298 S.E.2d 357, 362 (1983) (quoting 3A A. Corbin, *Corbin on Contracts* § 628, at 16 (1960)). The use of such words as “when,” “after,” “as soon as,” and the like, give clear indication that a promise is not to be performed except upon the occurrence of a stated event. *Id.* at 351, 298 S.E.2d at 362.

Here, Rowe incorrectly contends that Contract provision 3 is a condition precedent of the Contract that required him to provide Marchese with written verification that Marchese had been released of any and all obligations, and, as a result of Rowe’s failure to provide this written verification, the Contract never existed. Rowe’s argument fails because the plain language of Contract provision 3 does not require a condition to occur before the contract is valid. Moreover, Marchese proceeded with the closing based upon Rowe’s mere assurances that the verification was forthcoming. Therefore, Rowe’s failure to provide written verification does not support a condition precedent, and Rowe’s argument is without merit.

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[3] Third, Rowe contends the trial court erred in granting summary judgment because genuine issues of material fact exist concerning Marchese's waiver of the right to seek indemnification from Rowe. Specifically, Rowe argues that Marchese waived his right to indemnification because Rowe did not provide Marchese with a written verification for release of obligations and Marchese proceeded with the Contract. This Court has established that waiver is "an intentional relinquishment or abandonment of a known right or privilege." *Medearis v. Trustees of Myers Park Baptist Church*, 148 N.C. App. 1, 10, 558 S.E.2d 199, 206 (2001), *disc. rev. denied*, 355 N.C. 493, 563 S.E.2d 190 (2002) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464, 82 L. Ed. 1461, 1466 (1938)). A waiver may be express or implied. *Id.* at 11, 558 S.E.2d at 206. "A waiver is implied when a person dispenses with a right 'by conduct which naturally and justly leads the other party to believe that he has so dispensed with the right.'" *Id.* at 12, 558 S.E.2d at 206-07 (quoting *Guerry v. Am. Trust Co.*, 234 N.C. 644, 648, 68 S.E.2d 272, 275 (1951)).

In the case *sub judice*, neither the record nor the parties indicate that Marchese expressly waived his right to indemnification. Marchese did not impliedly waive his right to indemnification because he did not engage in conduct that naturally and justly would lead Rowe to believe he dispensed with his right to receive indemnification. Specifically, the Contract's indemnification clause and release clause are two separate independent clauses, and Rowe's failure to release Marchese from prior obligations did not waive the indemnification clause. Therefore, Marchese did not waive his right to indemnification, and Rowe's argument is meritless.

[4] Rowe's fourth argument states that the trial court erred in granting summary judgment because there is a material issue of fact as to whether Mrs. Marchese was an intended beneficiary of the Contract. The scope of review on appeal is confined to a consideration of those exceptions set out and made the basis of assignments of error in the record on appeal. N.C. R. App. P., Rule 10 (2006). "Assignments of error not set out in [Rowe's] brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned." N.C. R. App. P., Rule 28(b)(6) (2006). Rowe failed to cite authority supporting his fourth argument. For this reason, Rowe's fourth argument is not properly before us.

[5] Finally, Rowe contends that the trial court erred in awarding attorney fees on the grounds that the award is contrary to existing law and unsupported by the evidence. Ordinarily, attorney fees are

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not recoverable either as an item of damages or of costs, absent express statutory authority for fixing and awarding them. *United Artists Records, Inc. v. Eastern Tape Corp.*, 18 N.C. App. 183, 187, 196 S.E.2d 598, 602, *cert. denied*, 283 N.C. 666, 197 S.E.2d 880 (1973). However,

[o]bligations to pay attorneys' fees upon any note, conditional sale contract or other evidence of indebtedness, in addition to the legal rate of interest or finance charges specified therein, shall be valid and enforceable, and collectible as part of such debt, if such note, contract or other evidence of indebtedness be collected by or through any attorney at law after maturity, subject to the following provisions:

. . . .

(2) If such note, conditional sale contract or other evidence of indebtedness provides for the payment of reasonable attorneys' fees by the debtor, without specifying any specific percentage, such provision shall be construed to mean fifteen percent (15%) of the "outstanding balance" owing on said note, contract or other evidence of indebtedness.

N.C. Gen. Stat. § 6-21.2 (2005), *See also Marine Ecology Sys., Inc. v. Spooners Creek Yacht Harbor, Inc.*, 40 N.C. App. 726, 730, 253 S.E.2d 613, 616 (1979) (agreements intended as security are evidence of indebtedness covered under the statute); *Stillwell Enter., Inc. v. Interstate Equip. Co.*, 300 N.C. 286, 266 S.E.2d 812 (1980) (the statute applies not only to notes and conditional sale contracts, but also to such other evidence of indebtedness as other writings evidencing an unsecured debt or any other such security agreement which evidences both a monetary obligation and a lease of specific goods). When the trial court determines an award of attorney fees is appropriate under the statute, the amount of attorney fees awarded lies within the discretion of the trial court. *Coastal Prod. Credit Ass'n v. Goodson Farms, Inc.*, 70 N.C. App. 221, 226, 319 S.E.2d 650, 655, *disc. rev. denied*, 312 N.C. 621, 323 S.E.2d 922 (1984).

Here, the trial court granted attorney fees in an amount less than fifteen percent of the \$165,000 award. Attorney testimony, affidavits, and billing statements supported the attorney fees award. Therefore, the trial court did not abuse its discretion, and properly awarded attorney fees pursuant to the Contract. Accordingly, we affirm the trial court's award of attorney fees in favor of Marchese.

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In conclusion, we hold that the trial court did not err in granting summary judgment in favor of Marchese, and ordering that Marchese is entitled to \$21,500 in attorney fees and \$1,780.24 in costs.

AFFIRMED.

Judges TYSON and ELMORE concur.

IN THE MATTER OF: T.B., JUVENILE

No. COA05-521

(Filed 18 July 2006)

Juveniles— probation violation—commitment not permissible disposition at Level 2

The trial court erred by committing a juvenile to a youth development center for an indefinite term on 1 June 2004 based on his probation violations in a 6 May 2004 order, because: (1) the pertinent question with respect to the probation violation was not how many points the juvenile had, but rather what dispositional alternatives were statutorily authorized for a Level 2 disposition; and (2) our case law and the pertinent statutes establish that commitment is not a statutorily permissible disposition at Level 2 under N.C.G.S. § 7B-2506(1) through (23) when it is addressed by N.C.G.S. § 7B-2506(24).

Appeal by juvenile from order entered 1 June 2004 by Judge Elaine M. O'Neal in Durham County District Court. Heard in the Court of Appeals 7 December 2005.

Attorney General Roy Cooper, by Special Deputy Attorney General Gail E. Dawson, for the State.

Appellate Defender Staples Hughes for defendant-appellant.

GEER, Judge.

T.B., a juvenile, appeals from a final disposition order committing him to the Department of Juvenile Justice for an indefinite term. We conclude that, under the circumstances of this case, the trial court was not statutorily authorized to order a disposition of commitment

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based on T.B.'s probation violations. Accordingly, we reverse and remand for further proceedings.

Facts

T.B. was first adjudicated delinquent on 13 June 2003 based upon his admission of allegations of misdemeanor possession of stolen goods and assault inflicting serious injury. The trial court gave T.B. a Level 1 disposition of one-year supervised probation. Among other conditions, T.B.'s probation required T.B. to "obey [his] parents at all times," "attend school regularly and maintain good behavior while there," "report to [his] court counselor," and "cooperate with therapy."

On 28 April 2004, the trial court held a hearing on a motion for review filed by the State, alleging that T.B. had violated his probation by not following the rules both at school and at home. T.B. admitted the allegations, and the court found him in violation of his probation. In an order filed 6 May 2004, the court elevated T.B.'s disposition to a Level 2 and extended his probation for one year from 28 April 2004. Among the conditions added to his probation were: (1) T.B. was "placed on a stayed commitment to training school"; (2) the court provided for 28 24-hour periods of secure custody to be used at the court counselor's discretion; (3) T.B. was to remain on intensive probation until released by the court counselor; and (4) T.B. was to have no unexcused absences, no tardies, and no school suspensions. The court also scheduled another hearing for 1 June 2004, at which the court counselor would submit a status report as to T.B.'s progress. In the 28 April 2004 hearing, the court warned T.B. that if he failed to comply with the terms of his probation, "we got a cell for you with your name on it."

At the 1 June 2004 hearing, T.B.'s case manager read a summary of T.B.'s behavior into evidence, which stated that "[T.B.] is currently out of control. [He] continues to break house rules by missing curfew, using alcohol and drugs and affiliate [sic] with gang members." The case manager also testified that "[T.B.] has become more rebellious against his father and mother." T.B.'s court counselor testified in a similar fashion and enumerated several of the ways in which T.B. was not complying with the 28 April 2004 order. The court entered an order on 1 June 2004 providing, without further findings of fact: "Based on the (MFR) violation the juvenile was found to be in violation. He was admitted to Department of Juvenile Justice. Level 3 commitment disposition (per Judge O'Neal)." This "finding" appears

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to refer to the “MFR” (or motion for review) that was adjudicated in April 2004 and the probation violations found at that time. The court thereafter ordered an indefinite term of commitment. T.B. timely appealed.

Discussion

T.B. argues on appeal that the trial court was without authority to enter a Level 3 juvenile disposition of commitment to a youth development center. “[C]hoosing between . . . appropriate dispositional levels is within the trial court’s discretion.” *In re Robinson*, 151 N.C. App. 733, 737, 567 S.E.2d 227, 229 (2002). Accordingly, when a district court selects a disposition that is authorized by statute, this Court will not overturn its choice unless it “ ‘is so arbitrary that it could not have been the result of a reasoned decision.’ ” *Id.* (quoting *Chicora County Club, Inc. v. Town of Erwin*, 128 N.C. App. 101, 109, 493 S.E.2d 797, 802 (1997), *disc. review denied*, 347 N.C. 670, 500 S.E.2d 84 (1998)). We agree with T.B.’s contention that the disposition imposed by the trial court in this case was not authorized by statute.

Following T.B.’s original delinquency adjudication, the trial court was authorized by N.C. Gen. Stat. § 7B-2508 (2005) to impose either a Level 1 or a Level 2 disposition based on his delinquency history level (“low”) and the class of his offense (“serious”). The court chose to impose a Level 1 disposition with one year of supervised probation.

When the trial court concluded on 28 April 2004 that T.B. had violated his probation, it was then governed by N.C. Gen. Stat. § 7B-2510 (2005). Under that statute, “[i]f the court, after notice and a hearing, finds by the greater weight of the evidence that the juvenile has violated the conditions of probation set by the court, the court may continue the original conditions of probation, modify the conditions of probation, or . . . order a new disposition at the next higher level.” N.C. Gen. Stat. § 7B-2510(e) (emphasis added). Accordingly, the trial court was statutorily authorized to order a new disposition at Level 2, the next higher level, in the 6 May 2004 order. Of the additional conditions imposed in the 6 May 2004 order, T.B. argues only that the trial court’s provision for “a stayed commitment to training school” was not authorized as a Level 2 disposition.

At the 28 April 2004 hearing, before ordering the stayed commitment, the trial court asked: “How many points has [T.B.] got at this point, including his probation, where we’re at now?” The State’s attorney told the court that she thought T.B. had four points, to which

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the court responded: “All right. He’s got enough for training school at this point. We got enough for a stayed commitment. I gotcha where I want you now.” Later, the trial court stated: “So I know you’re getting a stayed commitment today. You got enough points.” The trial court apparently misapprehended the role of “points.”¹

Under the Juvenile Code, “points” are used to determine a juvenile’s delinquency history level. *See* N.C. Gen. Stat. § 7B-2507 (2005) (“The delinquency history level for a delinquent juvenile is determined by calculating the sum of the points assigned to each of the juvenile’s prior adjudications and to the juvenile’s probation status . . .”). This history level is then used as part of the calculation for determining the juvenile’s disposition level after an adjudication of delinquency; the trial court must also consider the seriousness of the present offenses in order to arrive at the available dispositional alternatives. N.C. Gen. Stat. § 7B-2508(f).

The pertinent question with respect to the probation violation was not how many “points” T.B. had, but rather what dispositional alternatives were statutorily authorized for a Level 2 disposition. A trial court ordering a Level 2 disposition “may provide for . . . any of the dispositional alternatives contained in subdivisions (1) through (23) of G.S. 7B-2506 . . .” N.C. Gen. Stat. § 7B-2508(d). The State contends that N.C. Gen. Stat. § 7B-2506(19) (2005) authorized the stayed commitment. That subsection does permit a trial court to “[s]uspend imposition of a more severe, statutorily permissible disposition with the provision that the juvenile meet certain conditions agreed to by the juvenile and specified in the dispositional order.” The State does not, however, address the requirement that the more severe disposition be “statutorily permissible.”

Our case law and the pertinent statutes establish that commitment is not a statutorily permissible disposition at Level 2. Commitment is addressed by N.C. Gen. Stat. § 7B-2506(24) and, therefore, is not one of the statutorily permitted Level 2 dispositions authorized by N.C. Gen. Stat. § 7B-2508(d) (noting Level 2 dispositions are set forth in N.C. Gen. Stat. § 7B-2506(1) through (23)). This Court has, consistent with the statutory provisions, observed: “A Level 2 dispositional limit—or intermediate disposition—does not provide for commitment of the juvenile to training school as one of the ‘intermediate’ dispositional alternatives.” *In re Allison*, 143 N.C.

1. Since T.B. had no prior adjudications of delinquency, these “points” arose solely from the adjudication in this case and the probation violation.

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App. 586, 597, 547 S.E.2d 169, 176 (2001). *See also Robinson*, 151 N.C. App. at 737, 567 S.E.2d at 229 (“Level 2 is an intermediate disposition, primarily community based, while Level 3 carries a commitment to the Department.”); N.C. Gen. Stat. § 7B-2508(e) (providing that commitment is a Level 3 disposition).² Since commitment is not a permissible Level 2 disposition, the trial court could not, under N.C. Gen. Stat. § 7B-2506(19), impose a stayed commitment in its 6 May 2004 order.

Further, the validity of the indefinite commitment ordered on 1 June 2004 hinges on whether the 6 May 2004 stayed commitment was proper. The 1 June 2004 order, as well as the transcript of the 1 June 2004 hearing, indicate that the order of indefinite commitment resulted from the trial court vacating its earlier stay of the commitment imposed in the 6 May order. Indeed, in its 1 June 2004 order, the trial court did not make any findings of further probation violations or enter any other findings to support a Level 3 disposition of commitment. *See* N.C. Gen. Stat. § 7B-2512 (2005) (requiring that the dispositional order contain appropriate findings of fact to support its conclusions of law). Instead, the court stated only that it was ordering commitment based on the probation violations admitted in response to the motion for review adjudicated in April 2004.

Because commitment is not an “allowable [Level 2] disposition[,]” N.C. Gen. Stat. § 7B-2506(19), the trial court was not authorized to impose commitment, stayed or otherwise, in the 6 May 2004 order. Since the 6 May 2004 probation violation order was the sole basis specified for the 1 June 2004 indefinite commitment, we must reverse and remand for imposition of a statutorily authorized Level 2 disposition.

Reversed and remanded.

Judges HUNTER and McCULLOUGH concur.

2. We note that, with respect to Level 2 dispositions, the trial court “may impose a Level 3 disposition if the juvenile has previously received a Level 3 disposition in a prior juvenile action.” N.C. Gen. Stat. § 7B-2508(d). T.B., however, does not fall into this category.

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PENNSYLVANIA NATIONAL MUTUAL INSURANCE COMPANY, PLAINTIFF v. WILLIAM HOWELL STRICKLAND, COLUMBUS UTILITIES, INC., ENZOR AND STRICKLAND LEASE AND RENTAL, INC., MICHELLE JONES, AND NEW SOUTH INSURANCE COMPANY, DEFENDANTS

No. COA05-1134

(Filed 18 July 2006)

Insurance— business automobile policy—underinsured motorist coverage

The trial court erred by granting summary judgment in favor of defendant corporations based on its determination that a business automobile insurance policy issued by plaintiff insurance company to defendants provided underinsured motorist (UIM) coverage to defendant individual, and the trial court is directed to enter summary judgment in favor of plaintiff, because: (1) the policy provided coverage only for vehicles actually owned by either of the corporations, and the person seeking coverage under the UIM policy was not occupying a covered automobile which is a vehicle owned by the named insured at the time of the injury; (2) when viewed in context, the listing of the pertinent car on the schedule of covered autos in the policy does not create ambiguity when it does not contradict the clear and unambiguous language stating that numerical symbol 2 covered autos are only those vehicles owned by the named insured or acquired by the named insured after the policy began; and (3) defendant's payment of a premium to plaintiff did not create UIM coverage for the pertinent car, but instead the language of the insurance contract controls the court's interpretation of the intention of the parties to the contract.

Appeal by plaintiff from order entered 14 June 2005 by Judge W. Allen Cobb in New Hanover County Superior Court. Heard in the Court of Appeals 8 March 2006.

McDaniel & Anderson, L.L.P., by John M. Kirby, for plaintiff-appellant.

Marshall, Williams & Gorham, L.L.P., by John L. Coble, for defendants-appellees William Howell Strickland, Columbus Utilities, Inc., and Enzor and Strickland Lease and Rental, Inc.

Anderson, Johnson, Lawrence, Butler & Bock, by A. David Bock, for defendants-appellees Michelle Jones and New South Insurance Company.

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ELMORE, Judge.

Pennsylvania National Mutual Insurance Company (plaintiff) appeals from an order of the trial court granting summary judgment to defendants. In that order, the court determined the insurance policy issued by plaintiff to the defendant corporations provided uninsured motorist (UM) and underinsured motorist (UIM) coverage to defendant William Howell Strickland (Strickland).

Plaintiff issued a Business Automobile Policy (policy) to Columbus Utilities, Inc. and Enzor and Strickland Lease and Rental, Inc. Strickland is the majority or part owner of the two named insured businesses; Strickland also operates Enzor and Strickland Lease and Rental, Inc. The "Named Insured" is identified in the policy as "Columbus Utilities Inc. & Enzor & Strickland Lease Inc." The policy provides UIM coverage for an "insured," which includes any person occupying a "covered auto." For both UM and UIM coverage, the number "2" is indicated in the column for "Covered Autos." On the page containing descriptions of covered auto symbols, the number "2" refers to "owned autos" only. Owned autos are "Only those autos you own . . . This includes those 'autos' you acquire ownership of after the policy begins." The policy defines "you" as the named insured.

Item Three of the policy contains a section entitled "Schedule Of Covered Autos You Own." This section lists several vehicles, including a 1988 Lincoln Town Car. Prior to purchasing the policy, Strickland consulted an insurance agent and discussed the possibility of including all of his vehicles on the same policy. The Lincoln Town Car was not registered in the name of either of the corporations. However, Strickland indicated to the insurance agent, John Smith, that he would transfer ownership of the Lincoln to Enzor & Strickland Lease and Rental, Inc.

On 6 November 1999 Strickland was driving the Lincoln home from dinner when a vehicle occupied by Michelle Jones (Jones) struck the Lincoln from behind. On 16 September 2002 Strickland filed an action against Jones. On 17 January 2003 Strickland's counsel informed plaintiff of the accident and the fact that New South Insurance Company, the liability carrier for Jones, was tendering its limits. On 28 January 2003 plaintiff requested that Strickland's counsel provide it with Strickland's medical records. On or about 15 September 2003, the tort action brought by Strickland against Jones

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was stayed pending a resolution of the coverage issues in a separate declaratory judgment action.

Plaintiff filed the instant action on 21 February 2005. Defendants filed an answer on 20 April 2005. In May of 2005, both plaintiff and defendants filed a motion for summary judgment. On 14 June 2005 the court entered an order of summary judgment. The court declared that the policy provided \$1,000,000.00 in UIM coverage to Strickland and that he was entitled to arbitrate his claim. Plaintiff filed notice of appeal to this Court on 11 July 2005.

The issue on appeal is whether the policy provides UIM coverage to Strickland. Plaintiff contends that, because the policy covers only the named insured and any persons occupying a "covered auto," the policy does not provide coverage for Strickland. Specifically, plaintiff asserts, Strickland is not the named insured and the Lincoln he was occupying was not a "covered auto." Defendants respond that because the Lincoln was listed under the schedule of covered autos and Strickland paid a premium for it, the evidence establishes that the parties intended that the Lincoln Town Car be afforded UIM coverage.

In support of its contention that the policy provides coverage only for vehicles actually owned by either of the corporations, plaintiff cites to *Sproles v. Greene*, 329 N.C. 603, 407 S.E.2d 497 (1991). In that case, a policy containing UIM coverage was issued by Aetna Casualty and Surety Company to the plaintiffs' employer, Lakeview Nursery and Garden Center, Inc. The policy indicated that UIM coverage was available only for number "2" vehicles, *i.e.*, vehicles owned by the named insured. *Id.* at 610, 407 S.E.2d at 501. The plaintiffs were occupying a 1983 GMC van when they were involved in a collision with another vehicle. The Court held that the plaintiffs were not covered by their employer's UIM coverage:

[T]he only automobiles covered under the UIM coverage in Lakeview's policy with Aetna are those automobiles owned by the named insured which in this case is the corporation Lakeview. When plaintiffs were injured, they were riding in a van which was owned by Avery County Recapping Company, Inc., and not by their employer Lakeview. Since plaintiffs are class two insureds and since class two insureds are only afforded UIM coverage under the terms of the policy when they are injured while occupying a "vehicle to which the policy applies," we conclude

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that . . . plaintiffs are not covered by Lakeview's UIM coverage under its Aetna policy.

Id.

Here, as in *Sproles*, the person(s) seeking coverage under the UIM policy was not occupying a covered auto, that is, a vehicle owned by the named insured, at the time of the injury. The Lincoln was not owned by either Columbus Utilities, Inc. or Enzor and Strickland Lease and Rental, Inc. Had the Lincoln been owned by one of the corporations at the time of the collision, then Strickland would have been occupying a covered auto under the policy. As defendants do not dispute that the legal title to the Lincoln was registered to Strickland or one of his family members, there is no factual dispute that the Lincoln was not owned by the named insured when Strickland was injured. *See* N.C. Gen. Stat. § 20-4.01(26) (2005) ("owner" of a vehicle is the person holding the legal title to the vehicle); *Jenkins v. Aetna Casualty and Surety Co.*, 324 N.C. 394, 398-99, 378 S.E.2d 773, 775-76 (1989).

Defendants argue nonetheless that the listing of the Lincoln Town Car on the schedule of "Covered Autos" creates an ambiguity regarding coverage of the Lincoln, and that ambiguities should be construed against the insurer. We must determine, then, whether the listing of the Lincoln in the policy created an ambiguity. Defendants are correct that an ambiguity in an insurance contract is construed against the insurer. *See Trust Co. v. Insurance Co.*, 276 N.C. 348, 354, 172 S.E.2d 518, 522 (1970). However, a mere disagreement between the parties over the language of the insurance contract does not create an ambiguity. Rather, "[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." *Id.*; *see also Watlington v. N.C. Farm Bureau Mut. Ins. Co.*, 116 N.C. App. 110, 112-13, 446 S.E.2d 614, 616 (1994). Also, each provision of an insurance contract must be interpreted in view of the whole contract and not in isolation. *See DeMent v. Nationwide Mut. Ins. Co.*, 142 N.C. App. 598, 602, 544 S.E.2d 797, 800 (2001) ("[T]he courts should resist piecemeal constructions and should, instead, examine each provision in the context of the policy as a whole.") (citation omitted).

When viewed in context, the listing of the Lincoln on the schedule of covered autos in Item Three of the policy does not create an ambiguity. The numerical symbol for vehicles with UIM coverage is

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"2." A vehicle is a symbol "2" vehicle if it is owned by the named insured. Since the Lincoln Town Car was not owned by the named insured, it is not a covered auto for UIM purposes. Item Three of the policy contains only a general list of vehicles under the auto schedule. Item Three does not define "covered autos" or "owned autos." Instead, these terms are specifically defined in the policy in a different section. Owned autos are "Only those autos you [named insured] own . . . This includes those 'autos' you acquire ownership of after the policy begins." A vehicle that is not owned by the named insured, then, is not provided UIM coverage. After reviewing the entire insurance contract, the listing of the Lincoln as a covered auto does not contradict the clear and unambiguous language stating that numerical symbol "2" covered autos are only those vehicles owned by the named insured or acquired by the named insured after the policy began. Accordingly, we reject defendants' assertion that the policy must be interpreted as providing coverage to any person occupying the Lincoln.

Plaintiff next contends that Strickland's payment of a premium to plaintiff did not create UIM coverage for the Lincoln. We agree with plaintiff that payment of a premium is not determinative of coverage; rather, the language of the insurance contract controls the court's interpretation of the intention of the parties to the contract, *see Duke v. Insurance Co.*, 286 N.C. 244, 247, 210 S.E.2d 187, 189 (1974); *Rouse v. Williams Realty Bldg. Co.*, 143 N.C. App. 67, 69-70, 544 S.E.2d 609, 612, *aff'd per curiam*, 354 N.C. 357, 554 S.E.2d 337 (2001). As stated *supra*, the insurance contract viewed as a whole provided UIM coverage only to vehicles owned by the corporations.

As we determine that the plain language of the policy did not provide UIM coverage to Strickland, we need not address plaintiff's additional arguments concerning alleged misrepresentation by the insured and failure to cooperate with the provisions of the policy. We reverse the judgment and order of the trial court declaring, *inter alia*, that the UIM coverage under the policy is applicable to the claims presented by Strickland and that Strickland is entitled to arbitration. Accordingly, entry of summary judgment in favor of defendants is reversed, and the trial court is directed to enter summary judgment in favor of plaintiff.

Reversed and remanded.

Judges STEELMAN and JACKSON concur.

WATSON v. MILLERS CREEK LUMBER CO.

[178 N.C. App. 552 (2006)]

GLENN D. WATSON AND WIFE, KATHY WATSON, PLAINTIFFS v. MILLERS CREEK LUMBER CO., INC. AND JOHN S. COUNTS, DEFENDANTS

No. COA05-1537

(Filed 18 July 2006)

1. Appeal and Error— appealability—interlocutory order—summary judgment—substantial right—title to disputed property

Although plaintiff prospective purchasers' appeal from the denial of their motion for summary judgment and grant of summary judgment in favor of defendant purchaser is an appeal from an interlocutory order based on the fact that defendant vendor elected not to participate in this appeal and the trial court did not certify the appeal under N.C.G.S. § 1A-1, Rule 54(b), interlocutory orders concerning title may be immediately appealed as vital preliminary issues involving substantial rights adversely affected. Also, defendant vendor stipulated that title to the disputed property rests in either plaintiffs or defendant purchaser and its liability, if any, cannot be determined until a final decision is entered on appeal.

2. Real Property— breach of installment land contract—superior title to disputed property

The trial court erred in a breach of contract case by denying plaintiffs' motion for summary judgment and by granting summary judgment in favor of defendant purchaser regarding superior title to disputed property, because: (1) the installment land contract entered into by defendant vendor and plaintiffs qualifies for protection from any subsequent purchaser for value under N.C.G.S. § 47-18; (2) plaintiffs' contract with defendant vendor entitled them to a good and sufficient deed effective upon payment in full of the purchase price; (3) defendant vendor admits after receiving the final payment from plaintiffs that the deed was never delivered to plaintiffs; (4) all parties stipulated that the contract was recorded in the county register of deeds on 8 November 1991, and also stipulated that defendant vendor conveyed the disputed property to defendant purchaser by deed eleven years later with defendant purchaser recording the deed on 3 January 2003; (5) plaintiffs possessed superior rights to the land since their contract was recorded prior to recordation by defendant purchaser; and (6) defendant purchaser is deemed

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under N.C.G.S. § 1A-1, Rule 36, by virtue of his failure to respond to plaintiffs' request for admissions, to have admitted he not only had both actual and constructive knowledge of plaintiffs' recorded bond for title, but also took title to the land subject to plaintiffs' recorded bond for title.

Appeal by plaintiffs from judgment entered 24 August 2005 by Judge Jesse B. Caldwell in Caldwell County Superior Court. Heard in the Court of Appeals 7 June 2006.

Wilson, Lackey & Rohr, P.C. by Timothy J. Rohr, for plaintiffs-appellants.

Joseph C. Delk, III, and McElwee Firm, PLLC, by John M. Logsdon, for defendants-appellees.

CALABRIA, Judge.

Glenn D. Watson and his wife, Kathy Watson ("plaintiffs"), appeal the denial of their motion for summary judgment and the grant of summary judgment to John S. Counts ("defendant Counts") regarding superior title to disputed property. We reverse.

On 8 November 1991, plaintiffs agreed to purchase from Millers Creek Lumber Co., Inc. ("defendant Millers Creek") a five-acre tract of land in Caldwell County ("the land"). Plaintiffs and defendant Millers Creek entered into an installment land contract ("the contract"). According to the terms of the contract, plaintiffs agreed to pay the balance of the purchase price, \$6,000, plus accumulated interest at the rate of twelve percent (12%), in 36 consecutive monthly installments of \$199.29 over a three-year period. Upon payment in full of the purchase price, defendant Millers Creek agreed "to make, execute and deliver unto [plaintiffs] . . . a good and sufficient deed[.]" On 8 November 1991, the contract was recorded in Book 1050, page 728, of the Caldwell County Register of Deeds entitled "Bond for Title." Although plaintiffs timely paid all installments, defendant Millers Creek failed to deliver the deed to plaintiffs. On 3 January 2003, defendant Millers Creek conveyed the land to defendant Counts who recorded the deed in Book 1426, page 669, of the Caldwell County Register of Deeds.

On 26 May 2004, plaintiffs filed a complaint alleging, *inter alia*, resulting trust, constructive trust, and breach of contract. Plaintiffs

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twice filed notices of lis pendens. On 29 June 2004, defendant Millers Creek filed an answer asserting several affirmative defenses. On 11 October 2004, defendant Counts filed his answer and cross claim. On 29 April 2005, plaintiffs filed their first set of requests for admissions pursuant to N.C. Gen. Stat. § 1A-1, Rule 36, and mailed them to the attorney representing defendant Counts. Defendant Counts never responded to this discovery document but on 2 August 2005, he filed a motion for summary judgment. Plaintiffs filed their motion for summary judgment ten days later. On 24 August 2005, the trial court denied plaintiffs' motion for summary judgment, granted defendant Counts' motion for summary judgment, and dismissed the action against defendant Counts. Plaintiffs appeal.

I. Summary Judgment:

Plaintiffs argue the trial court erred in granting defendant Counts' motion for summary judgment while simultaneously denying their motion. Plaintiffs contend the contract they entered with defendant Millers Creek qualifies for protection from any subsequent purchaser for value pursuant to N.C. Gen. Stat. § 47-18. We agree.

[1] At the outset, we note this appeal is interlocutory since defendant Millers Creek elected not to participate in this appeal. " '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.' " *McCutchen v. McCutchen*, 360 N.C. 280, 282, 624 S.E.2d 620, 622 (2006) (emphasis added) (quoting *Veazey v. Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950)). "Any order resolving fewer than all of the claims between the parties is interlocutory." *Id.* 624 S.E.2d at 622-23 (citation omitted). 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." *Boyd v. Robeson Cty.*, 169 N.C. App. 460, 464, 621 S.E.2d 1,4, *disc. review denied*, 359 N.C. 629, 615 S.E.2d 866 (2005). In the instant case, the trial court did not certify the appeal pursuant to Rule 54(b). However, "interlocutory orders concerning title . . . must be immediately appealed as vital preliminary issues involving substantial rights adversely affected." *N.C. Dep't of Transp. v. Stagecoach Vill.*, 360 N.C. 46, 48, 619 S.E.2d 495, 496 (2005) (citation and internal quotation marks omitted). Furthermore, defendant Millers Creek stipulated that title to the disputed property rests in either plaintiffs or defendant Counts and their liability, if any, "cannot be determined

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until a final decision is entered on appeal.” Consequently, this appeal is properly before us.

“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.’” *Harrison v. City of Sanford*, 177 N.C. App. 116, 118, 627 S.E.2d 672, 675 (2006) (quoting N.C. Gen. Stat. § 1A-1, Rule 56(c) (2005)). “By both parties filing motions for summary judgment, the parties agree there are no genuine issues of fact.” *Sharpe v. Sharpe*, 150 N.C. App. 421, 423, 563 S.E.2d 285, 287 (2002). “On appeal, we review the granting of a summary judgment motion *de novo*. *Ripellino v. N.C. Sch. Bds. Ass’n, Inc.*, 176 N.C. App. 443, 446, 627 S.E.2d 225, 228 (2006).

[2] The Connor Act, N.C. Gen. Stat. § 47-18 (2005), states, in pertinent part, “[n]o . . . contract to convey . . . shall be valid to pass any property interest as against . . . purchasers for a valuable consideration . . . but from the time of registration thereof in the county where the land lies[.]” “[The Connor Act] was enacted for the purpose of providing a plan and a method by which an intending purchaser . . . can safely determine just what kind of a title he is in fact obtaining.” *Chandler v. Cameron*, 229 N.C. 62, 66, 47 S.E.2d 528, 530 (1948) (internal quotation marks and citation omitted). Consequently, “the act requires recordation of all . . . contracts to convey . . . affecting the title to real property.” *Id.* 47 S.E.2d at 531. Importantly, our Supreme Court has determined “[o]ne who has a contractual right to compel another to convey is, upon the recordation of the contract, accorded the same protection as a grantee in a recorded deed.” *Quinn v. Thigpen*, 266 N.C. 720, 723, 147 S.E.2d 191, 193 (1966) (emphasis added).

The case *sub judice* is similar to *Clark v. Butts*, 240 N.C. 709, 83 S.E.2d 885 (1954). In *Clark*, plaintiff Annie Clark (“Clark”) and defendant Jonas Askew (“Askew”) signed a contract whereby Clark agreed to care for Askew, whose health was in decline, and in return, Askew agreed to grant Clark a life estate in his house and lot. *Clark*, 240 N.C. at 710, 83 S.E.2d at 886. Clark registered the contract in the Camden County Register of Deeds on 16 June 1942. *Id.* 240 N.C. at 711, 83 S.E.2d at 887. Three years later, Askew conveyed his house and lot to Johnnie Butts (“Butts”). *Id.* Butts recorded his deed in the Camden County Register of Deeds on 19 May 1945. *Id.* Clark filed a

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complaint against Butts asking the trial court to declare her the owner of Askew's house and lot. *Id.* The trial court declared Clark the owner and our Supreme Court agreed stating "the contract . . . was registered nearly three years before the deed from Askew to [Butts] was executed. The registration of [the contract] was constructive notice to [Butts]." *Id.* 240 N.C. at 715, 83 S.E.2d at 889. Further, our Supreme Court concluded "whatever rights [Butts] acquired by the deed from Askew . . . were subservient to the rights of [Clark] under her prior registered contract[.]" *Id.*

In the instant case, plaintiffs' contract with defendant Millers Creek entitled them to "a good and sufficient deed" effective "[u]pon . . . payment in full of said purchase price." It is uncontested that plaintiffs paid defendant Millers Creek the purchase price in full in November 1994. Further, plaintiffs contend and defendant Millers Creek admits after receiving the final payment the deed was never delivered to plaintiffs. All parties stipulated that the contract was recorded in the Caldwell County Register of Deeds on 8 November 1991. The parties also stipulated that defendant Millers Creek conveyed the disputed property to defendant Counts by deed eleven years later and defendant Counts recorded the deed in the Caldwell County Register of Deeds on 3 January 2003. Pursuant to *Clark, supra*, plaintiffs possessed superior rights to the land since their contract was recorded prior to recordation by defendant Counts.

Furthermore, pursuant to Rule 36 of the North Carolina Rules of Civil Procedure, defendant Counts is deemed, by virtue of his failure to respond to plaintiffs' request for admissions, to have admitted he not only had both actual and constructive knowledge of plaintiffs' recorded "Bond for Title," but also took title to the land subject to plaintiffs' recorded "Bond for Title." Consequently, plaintiffs possess superior title to the land. Therefore, the trial court's grant of summary judgment to defendant Counts is reversed.

Reversed.

Judges HUNTER and BRYANT concur.

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STATE OF NORTH CAROLINA v. DAVID CHRISTOPHER GOODSON

No. COA05-1255

(Filed 18 July 2006)

Crimes, Other— safecracking—locked desk not a safe

A “safe” or “vault” must be something more substantial than a common locked desk compartment for a conviction under the safecracking statute, N.C.G.S. § 14-89.1. Defendant's motion to dismiss should have been granted.

Appeal by defendant from judgment entered 5 May 2005 by Judge Kenneth F. Crow in Carteret County Superior Court. Heard in the Court of Appeals 17 May 2006.

Attorney General Roy Cooper, by Assistant Attorney General LaShawn L. Strange, for the State.

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

ELMORE, Judge.

David Goodson's (defendant) appeal from his conviction for safecracking and being an habitual felon raises the issue of whether a locked desk is a safe within the meaning of N.C. Gen. Stat. § 14-89.1. Since we cannot agree with the trial court that a locked desk compartment falls within the legislative intent for specifically punishing the act of attempting to break into a safe, we must reverse.

Complainants, Kim Purser and Charlene Lassiter, are co-owners of the Island Cove Convenience Store (the Store) in Atlantic Beach, North Carolina. At about 2:40 p.m. on 27 May 2004, Ms. Purser left the front of the store to go back to the office area. When she came in the office she saw defendant on his knees in front of a desk, attempting to pry open a side compartment of the desk with a tool. She yelled at defendant; he ran out a back door of the Store and got into a black Isuzu Trooper. Police later apprehended defendant and Ms. Purser identified him as the man she saw attempting to break into the desk.

Ms. Purser and Ms. Lassiter testified that the desk defendant was attempting to break into was one similar to those one would purchase at an office supply store or department store and assemble yourself. They testified that it was made of particle board and had a locking side compartment door. Inside that locked door is where the Store

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kept a lockbox with money, the company checkbook, and the Store's computer. Several police officers testified that a screwdriver was recovered from defendant's car and the marks on the desk matched that which the screwdriver would make.

Defendant was tried for safecracking, in violation of N.C. Gen. Stat. § 14-89.1, which makes it a Class I felony to "unlawfully open[], enter[], or attempt[] to open or enter a safe or vault . . . [b]y the use of explosives, drills, or tools . . ." N.C. Gen. Stat. § 14-89.1(a)(1) (2005). At the close of the State's case, defendant made a motion to dismiss the charges, arguing that the State had not presented substantial evidence he attempted to break into a "safe" or "vault."

When considering a motion to dismiss for insufficient evidence, the trial court must determine whether there is substantial evidence of each element of the offense and that the defendant committed the offense. *State v. Irwin*, 304 N.C. 93, 97, 282 S.E.2d 439, 443 (1981). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 150 N.C. App. 138, 140, 564 S.E.2d 237, 239 (quoting *State v. Vause*, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991) (citations omitted)), *cert. denied*, 355 N.C. 756, 566 S.E.2d 87 (2002). All evidence is to be considered in the light most favorable to the State and all reasonable inferences are to be drawn therefrom. *Irwin*, 304 N.C. at 98, 282 S.E.2d at 443. Where there is a reasonable inference of a defendant's guilt from the evidence, the jury must determine whether that evidence "convincing them beyond a reasonable doubt of defendant's guilt." *Id.*

The trial court entered findings in the record to support its determination that the State had presented substantial evidence the desk compartment was a safe or vault. In particular, the court found that: the storage area of the desk had a lock on it that was secured by a key; the lock was consistent with the type of lock that was meant and designed to keep people from getting into the storage area; the storage area was designed to keep items safe and secure; inside the storage area was a cash box and other items of value to the store owner; and use of the storage area was as a vault. Yet, we are not convinced that the legislature intended "safe" or "vault" to include a desk compartment such as complainants'.

When interpreting statutes, our principal goal is "to effectuate the purpose of the legislature in enacting the statute." *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 574, 573 S.E.2d 118, 121 (2002).

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As with any other statute, the legislative intent controls the interpretation of a criminal statute. . . . We generally construe criminal statutes against the State. . . . However, “[t]he canon in favor of strict construction [of criminal statutes] is not an inexorable command to override common sense and evident statutory purpose. . . . Nor does it demand that a statute be given the “narrowest meaning”; it is satisfied if the words are given their fair meaning in accord with the manifest intent of the lawmakers.’

State v. Jones, 358 N.C. 473, 477-78, 598 S.E.2d 125, 128 (2004) (internal citations omitted). But civil or criminal, “[w]hen the language of a statute is clear and unambiguous, there is no room for judicial construction, and the courts must give it its plain and definite meaning.” *Lemons v. Old Hickory Council*, 322 N.C. 271, 276, 367 S.E.2d 655, 658 (1988).

The plain meaning of the word “safe” is “[a] metal container usually having a lock, used for storing valuables[,]” or more broadly, “[a] repository for protected stored items.” The Am. Heritage Coll. Dictionary 1199 (3rd ed. 1997). Also, “vault” means “[a] room or compartment, often built of steel, for the safekeeping of valuables.” *Id.* at 1494. Thus, the use of these words suggests the General Assembly intended to criminalize only the attempted entry (in this case) of a solid, strong compartment with a locking mechanism or other means of protection that one stores valuables in for safekeeping. While the broadest definition of safe may include a simple locked desk compartment used as “a repository for protected items,” in the context of a criminal statute, we are compelled to prohibit the word from stretching to its maximum breadth. *See State v. Thomas*, 292 N.C. 251, 232 S.E.2d 411 (1977) (prior version of safecracking statute criminally actionable only where a safe is opened by use of tools or explosives and without force defendant’s action is not punishable); *see also* 1977 N.C. Sess. Laws ch. 1106, § 1 (an act to clarify statute to make it apply when the safe or vault is “unlawfully opened without the use of force.”). Otherwise, any desk drawer, or possibly any suitcase, bearing a lock would constitute a safe—and hence a Class I felony for attempting to break into it. A “safe” or “vault,” while not necessarily having to be that associated with a bank or those stylized in old western movies, must be something more substantial than a common locked desk compartment.

Other jurisdictions that have reviewed this issue are in agreement. In *People v. DeVriese*, 258 N.W.2d 93, 94-95 (Mich. Ct. App.

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1977), the court remanded a conviction for safecracking where defendant broke into a converted walk-in refrigerator. The court held that the structure was not a “safe, vault, or other depository” since it was not shown to be “substantially impenetrable.” *Id.* Also, while applying a similar safecracking statute to that of North Carolina’s, the court in *State v. Gover*, 587 N.E.2d 321 (Ohio Ct. App. 1990), determined that when a vault was used as a private dining area in a restaurant and a safe as a display case for cosmetic jewelry, the defendant could not be guilty of safecracking. *Id.* at 323. In reversing a conviction for safecracking in which a defendant broke into a vending machine, the Supreme Court of Ohio applied nothing more than common logic to the words “safe” and “vault.”

Those words, considered together, strongly suggest iron or steel containers ordinarily found in banking institutions or in business establishments, which are used for the storage of money, jewelry, other valuables and important papers and documents. One picture a safe as an iron or steel depository for the safekeeping of assorted valuables and a vault as a large arched or square structure located in a protected area such as an underground basement and built of stone, bricks, concrete or steel, where a variety of valuables are usually stored. One dictionary definition of a vault is ‘a chamber used as a safe.’

State v. Aspell, 225 N.E.2d 226, 228 (Ohio 1967).

In sum, just because complainants referred to the desk compartment as a safe or used it to store their money does not constitute substantial evidence that it is legally cognizable as such. Defendant’s motion to dismiss should have been granted. And since this felony subjected defendant to being an habitual felon, the judgment entered upon that indictment must be vacated. Further, due to our disposition of this case, defendant’s petition for writ of certiorari regarding his sentencing factors is academic; and as such, we hereby dismiss it as moot.

Reversed in part; vacated in part (04 CRS 04573); dismissed in part.

Judges MCGEE and STEELMAN concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

Filed 18 July 2006

AKINS v. MISSION ST. JOSEPH'S HEALTH SYS., INC. No. 05-1308	Buncombe (05CVS1632)	Appeal dismissed
ASHER v. WHITTAKER No. 05-1572	Harnett (04CVS1436)	Dismissed as interlocutory
BOLES v. URGENT CARE PHARM., INC. No. 05-540	Moore (03CVS1332) (03CVS1341)	Appeals dismissed
CAROLINA BLDG. SERVS. WINDOWS & DOORS, INC. v. BOARDWALK, LLC No. 05-1030	Iredell (02CVS989)	Affirmed
CHAPEL HILL TITLE & ABSTRACT CO. v. TOWN OF CHAPEL HILL No. 05-1118	Orange (04CVS1850)	Reversed and remanded
DILLAHUNT v. CLARK No. 05-1494	Craven (03CVS1229)	Dismissed
ETHERIDGE v. ELIZABETHAN GARDENS, INC. No. 05-1374	Dare (04CVS460)	Affirmed
GOODSON v. MAFCO HOLDINGS, INC. No. 05-1331	Ind. Comm. (I.C. #177963)	Affirmed in Part; Reversed and Re- manded in Part
GORE v. MYRTLE/MUELLER No. 05-988	Ind. Comm. (I.C. #43566)	Reversed
HENDERSON v. APAC- ATLANTIC, INC. No. 05-1141	Iredell (04CVS1262)	Affirmed
IN RE A.M.P. & Y.B.G. No. 06-34	Wake (05J96)	Affirmed
IN RE J.M.P. No. 05-1079	Greene (03JT43)	Reversed and remanded
IN RE K.A. No. 05-1417	Vance (04J158)	Affirmed
IN RE L.E.J. No. 05-1392	Wilkes (03J122)	Affirmed

IN RE L.O. No. 05-1495	Wake (05J336)	Vacated and remanded
IN RE T.D.M. No. 05-1098	Wayne (04J123)	Affirmed
LUCAS v. LL BLDG. PRODS. No. 05-1431	Ind. Comm. (I.C. #235306)	Affirmed
NOVO NORDISK PHARM. INDUS., INC. v. PROGRESS ENERGY, INC. No. 05-737	Johnston (04CVS2298)	Dismissed
PATEL v. STANLEY WORKS CUSTOMER SUPPORT No. 05-462	Ind. Comm. (I.C. #876636)	Affirmed
PLAYER v. PLAYER No. 05-1208	Mecklenburg (03CVD7294)	Affirmed
POINDEXTER v. BOARDWALK, LLC No. 05-1029	Iredell (02CVS1563)	Affirmed
6214 S. BLVD. HOLDINGS, LLC v. CITY OF CHARLOTTE No. 05-1477	Mecklenburg (04CVS10310)	Affirmed
STATE v. ARCHIE No. 05-1444	Forsyth (04CRS62573) (04CRS62574) (05CRS20112)	No error
STATE v. BANKS No. 05-1632	New Hanover (04CRS67046) (04CRS67047)	Affirmed
STATE v. BANNER No. 05-190	Forsyth (02CRS38883) (02CRS38884)	No error
STATE v. CARIGNAN No. 05-825	Dare (04CRS50220)	No error
STATE v. CARMICHAEL No. 05-1583	Wilson (04CRS51181)	No error
STATE v. CHRISTIAN No. 05-958	Cumberland (03CRS71149)	No error
STATE v. GUSTUS No. 05-1525	Pender (05CRS2923) (05CRS2924)	Affirmed

STATE v. HALL No. 05-1097	Columbus (04CRS1849)	No error
STATE v. HINSON No. 05-1045	Guilford (04CRS91128) (04CRS91131)	No error
STATE v. JOHNSON No. 05-1421	Wake (04CRS80357) (04CRS80358) (05CRS1392) (05CRS1393) (05CRS1394) (05CRS1395) (05CRS1396) (05CRS1397) (05CRS1398)	No error
STATE v. LAND No. 05-1474	Greene (04CRS50173)	No error
STATE v. LOWERY No. 05-1150	Montgomery (03CRS51253) (04CRS2571)	No error
STATE v. PEARSON No. 05-1306	Harnett (03CRS56697)	No error
STATE v. ROWE No. 06-231	Henderson (05CRS728) (05CRS51617) (05CRS51633) (05CRS51630)	No error in part, dis- missed without prej- udice in part
STATE v. SCOTT No. 05-1639	Caldwell (05CRS5179)	Reversed
STATE v. SELLERS No. 05-1498	Guilford (04CRS75446) (04CRS75448)	No error
STATE v. TROXLER No. 05-1388	Guilford (04CRS72596) (04CRS72601)	No error
STATE v. WHALEY No. 05-948	Polk (05CRS205)	No error
STATE v. WILSON No. 05-729	Forsyth (03CRS57336) (03CRS57337) (03CRS57338) (03CRS10718)	No error in part; remanded in part

STATE v. WITHAM No. 05-1350	Wake (04CRS26009) (04CRS25864)	No error in part; va- cated and remanded in part
STATE v. WOMACK No. 06-196	Lee (04CRS54061)	No error
SWANEY v. FIVE STAR FOOD SERV., INC. No. 05-1106	Ind. Comm. (I.C. #215326)	Affirmed

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STATE OF NORTH CAROLINA v. MATTHEW CHARLES GRANT

No. COA05-1295

(Filed 1 August 2006)

1. Appeal and Error— relevancy—standard of review

A trial court's rulings on relevancy are not discretionary and are not reviewed on appeal for abuse of discretion, but they are given great deference.

2. Appeal and Error— preservation of issues—motion in limine—renewal of objection

Defendant's contention that the trial court erred by denying his motion in limine was reviewed on appeal, despite his failure to renew his objections at trial. N.C.G.S. § 8C-1, Rule 103 was then presumed constitutional, and the trial court assured defendant that he did not need to renew his objections.

3. Evidence— other crimes or bad acts—possession of assault rifle

Testimony about defendant's possession of a modified assault rifle was relevant in a prosecution for a murder committed with a shotgun. The evidence explained why defendant was in the field where the shooting occurred, why defendant used a shotgun instead of the rifle, and defendant's motive for the shooting. Disposal of the assault rifle showed a consciousness of guilt, and testimony about modifications to the rifle corroborated other testimony.

4. Evidence— other crimes or bad acts—possession of pistol

A pistol that was not connected in any way to a shooting with a shotgun was not relevant in the subsequent first-degree murder prosecution and should not have been admitted. However, there was no prejudice because there was overwhelming evidence of defendant's guilt.

5. Evidence— other crimes or bad acts—drug dealing and robbing drug dealers—relevancy to premeditation and deliberation

Evidence that defendant robbed drug dealers and hit a drug dealer during a robbery was relevant in a first-degree murder prosecution to refute defendant's contention that the shooting was without premeditation and deliberation. Evidence that de-

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defendant bought and used drugs was relevant to explain his robberies of drug dealers.

6. Evidence— other crimes or bad acts—inducing another to commit fraud—purchases of weapons—relevancy to story of crime

Evidence that a first-degree murder defendant induced another to fraudulently fill out a pawn shop form so that he could buy a gun was relevant to how defendant acquired the murder weapon. Evidence that defendant illegally purchased another weapon was relevant to how defendant acquired that weapon, the possession of which was the motive for the shooting.

7. Evidence— other crimes or bad acts—missing curfew—relevancy

Evidence that a first-degree murder defendant had missed his probation curfew was part of the chain of circumstances leading to the shooting.

8. Evidence— defendant's statements to clinical social worker—admission for rebuttal

Testimony that a first-degree murder defendant had told a social worker (who did not fully believe him) that he had been involved in drive-by shootings was relevant to show that he could be manipulative. The testimony was elicited to rebut the social worker's testimony that defendant was impulsive.

9. Evidence— uncharged crimes and bad acts—not unduly prejudicial

The probative value of uncharged crimes and bad acts was not substantially outweighed by the danger of unfair prejudice in a first-degree murder prosecution where premeditation and deliberation were contested issues at trial.

10. Evidence— defendant's conduct on probation—hearsay—door opened by defendant

Defendant opened the door in a first-degree murder prosecution to hearsay testimony about his conduct during probation. The trial court did not err by admitting the evidence.

11. Homicide— first-degree murder—short-form indictment—constitutionality

The short-form indictment for first-degree murder is constitutionality.

Judge STEELMAN concurring in the result.

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Appeal by defendant from judgment dated 1 December 2004 by Judge Donald W. Stephens in Superior Court, Wake County. Heard in the Court of Appeals 11 May 2006.

Attorney General Roy Cooper, by Special Deputy Attorney General Robert C. Montgomery and Assistant Attorney General Amy C. Kunstling, for the State.

Nora Henry Hargrove for defendant-appellant.

McGEE, Judge.

Matthew Charles Grant (defendant) was convicted of first degree murder on 17 November 2004. After a sentencing hearing, the trial court sentenced defendant to life imprisonment without parole on 1 December 2004. Defendant appeals.

The State's evidence at trial tended to show the following: Vanorance McQueen (McQueen) testified that defendant gave him \$120.00 on 29 November 2003 and asked McQueen to purchase a firearm for him. McQueen testified that defendant wanted the gun to commit robberies. McQueen filled out the forms necessary for the purchase of a firearm but he lied on the forms by stating that he was purchasing the firearm for himself. McQueen further testified that he purchased a single shot twelve gauge shotgun (the shotgun) from a pawn shop and gave the shotgun to defendant. The shotgun was later identified as the murder weapon.

Dustin Roark (Roark) testified that in early January 2004, defendant asked him if he knew where defendant could buy a gun. Roark told defendant he knew someone who was selling a gun. Roark testified that he and defendant drove to Biscoe, North Carolina, where defendant purchased an SKS assault rifle from an individual.

Eric Hertzog (Hertzog) testified that he lived in defendant's home from December 2003 through early February 2004. Hertzog testified that he and defendant left defendant's home on the night of 1 January 2004, in violation of defendant's court-ordered curfew, to shoot defendant's shotgun. Hertzog also testified that sometime in January or early February 2004, he participated in a robbery with defendant. Defendant told him to wait in the car while defendant robbed a drug dealer. Defendant told Hertzog to point the shotgun at the drug dealer "if the drug dealer tried to do anything[.]" Hertzog testified that defendant robbed the drug dealer and that Hertzog did not have to use the shotgun. Hertzog further testified that defendant told him on

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12 February 2004 that defendant had killed a police officer. Hertzog testified that he gave this information to police on 13 February 2004.

The Wake County Sheriff's Office investigated the 12 February 2004 shooting death of one of its deputies, Mark Tucker (the victim). Deputy Dennis Currin testified that on 13 February 2004, defendant was identified as a suspect in the shooting. Deputy William Harding (Deputy Harding) testified that he conducted surveillance of defendant on the night of 13 February 2004 and into the early morning hours of 14 February 2004. Deputy Harding testified that he arrested defendant for reckless driving, improper registration, and possession of marijuana. Deputy Harding transported defendant to the Wake County Public Safety Center.

Sergeant Jerry Winstead (Sergeant Winstead), of the Wake County Sheriff's Office, testified that he and Lieutenant Richard Johnson (Lieutenant Johnson) interviewed defendant at the Wake County Public Safety Center on 14 February 2004 about the shooting death of the victim. Sergeant Winstead testified that Chief Deputy Stewart entered the interview room and told them, "we got the gun." Defendant heard this statement and Lieutenant Johnson told defendant that "things [were] piling up." Sergeant Winstead told defendant "the physical evidence [was] coming in minute by minute[.]" Defendant lowered his head, pulled Sergeant Winstead's pen and notepad toward him, and wrote the following: "I didn't want to. I felt it was the only choice I had." Defendant then confessed to shooting the victim.

Sergeant Winstead further testified that defendant made the following written statement on 14 February 2004:

I had gone back to that field to shoot off the shotgun I had. I had no intention of ever using it on another person.

I backed into a spot and parked my car. Then I got out and popped the trunk and was checking out the gun and I had loaded it.

I heard a noise and when I looked up and I saw an unmarked police car coming towards me. My first thought was to just close my trunk and try to leave. But the officer pulled up in front of my car sort of and stopped.

I stayed behind my car, and when he got out I came from out behind my car with the shotgun loaded. I knew that I was going

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to be in trouble either way, but I felt that I didn't—I did not have a choice.

He looked at me and started to reach for his gun but he stopped. He told me to put the gun down. I was so scared I didn't really know what to do. When he told me to put the gun down I knew that if I did, my life would be over.

I told him I can't. And it just seemed to happen so fast. I heard the gun go off. I didn't ever look to see what happened. I turned around, threw the gun in the trunk, closed it and got in my car and drove away.

I was scared to death. I asked—I was shaking all over and all I could think about was that I needed to be around people. I called up some of my friends and told them to meet me somewhere. They asked what happened and I told them.

They said they would help me hide my stuff and that . . . is what happened. I never wanted to kill anybody and I wished I could take it all back and I can't. All I can do now is take responsibility for my actions and pray that one day [the] family and God will forgive me.

Lieutenant Johnson testified that he interviewed defendant again on 15 February 2004. Defendant provided more details about the shooting. Defendant told Lieutenant Johnson that he drove to the construction site of the new YMCA building on 12 February 2004 to target shoot. Defendant said he was standing at the trunk of his car when he “saw what he thought or knew to be an unmarked police car.” Defendant told Lieutenant Johnson that “there was no question in his mind that what he saw was a police car[.]”

Lieutenant Johnson testified that defendant said the victim got out of his car. Defendant said he saw the victim's badge clipped to his belt. Lieutenant Johnson further testified as follows: “[Defendant] stated that knowing that he was on probation, was not legally able to possess a firearm, that [defendant] . . . knew that [the victim] . . . had probable cause to search his car and that he was going back to jail and he didn't want to go back to jail.” Lieutenant Johnson also testified that defendant stated that he raised the shotgun, and “as he raised the [shotgun], he was cocking it preparing to shoot.” Defendant said he aimed at the victim's head because “[h]e didn't want to shoot through the door. He didn't know if [the shot] would penetrate.” Defendant again confessed to killing

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the victim. Defendant also told Lieutenant Johnson that defendant's friend, McQueen, had helped defendant acquire the shotgun, and that defendant had purchased the shotgun to "rip marijuana dealers off."

Justin Franke (Franke) and Lawson Rankin (Rankin) testified that defendant told them that on 12 February 2004, he went to a field near his house to test his new SKS assault rifle. However, defendant told Franke and Rankin that the clip on the SKS assault rifle was "messed up" and that defendant tried to fix it. Franke and Rankin testified that defendant said he could not fix the clip and decided to shoot the shotgun in the field. Defendant also told Franke and Rankin that he picked up the shotgun from the trunk and heard someone say, "son, put the gun down." Defendant told them he turned around and saw the victim standing next to a Crown Victoria. Defendant told Franke and Rankin that he shot the victim with the shotgun. Defendant also told them he shot the victim because "he was on probation for . . . car thefts and . . . possessing guns would have sent him back to jail."

Franke and Rankin also testified that defendant asked them to hide the shotgun and defendant's pistol. Defendant gave them step-by-step instructions as to how they should conceal the weapons. Franke and Rankin hid the shotgun and pistol in the woods and told defendant where they had hidden them.

Scott Varju (Varju) testified that on the evening of 12 February 2004, defendant asked him to hold defendant's SKS assault rifle. Defendant told Varju that "there [were] cops driving around his house and he didn't know why and he wanted [Varju] to hold [the SKS assault rifle][.]" Varju took the SKS assault rifle from defendant and hid it in a speaker box at Varju's home. Police recovered the SKS assault rifle from Varju's home on 18 February 2004.

Special Agent Neal Morin (Agent Morin) of the North Carolina State Bureau of Investigation testified that he was assigned to the crime laboratory in Raleigh as a firearms examiner. Agent Morin testified he examined the SKS assault rifle and determined that it had been modified in "an attempt to convert the [SKS assault] rifle to full automatic fire."

Margaret Price (Ms. Price) testified that she became defendant's probation officer in November 2003. On cross-examination, defense counsel asked Ms. Price about a report in her files as follows:

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Q. Yes. And I can approach if it will speed that up. Let me show you the page I am looking at. Is this a page from your report—from your files?

A. It is.

Q. Okay. And it is. Okay. And does that indicate that there was a conversation about contact with TASK and [defendant] indicated he had an appointment for the 19th of February?

A. That's correct.

On re-direct examination, the State engaged in the following inquiry:

Q. Miss Price, your records also reflect the correspondence from Miss Brayboy at the TASK Program?

A. Yes, it does.

Q. And after [defendant's] arrest did she write you a letter detailing his participation in their TASK Program?

A. Yes, she did.

Q. And did—in that did she note that—

[DEFENSE COUNSEL]: Objection to hearsay.

THE COURT: Overruled. Is this part of your file?

[MS. PRICE]: The letter is, your Honor.

THE COURT: All right. Fine. Overruled.

BY [THE STATE]:

Q. In that did she note that on at least one occasion that he had called to reschedule one of his appointments on January the 9th?

A. That is correct. It does note that.

Q. And later on February the 11th, the day before this incident, does it reflect the call from [defendant's] father expressing concerns and wanting to talk to somebody?

[DEFENSE COUNSEL]: Objection. Hearsay.

THE COURT: Overruled. Go ahead.

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BY [THE STATE]:

Q. Does it reflect that on February 11th, the day before this incident, that [defendant's] father called the TASK Program expressing some concerns and wanting to speak with them in fact delaying the process?

A. Yes, it does.

Defendant presented the following evidence at trial. Dr. Seymour Halleck (Dr. Halleck) testified as an expert in forensic psychiatry. Dr. Halleck testified that at the time of the shooting, defendant "had serious emotional problems which adversely affected his ability to plan his actions[.]" Dr. Halleck testified that defendant suffered from chronic depression, chronic low self-esteem, and an inability to handle emotion. Dr. Halleck testified defendant was terrified and in a state of panic when he shot the victim.

Dr. Halleck also testified regarding defendant's childhood. Dr. Halleck testified that both of defendant's parents "drank and smoked a great deal." Dr. Halleck testified that defendant lived with various irresponsible relatives and was neglected as a child. Dr. Halleck also testified that defendant was beaten as a child and might have been sexually abused.

Dr. Halleck further testified that defendant's paternal grandparents gained custody of defendant when defendant was four years old and that defendant's paternal grandparents later adopted defendant. Dr. Halleck testified defendant was referred for an evaluation when defendant was five years old and was diagnosed as being "exceedingly anxious and depressed experiencing emotional overload bordering on psychosis." As a result, defendant received psychotherapy. The paternal grandparents eventually arranged for defendant to receive inpatient treatment from July 1999 to August 2000 at Peninsula Village, a residential treatment center for children in Tennessee. Defendant received group and individual therapy at Peninsula Village and was prescribed several medications.

Jean Bolding (Ms. Bolding) also testified for defendant as an expert in adolescent and family counseling. Ms. Bolding testified on direct examination that she was a licensed clinical social worker who was defendant's family therapist at Peninsula Village. Ms. Bolding testified that defendant was an "extremely impulsive" person.

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On cross-examination, the State elicited testimony from Ms. Bolding that, while defendant was at Peninsula Village, defendant told Ms. Bolding that he had previously participated in drive-by shootings. The State also elicited testimony from Ms. Bolding that “[t]here were times where [Ms. Bolding] felt very strongly that [defendant] exaggerated his misdeeds” and that she was not certain whether defendant was telling the truth about his participation in the drive-by shootings.

I.

[1] Defendant first argues the trial court erred by denying his motion *in limine* to exclude evidence that defendant possessed an SKS assault rifle and a pistol, and that the SKS assault rifle had been modified. Defendant argues this evidence was irrelevant and any probative value was substantially outweighed by the danger of unfair prejudice.

Pursuant to North Carolina Rule of Evidence 401, “[r]elevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” N.C. Gen. Stat. § 8C-1, Rule 401 (2005). “[I]n a criminal case every circumstance calculated to throw any light upon the supposed crime is admissible and permissible.” *State v. Bruton*, 344 N.C. 381, 386, 474 S.E.2d 336, 340 (1996) (quoting *State v. Collins*, 335 N.C. 729, 735, 440 S.E.2d 559, 562 (1994)). The determination of the weight of such evidence is a matter properly left to the jury. *State v. Smith*, 357 N.C. 604, 614, 588 S.E.2d 453, 460 (2003), *cert. denied*, *Smith v. North Carolina*, 542 U.S. 941, 159 L. Ed. 2d 819 (2004). Although a trial court’s rulings on relevancy are not discretionary and we do not review them for an abuse of discretion, we give them great deference on appeal. *State v. Streckfuss*, 171 N.C. App. 81, 88, 614 S.E.2d 323, 328 (2005).

Relevant evidence may be excluded pursuant to Rule 403 “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” N.C. Gen. Stat. § 8C-1, Rule 403 (2005). A trial court has discretion whether or not to exclude evidence under Rule 403, and a trial court’s determination will only be disturbed upon a showing of an abuse of that discretion. *State v. Campbell*, 359 N.C.

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644, 674, 617 S.E.2d 1, 20 (2005), *cert. denied*, *Campbell v. North Carolina*, — U.S. —, 164 L. Ed. 2d 523 (2006).

[2] Our Supreme Court has held that “[a] motion *in limine* is insufficient to preserve for appeal the question of the admissibility of evidence if the defendant fails to further object to that evidence at the time it is offered at trial.” *State v. Conaway*, 339 N.C. 487, 521, 453 S.E.2d 824, 845, *cert. denied*, *Conaway v. North Carolina*, 516 U.S. 884, 133 L. Ed. 2d 153 (1995). However, the General Assembly amended Rule 103 of the Rules of Evidence to provide as follows: “Once the [trial] court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.” N.C. Gen. Stat. § 8C-1, Rule 103(a)(2) (2005). The General Assembly made the amendment applicable to rulings made on or after 1 October 2003.

In *State v. Tutt*, 171 N.C. App. 518, 615 S.E.2d 688 (2005), our Court held that the amendment to Rule 103 was unconstitutional to the extent it was inconsistent with N.C.R. App. P. 10(b)(1). *Id.* at 524, 615 S.E.2d at 692-93. In *Tutt*, our Court held that although the defendant challenged the lineup through a motion *in limine*, the defendant failed to preserve his objection to the lineup by failing to object at trial. *Id.* at 524, 615 S.E.2d at 693. However, our Court recognized that Rule 103 was presumed constitutional at the time of the trial and invoked Rule 2 of the North Carolina Rules of Appellate Procedure to address the defendant’s argument. *Id.*

In the present case, Rule 103(a)(2) was also under a presumption of constitutionality at the time of trial. *See Id.* The trial court assured defendant that he did not need to renew his objections to the evidence when it was offered at trial. Accordingly, we shall review defendant’s arguments. *See Id.*; *see also*, *State v. Baublitz*, 172 N.C. App. 801, 806, 616 S.E.2d 615, 619 (2005).

[3] In arguing that the challenged evidence was irrelevant, defendant relies upon *State v. Wallace*, 104 N.C. App. 498, 410 S.E.2d 226 (1991), *disc. review denied*, 331 N.C. 290, 416 S.E.2d 398, *cert. denied*, *Wallace v. North Carolina*, 506 U.S. 915, 121 L. Ed. 2d 241 (1992) and *State v. Patterson*, 59 N.C. App. 650, 297 S.E.2d 628 (1982). In *Wallace*, the defendant was convicted of robbery with a dangerous weapon. *Wallace*, 104 N.C. App. at 499-500, 410 S.E.2d at 227. At trial, the State introduced evidence that police found “a toboggan with holes cut out in the front like a mask[]” in the vehicle the defendant

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was driving when he was arrested. *Id.* at 501, 410 S.E.2d at 228. However, the State did not contend that a mask was used in the commission of the robbery. *Id.* at 502, 410 S.E.2d at 228. Our Court held the evidence was irrelevant and inadmissible because it had “not been connected to the crime charged and . . . [had] no logical tendency to prove any fact in issue[.]” *Id.* at 502, 410 S.E.2d at 228-29. However, our Court further held: “In light of the substantial evidence of [the] defendant’s guilt, we conclude that there is no reasonable possibility that the verdict returned by the jury was affected by the erroneous introduction of the toboggan testimony.” *Id.* at 503, 410 S.E.2d at 229.

In *Patterson*, the defendant was convicted of armed robbery. *Patterson*, 59 N.C. App. at 651, 297 S.E.2d at 629. On cross-examination of the defendant, the State elicited testimony that there was a sawed-off shotgun in the vehicle the defendant was driving at the time of his arrest. *Id.* at 652, 297 S.E.2d at 630. However, there was no evidence that the sawed-off shotgun was used in the commission of the armed robbery. *Id.* at 653, 297 S.E.2d at 630. The State introduced into evidence a small caliber pistol and the victim identified the pistol as being very similar to the one used in the robbery. *Id.* Our Court held that the sawed-off shotgun “was not connected to the robbery and it was clearly not relevant to any issues in the case.” *Id.* Our Court also held that “there [was] a reasonable possibility that the erroneous admission of the shotgun evidence contributed to the defendant’s conviction, particularly in light of the conflicting evidence regarding the identity of the defendant as the man who robbed [the victim].” *Id.* at 653-54, 297 S.E.2d at 630.

The present case is distinguishable. Here, the testimony of Franke and Rankin that defendant possessed the SKS assault rifle was relevant to explain why defendant was in a field on 12 February 2004, and why defendant shot the victim with the shotgun, rather than the SKS assault rifle. The evidence was also relevant to establish defendant’s motive for shooting the victim because defendant did not want the victim to discover that defendant was violating his probation by possessing firearms. Varju’s testimony regarding concealment of the SKS assault rifle was relevant to show that defendant was conscious of his own guilt. Agent Morin’s testimony regarding the modifications made to the SKS assault rifle corroborated the testimony of Franke and Rankin that defendant told them the clip on the SKS assault rifle was “messed up.” Therefore, Agent Morin’s testimony was also relevant.

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Furthermore, because defendant's possession of the SKS assault rifle was highly probative of defendant's motive for shooting the victim, we conclude that the probative value of the challenged evidence was not "substantially outweighed by the danger of unfair prejudice" to defendant. *See* N.C.G.S. § 8C-1, Rule 403. Therefore, the trial court did not abuse its discretion by allowing introduction of evidence that defendant possessed the SKS assault rifle and that it had been modified.

[4] However, unlike the testimony concerning defendant's possession of the SKS assault rifle, the testimony that defendant possessed the pistol was irrelevant. As in *Wallace* and *Patterson*, the pistol was not connected to the shooting of the victim in any way. Nonetheless, a defendant is not prejudiced by trial errors which do not amount to constitutional violations unless "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C. Gen. Stat. § 15A-1443(a) (2005). "Erroneous admission of evidence may be harmless where there is an abundance of other competent evidence to support the state's primary contentions, or where there is overwhelming evidence of [the] defendant's guilt." *State v. Weldon*, 314 N.C. 401, 411, 333 S.E.2d 701, 707 (1985) (internal citations omitted).

In the present case, there was overwhelming evidence of defendant's guilt. "Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation." *State v. Fleming*, 296 N.C. 559, 562, 251 S.E.2d 430, 432 (1979). "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 does not require brooding or reflection for any appreciable length of time, but imports the execution of an intent to kill in a cool state of blood without legal provocation, and in furtherance of a fixed design." *State v. Myers*, 299 N.C. 671, 677, 263 S.E.2d 768, 772 (1980).

In this case, defendant admitted he shot the victim. Defendant admitted he shot the victim because defendant was on probation and knew he was not supposed to possess guns and did not want to go back to jail. Defendant also stated he aimed for the victim's head because he did not know if the shot would go through the car door

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the victim was standing behind. Several other witnesses corroborated defendant's statements. We overrule defendant's assignments of error grouped under this argument.

II.

Defendant next argues the trial court erred by denying his motion *in limine* to exclude evidence of uncharged crimes and bad acts committed by defendant. Defendant challenges evidence that defendant: (1) bought and used drugs, robbed drug dealers, and hit a drug dealer during a robbery; (2) induced another to fraudulently fill out a pawn shop form so that defendant could buy a gun, and bought another gun illegally; and (3) disregarded his court-imposed curfew. Defendant also challenges testimony of Ms. Bolding that defendant said he had been involved in drive-by shootings. For the reasons stated in Section I of this opinion, we review defendant's argument even though he did not raise objections when the challenged evidence was introduced at trial. *See Tutt*, 171 N.C. App. at 524, 615 S.E.2d at 693; *see also, Baublitz*, 172 N.C. App. at 806, 616 S.E.2d at 619.

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

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

"Rule 404(b) is a rule of inclusion, subject to the single exception that such evidence must be excluded if its *only* probative value is to show that [a] defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *State v. Berry*, 356 N.C. 490, 505, 573 S.E.2d 132, 143 (2002).

[5] Defendant first challenges evidence that he bought and used drugs and that he robbed drug dealers and hit a drug dealer during a robbery. During opening statement, defense counsel argued defendant panicked and shot the victim; defense counsel argued the shooting was not planned. Defense counsel further stated:

Thank you. And [defendant] wrote and filed with this Court I, [defendant], hereby give my informed and voluntary consent to my lawyers to tell the jury at my murder trial, which is now set

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for October 11th, 2004, that I am guilty of second degree murder. And that, ladies and gentlemen, is the question before you. What is [defendant] guilty of? And all of the evidence that you will hear that I am talking about that I am permitted to forecast will say the same thing, second degree murder.

Accordingly, premeditation and deliberation were strongly contested issues at trial.

In *State v. Gibson*, 333 N.C. 29, 424 S.E.2d 95 (1992), *overruled in part on other grounds by State v. Lynch*, 334 N.C. 402, 432 S.E.2d 349 (1993), the defendant was convicted of, *inter alia*, first degree murder. *Id.* at 33, 424 S.E.2d at 97. The defendant filed a motion *in limine*, based upon Rule 404(b) and Rule 403, to exclude certain statements made by the defendant, in which the defendant admitted to committing other murders in the past. *Id.* at 39-40, 424 S.E.2d at 101. The trial court denied the defendant's motion. *Id.* at 40, 424 S.E.2d at 101. Our Supreme Court recognized that the defendant raised the defense of duress, thereby making premeditation and deliberation contested issues in the case. *Id.* at 43, 424 S.E.2d at 103. Our Supreme Court held as follows:

The statements by defendant are admissible in this case because they tend to refute defendant's contention that defendant was acting under duress through fear of Bob Jennings' retaliation when he shot the victim. In so refuting defendant's contention and defense of duress and fear, these statements relate directly to defendant's state of mind and thus necessarily bear upon and forcefully support key elements of the primary offense charged: malice with specific intent to kill and premeditation and deliberation. These statements in such context clearly relate to "intent" and "preparation" and therefore fall within the inclusionary portion of Rule 404(b).

Id. at 42, 424 S.E.2d at 102-03 (internal citations omitted).

Likewise, in this case, evidence that defendant robbed drug dealers and hit a drug dealer during a robbery was clearly relevant to refute defendant's contention that he shot the victim without premeditation and deliberation. The evidence in the present case showed that (1) defendant was capable of planning criminal conduct, (2) defendant was capable of dealing with stressful and dangerous situations, and (3) defendant was willing to use a firearm in the commission of criminal offenses. The evidence that defendant

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bought and used drugs was relevant to explain defendant's robberies of drug dealers.

[6] Defendant next challenges evidence that he induced another to fraudulently fill out a pawn shop form so that defendant could buy a gun, and defendant also challenges evidence that he bought another gun illegally. However, in *State v. Agee*, 326 N.C. 542, 391 S.E.2d 171 (1990), our Supreme Court held as follows:

“Evidence, not part of the crime charged but pertaining to the chain of events explaining the context, motive and set-up of the crime, is properly admitted if linked in time and circumstances with the charged crime, or [if it] forms an integral and natural part of an account of the crime, or is necessary to complete the story of the crime for the jury.”

Id. at 548, 391 S.E.2d at 174 (quoting *United States v. Williford*, 764 F.2d 1493, 1499 (11th Cir. 1985)).

In *State v. Rannels*, 333 N.C. 644, 430 S.E.2d 254 (1993), the defendant was convicted of, *inter alia*, first degree murder. *Id.* at 649, 430 S.E.2d at 257. Pursuant to Rule 404(b), the defendant moved to suppress evidence that he stole the pistol he used to shoot the victim, and the trial court denied the motion. *Id.* at 657, 430 S.E.2d at 261. Our Supreme Court held as follows: “That defendant stole the murder weapon tends to prove not only that he possessed it but the circumstances under which he acquired it. This kind of evidence is generally admissible in a homicide prosecution as tending to prove the guilt of the accused.” *Id.* at 658, 430 S.E.2d at 262.

In the present case, evidence that defendant induced McQueen to fraudulently fill out a pawn shop form so that defendant could buy a gun was relevant to show how defendant acquired the murder weapon. It was also relevant to show that defendant possessed the murder weapon. Evidence that defendant illegally purchased the SKS assault rifle was relevant to show how defendant acquired that weapon, the possession of which was defendant's motive for shooting the victim. The evidence was relevant “ ‘to complete the story of the crime for the jury.’ ” *Agee*, 326 N.C. at 548, 391 S.E.2d at 174 (quoting *Williford*, 764 F.2d at 1499).

[7] Defendant also challenges evidence that defendant missed his curfew. Like the evidence regarding defendant's acquisition of the shotgun and SKS assault rifle, the evidence that defendant violated his curfew was part of the chain of circumstances leading up to the

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shooting. This evidence also had no tendency to show that defendant had a propensity to commit first degree murder.

[8] Defendant further challenges the testimony of Ms. Bolding, who testified on cross-examination that defendant said he had been involved in drive-by shootings. However, the State elicited this testimony on cross-examination to rebut Ms. Bolding's direct testimony that defendant was impulsive. Ms. Bolding's challenged testimony on cross-examination was relevant to show that defendant could be manipulative.

[9] We must also determine whether, pursuant to Rule 403, the trial court abused its discretion by allowing the introduction of this evidence. *See Campbell*, 359 N.C. at 674, 617 S.E.2d at 20. However, because premeditation and deliberation were contested issues at trial, we conclude the probative value of the challenged evidence was not "substantially outweighed by the danger of unfair prejudice." *See* N.C.G.S. § 8C-1, Rule 403. Therefore, the trial court did not abuse its discretion, and we overrule defendant's assignments of error grouped under this argument.

III.

[10] Defendant next argues the trial court erred by allowing inadmissible hearsay testimony regarding defendant's conduct during probation. We first note that defendant has waived any argument that his Sixth Amendment right to confront witnesses was violated. *See State v. Gainey*, 355 N.C. 73, 87, 558 S.E.2d 463, 473, cert. denied, *Gainey v. North Carolina*, 537 U.S. 896, 154 L. Ed. 2d 165 (2002) (recognizing that "Constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal.").

"Hearsay is not admissible except as provided by statute or by these rules." N.C. Gen. Stat. § 8C-1, Rule 802 (2005). However, "[w]here one party introduces evidence as to a particular fact or transaction, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though such latter evidence would be incompetent or irrelevant had it been offered initially." *State v. Albert*, 303 N.C. 173, 177, 277 S.E.2d 439, 441 (1981).

In *State v. Mason*, 159 N.C. App. 691, 583 S.E.2d 410 (2003), the defendant was convicted of, *inter alia*, first degree murder. *Id.* at 691, 583 S.E.2d at 411. The defendant argued the trial court erred by allowing the State to introduce prejudicial hearsay. *Id.* at 694, 583 S.E.2d at 412. Specifically, the defendant argued the trial court erred by per-

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mitting a deputy to testify about a domestic violence call involving the defendant on the night of the shooting. *Id.* at 695, 583 S.E.2d at 413. However, on cross-examination of the deputy, the defendant asked the deputy about a report the deputy had written concerning the incident and the defendant inquired about the omission of certain details. *Id.* The trial court permitted the State to ask the deputy about the contents of the report on re-direct examination. *Id.* Our Court held that “[b]y raising the issue of why [the] [d]eputy . . . was called to the scene and his subsequent report on the domestic violence allegation, [the] defendant ‘opened the door’ to allow the State to ask similar or related questions.” *Id.* Our Court held that the State’s evidence was properly admitted. *Id.*

In the present case, on cross-examination of Ms. Price, defendant asked her about information in her file related to an appointment defendant had with someone at the TASK Program. By asking Ms. Price about this information in her file, defendant opened the door to re-direct examination concerning this issue. Accordingly, the trial court did not err by allowing the State to elicit hearsay testimony to explain and rebut evidence elicited about the file on defendant’s cross-examination of Ms. Price. We overrule this assignment of error.

IV.

[11] Defendant argues the short-form indictment under which he was charged was unconstitutional because it did “not allege the elements of premeditation, deliberation or the presence of the specific intent to kill.” However, defendant acknowledges that our Supreme Court has upheld the constitutionality of the short-form murder indictment. In *State v. Braxton*, 352 N.C. 158, 531 S.E.2d 428 (2000), *cert. denied*, *Braxton v. North Carolina*, 531 U.S. 1130, 148 L. Ed. 2d 797 (2001), the defendant argued the indictment under which he was charged was unconstitutional in that it failed to allege “premeditation, deliberation, and specific intent to kill.” *Id.* at 173, 531 S.E.2d at 437. Our Supreme Court upheld the constitutionality of the short-form murder indictment and concluded that “premeditation and deliberation need not be separately alleged in the short-form indictment.” *Id.* at 174-75, 531 S.E.2d at 437-38. Therefore, we overrule this assignment of error.

No error.

Judge ELMORE concurs.

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Judge STEELMAN concurs with a separate opinion.

STEELMAN, Judge concurring in the result.

I fully concur in the result reached in the majority's opinion. However, I am compelled to write separately in the matter because I believe the standard of appellate review for decisions of the trial court under Rule 401 of the North Carolina Rules of Evidence as stated by the majority and the cases cited by that opinion is incorrect.

The majority states that: "Although a trial court's rulings on relevancy are not discretionary and we do not review them for an abuse of discretion, we give them great deference on appeal." The correct standard of appellate review for a trial court's determinations of relevancy under Rule 401 should be "abuse of discretion."

The concept that the standard of review is "great deference" rather than abuse of discretion first appeared in the case of *State v. Wallace*, 104 N.C. App. 498, 410 S.E.2d 226 (1991).¹ *Wallace* purports to paraphrase § 5166 of C. Wright & K. Graham, 22 Federal Practice and Procedure (1978) (hereinafter, Wright and Graham) as follows: "Thus, even though a trial court's rulings on relevancy technically are not discretionary and therefore are not reviewed under the abuse of discretion standard applicable to Rule 403, such rulings are given great deference on appeal." *Wallace*, 104 N.C. App. at 502, 410 S.E.2d. at 228.

"Where our rule and the federal rule are similar, we may look to the federal rule's legislative history and federal court interpretations for guidance in determining our General Assembly's intent in adopting the rule." *Crawford v. Faye*, 112 N.C. App. 328, 333, 435 S.E.2d 545, 548 (1993). The discussion in § 5166 of Wright and Graham deals with the scope of the trial court's discretion in determining relevancy under Rule 401 of the Federal Rules of Evidence compared to what existed prior to the adoption of those rules. This is then compared

1. This analysis has been carried forward in numerous cases since its publication. See, e.g., *State v. Davis*, 177 N.C. App. 98, 627 S.E.2d 474 (2006); *State v. Streckfuss*, 171 N.C. App. 81, 614 S.E.2d 323 (2005); *Dunn v. Custer*, 162 N.C. App. 259, 591 S.E.2d 11 (2004); *State v. Smith*, 157 N.C. App. 493, 581 S.E.2d 448 (2003). *Contra Dep't of Transp. v. Elm Land Co.*, 163 N.C. App. 257, 267, 593 S.E.2d 131, 138, *disc. review denied*, 358 N.C. 542, 599 S.E.2d 42 (2004) (applying abuse of discretion standard of review to the trial court's determination of whether proffered evidence was relevant to the issues being tried).

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with the judge's discretion to exclude evidence under Rule 403. The relevant portion of § 5166 of Wright and Graham contained in the 1978 treatise reads as follows:

[R]ule 401 sets a standard for relevance that judges are supposed to follow. This standard does give the judge great freedom to admit evidence, but it diminishes quite substantially his authority to exclude evidence as irrelevant. Since Rule 401 restricts mandatory exclusion for irrelevance, this means that the discretionary power to exclude under Rule 403 becomes even more important. But the discretion under Rule 403 is far from a license for free-wheeling exclusion; it carefully delineates a balancing test that must be applied before evidence can be excluded. In any event, it is important to distinguish between the discretion granted in Rule 403 and the standard of relevance that governs the decision under Rule 401; in one case the Rule gives a greater leeway to exclude evidence, while in the other the judge is given greater freedom to admit evidence.

If one defines "discretion" as a relative immunity from appellate review, then it is correct to say that the trial judge will continue to have discretion in ruling on relevance under Rule 401.

22 C. Wright and K. Graham, *Federal Practice and Procedure* § 5166, 74-75 (1978).

According to Wright and Graham, under Rule 401 the trial judge's authority to exclude evidence is substantially diminished. *Id.* However, this conclusion does not impact the standard of appellate review; it merely becomes part of the analysis of whether the trial judge abused his or her discretion. *Id.* This is confirmed by the language contained in § 5166 of the 2005 supplement to *Wright and Graham*:

Increasingly federal courts have begun to say that virtually all evidence rulings will only be reviewed under an abuse of discretion standard.

Since evidence whose relevance is debatable is, by definition, evidence of questionable probative worth, the exclusion of such evidence on grounds of relevance will seldom be reversible error.

22 C. Wright & K. Graham, *Federal Practice and Procedure* § 5166, 21 (Supp. 2005).

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Both federal and other state court cases hold the appropriate standard of appellate review for trial court decisions under Rule 401 is abuse of discretion. *See e.g. United States v. Abel*, 469 U.S. 45, 54, 83 L. Ed. 2d 450, 459 (1984); *United States v. Masat*, 948 F.2d 923, 933 (5th Cir. 1991); *United States v. Harris*, 542 F.2d 1283, 1317 (7th Cir. 1976); *United States v. Williams* 545 F.2d 47, 50 (8th Cir. 1976); *Juniper v. Commonwealth*, 626 S.E.2d 383, 415 (Va. 2006); *State v. Dubose*, 953 S.W.2d 649, 652 (Tenn. 1997); *People v. Sanders*, 905 P.2d 420, 465 (Cal. 1995); *Moreno v. State*, 858 S.W.2d 453, 463 (Tex. Crim. App. 1993); *State v. Fedorowicz*, 52 P.3d 1194, 1203 (Utah 2002); *Agan v. State*, 417 S.E.2d 156, 160 (Ga. Ct. App. 1992). Similarly, the standard of our appellate review of a trial court's determination to admit evidence under Rule 403 is abuse of discretion. *State v. Mason*, 315 N.C. 724, 731, 340 S.E.2d 430, 435 (1986); *State v. Summers*, 177 N.C. App. 691, 697, 629 S.E.2d 902, 907 (2006).

The standard of appellate review for Rule 401 enunciated in *Wallace* is "great deference," which is stated to fall short of "abuse of discretion," but apparently is not *de novo* review either. North Carolina does not need a different standard of appellate review for decisions under Rule 401 and Rule 403 of our Rules of Evidence. Under Rule 401, the trial court must determine whether the evidence makes the existence of any fact more or less probable. N.C. Gen. Stat. § 8C-1, Rule 401 (2006). Under Rule 403, the trial court must determine whether the probative value of evidence is substantially outweighed by several countervailing factors. N.C. Gen. Stat. § 8C-1, Rule 403 (2006). Both require the trial court to perform a balancing test to determine whether the evidence should be admitted or excluded. This is inherently a discretionary act. Thus, the correct standard of appellate review of these decisions should be abuse of discretion.

I acknowledge that this Court is bound by the holding in *Wallace* and its progeny. *In the matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). However, I hope our Supreme Court will address this issue, in this or a future case, so that the standard of appellate review for Rule 401 rulings can be corrected. In addition, the Supreme Court should address this issue in order to remedy a split of authority at this Court. On the one hand there is *Wallace* and its progeny that carry forward the "great deference" standard of appellate review. On the other, there is the case of *Dep't of Transp. v. Elm Land Co.*, which articulated the standard of appellate review as follows: "This Court must determine whether the trial

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court abused its discretion in determining whether the proffered evidence was relevant to the issues being tried.” 163 N.C. App. at 267, 593 S.E.2d at 138.

LINDA P. CALHOUN, M.D.; MARK T. MURPHY, M.D.; HEMANTKUMAR PATEL, M.D.; PRAFUL N. PATEL, M.D.; AND J. ROBINSON HARPER, JR., M.D., PLAINTIFFS v. WHA MEDICAL CLINIC, PLLC, DEFENDANT

No. COA05-1345

(Filed 1 August 2006)

1. Employer and Employee— non-compete agreement—reasonableness a matter of law

The reasonableness of agreements not to compete is a matter of law, and the trial court did not err by dismissing the jury in a declaratory judgment action to determine the validity of medical non-compete agreements.

2. Employer and Employee— non-compete agreements—consideration—offer of employment in merged company

Offers of new employment served as consideration for non-compete agreements where a medical practice became part of a new entity.

3. Employer and Employee— medical non-compete agreements—no violation of public policy per se

Non-compete agreements in physicians’ employment contracts are not per se against public policy.

4. Physicians and Surgeons— non-compete agreements—not against public policy

Medical non-compete agreements were not against public policy where the physicians were able to pay the liquidated damages and had no plans to leave the area.

5. Appeal and Error— presentation of issues—contention not argued—abandoned

Plaintiffs abandoned by not arguing an assignment of error that testimony of the purpose of a clause in a medical non-compete agreement was irrelevant.

6. Appeal and Error— presentation of issues—assignment of error—overbroad

An overbroad assignment of error did not preserve for appellate review the contention that a finding concerning a medical non-compete clause and AMA ethics was “contrary to law.”

7. Appeal and Error— presentation of issues—assignment of error to conclusion—error not properly assigned to underlying finding

The appellate court did not consider an assignment of error that concerned only the validity of a medical non-compete agreement notwithstanding an AMA ethics provision where plaintiffs did not properly assign error to underlying finding concerning that provision.

8. Costs— attorney fees—non-compete agreement—findings not sufficient

An award of attorney fees under N.C.G.S. § 6-21.2 in a declaratory judgment action determining that a covenant not to compete and a liquidated damages provision in plaintiff doctors’ contract of employment were enforceable is remanded for appropriate factual findings where the trial court made no findings as to whether the employment contract is a “printed or written instrument, signed or otherwise executed by the obligor, which evidences on its face a legally enforceable obligation to pay money” or whether the contract relates to commercial transactions within the meaning of the statute.

Appeal by plaintiffs from order entered 10 June 2005 by Judge Kenneth F. Crow in New Hanover County Superior Court. Heard in the Court of Appeals 10 May 2006.

Ward and Smith, P.A., by Jenna Fruechtenicht Butler and John M. Martin, for plaintiffs-appellants.

Nelson, Mullins, Riley, & Scarborough, L.L.P., by Noah H. Huffstetter, III, and Catharine W. Cummer, and Murchison, Taylor, & Gibson, P.L.L.C., by Michael Murchison and Andrew K. McVey, for defendant-appellee.

CALABRIA, Judge.

Linda P. Calhoun, M.D., Mark T. Murphy, M.D., Hemantkumar Patel, M.D., Praful N. Patel, M.D., and J. Robinson Harper, Jr., M.D.,

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collectively (“plaintiffs”), appeal from a declaratory judgment of the trial court, determining a covenant not to compete and a liquidated damages provision were enforceable in an employment agreement between plaintiffs and WHA Medical Clinic, PLLC (“WHA”). We affirm in part and remand in part.

The trial court made, *inter alia*, the following findings of fact:

1. [WHA] is a multi-specialty medical group of approximately 60 physicians who provide both primary and specialty care in south-eastern North Carolina.
2. [Plaintiffs] are physicians licensed to practice medicine by the State of North Carolina and are board-certified in cardiology.
3. WHA was formed in 1996 as the successor to Wilmington Health Associates, P.A. (“Wilmington Health”). Prior to 1996, many of the physicians who work for WHA were owners or employees of Wilmington Health.
4. Harper joined Wilmington Health as an employee physician in July 1990 and became a shareholder in August 1993. Calhoun joined Wilmington Health in January 1992 and became a shareholder in January 1994. P. Patel joined Wilmington Health in December 1994 and became a member of WHA in December 1996. Harper, Calhoun, and P. Patel shall be collectively referred to as “Member Plaintiffs.”
5. At the time the Member Plaintiffs joined Wilmington Health, their employment agreements included restrictive covenants with liquidated damages provisions that enabled the employee-physician to stay and compete through payment of a fixed sum designed to compensate Wilmington Health for its investment in the physician and the expenses associated with the physician’s departure. When Harper and P. Patel originally joined Wilmington Health prior to 1996, they signed such covenants without objection.
6. The benefits of joining an established practice such as Wilmington Health included a guaranteed salary and benefits package, an established patient and referral base, association with well-regarded physicians, staff, facilities, and equipment, licensing and credentialing support, billing, administrative[,] and financial administration.

...

8. In August 1996, Wilmington Health and *Phycor Inc.*, a Tennessee physician practice management company, entered into an agreement to sell the assets of Wilmington Health to *PhyCor Inc.* (“Asset Purchase Agreement”). The Asset Purchase Agreement also required WHA, the newly formed entity that employed the physicians formerly employed by Wilmington Health, to enter into a service agreement with *PhyCor of Wilmington*, a subsidiary of *PhyCor Inc.* (“Service Agreement”).

9. Simultaneous with the sale of assets, on August 1, 1996, Harper and Calhoun executed individual Payback Agreements, which were separate and distinct from the employment agreements at issue in this case. Pursuant to the Payback Agreements, Harper and Calhoun agreed to return all or a portion of their *PhyCor* payouts if they did not remain with WHA for a period of 4 years commencing August 1, 1996.

10. To protect *PhyCor’s* investment in the tangible and intangible assets of Wilmington Health, the Service Agreement required WHA to obtain and enforce restrictive covenants from current and future physician members and employees.

11. The Asset Purchase and Service Agreements further provided that, if an individual physician chose not to enter into the new contracts containing restrictive covenants, the compensation to WHA would be reduced and that individual physician would not receive any share of the *PhyCor* proceeds. At least one physician, Lowell Shinn, chose not to sign the new contract. Dr. Shinn did not receive a payout and the compensation to WHA was proportionately reduced.

12. On August 1, 1996, Calhoun and Harper executed a Member Physician Services Agreement setting forth the terms and conditions of their employment with WHA. A First Amendment to Member Physician Services Agreement was executed on March 25, 1999.

13. In part, Paragraph 13 of the Member Physician Services Agreements provides:

13.1 Covenant Not to Compete

13.1 Physician agrees that during the term of this Agreement and for a period of eighteen (18) months following the termination of employment of Physician with the Company, Physician will not Compete with the Company, as defined

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below, or employ or solicit the employment of any Restricted Employee, as defined below.

13.2 For purposes of this restrictive covenant, the following definitions apply:

...

B. "Restricted Employee" means any person that was an employee of the Company at any time during the twelve (12) months immediately preceding the termination of employment of Physician with the Company.

C. "Restricted Territory" means . . . New Hanover, Pender, Brunswick, Onslow, Duplin, Bladen and Columbus Counties if Physician is a subspecialist or other non-primary care physician.

...

13.4 Physician agrees that a breach by Physician of this restrictive covenant would cause irreparable damage to the Company and that, in the event of a breach or threatened breach by Physician, the Company shall be entitled to preliminary and permanent injunctions restraining Physician from breaching or continuing to breach this restrictive covenant.

...

13.8 In the event the Physician desires to practice in violation of this restrictive covenant, Physician shall have the option of paying to the Company the following liquidated damages in advance of practicing in violation of the covenant. Physician shall pay to the Company as liquidated damages an amount equal to the greater of (i) Physician's "average annual income" as shown on the W-2 or K-1 forms prepared by Wilmington Health Associates, P.A. ("WHA") or the Company for the two most recent years preceding termination of Physician's employment, or (ii) Physician's share of the total gross proceeds payable to WHA pursuant to the Asset Purchase Agreement between WHA and PhyCor of Wilmington, Inc. ("PhyCor"), including the amount of any liabilities of WHA assumed by PhyCor pursuant to the Asset Purchase Agreement, and Physician's share of sums payable to the Company pursuant to Article 12 of the Service Agreement.

14. The liquidated damages provision ensured that physicians who profited from the *PhyCor* transaction were required to repay, at a minimum, the amount of gross proceeds they received under the Asset Purchase and Service Agreements, should they depart and compete with WHA.

15. Such liquidated damages provisions were included because the damage caused by the departure and subsequent immediate competition by physicians depends upon several factors and is difficult to determine in advance. A departing physician's prior net contribution to corporate overhead, the volume of patients and patient revenues lost to the departing physician's new practice, the length of time and cost associated with recruiting replacement physicians, the time it takes a new replacement physician to become a fully productive contributor to the group, and the ability of the remaining physicians in the group to assume the care of patients who wish to remain with the group all affect the extent of WHA's damages.

...

17. Each Member Plaintiff had a choice: Either agree to the new contract and receive a payout, or, not agree to the new contract and consequently forego said payout. . . .

18. Plaintiffs Harper, Calhoun, and P. Patel chose to sign the new contract with the restrictive covenants and subsequently received the following individual payouts: Harper received \$287,350, Calhoun received \$267,171, and P. Patel received \$245,730[.]

...

20. In December of 1999, WHA hired plaintiff H. Patel, an electrophysiology cardiologist. On December 29, 1999, H. Patel executed an Employee Physician Services Agreement that sets forth the terms and conditions of his employment with WHA. H. Patel began practice at WHA as an employee physician in the summer of 2000.

21. Also in late 1999, WHA hired plaintiff Murphy. On November 23, 1999, Murphy executed an Employee Physician Services Agreement that set forth the terms and conditions of his employment with WHA. Murphy began practice at WHA as an employee-physician in 2000.

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22. Paragraph 17 of the Employee Physician Services Agreement is titled “Restrictive Covenant” and is identical to Paragraph 13 of the Member Physician Services Agreements (the Employee Physician Services Agreements and Member Physician Services Agreements will be collectively referred to as “Employment Agreements”). H. Patel’s and Murphy’s employment agreements contained the same provisions regarding hiring of “restricted employees” and confidentiality as the Member Physician Services Agreements.

23. In addition, Paragraph 14 of Murphy’s and H. Patel’s Employee Physician Services Agreements, titled “Compliance with Rules and Regulations,” provides in part:

Physician shall comply with all rules and regulations as may be established and modified by the Managers of Company from time to time pertaining the business and medical practice of Company. Notwithstanding the foregoing, Physician and Company shall be obligated to follow all requirements of local, state, and federal laws and regulations relating to the practice of medicine and treatment of patients and no provision of this Agreement shall be enforceable by Company or Physician or any court of competent jurisdiction where local, state or federal laws and regulations and/or the AMA Code of Professional Ethics prohibits and/or discourages the conduct described in or intent of the provision(s) sought to be enforced.

24. Diane Atkinson, the Executive Director of WHA, testified that the above provision was included in WHA’s employee physician agreements to assuage concerns of potential physician candidates that WHA’s contracts gave WHA the power to direct physicians to take unnecessary medical measures. She indicated that this provision was not intended to absolve the restrictive covenant.

25. At the time Murphy and H. Patel executed their Employee Physician Services Agreements and at the time of their departure from WHA, Policy E-9.02 of the AMA Code of Medical Ethics provided: *Covenants-not-to-compete restrict competition, disrupt continuity of care, and potentially deprive the public of medical services. The (AMA) Council on Ethical and Judicial Affairs discourages any agreement which restricts the right of a physician to practice medicine for a specified period of time or in a specified area upon termination of employment,*

partnership or corporate agreement. Restrictive covenants are unethical if they are excessive in geographic scope or duration in the circumstances presented, or if they fail to make reasonable accommodation of patients' choice of physician.

. . .

28. WHA serves patients from each of the 7 counties reflected in the restrictive covenants, and the Plaintiffs treated patients from all 7 counties.

29. Plaintiffs are all intelligent, well-educated adults who freely and voluntarily entered into their respective Member Physician Services and/or Employment Agreements with WHA. . . .

30. In the fall of 2000, WHA negotiated a termination of its relationship with *PhyCor* and agreed to pay over \$8 million to repurchase the rights that *PhyCor* and *PhyCor of Wilmington* had acquired under the Asset Purchase and Service Agreements.

. . .

32. In the summer of 2001, Plaintiffs began meeting to discuss forming a separate cardiology practice in New Hanover County, North Carolina.

. . .

35. [A *pro forma* conducted by a certified public accountant] projected that each Plaintiff could earn approximately one million dollars in their first full year of practice, substantially more than they were earning at WHA. [The accountant] also provided Plaintiffs with an analysis of the after-tax cost of the liquidated damages that the Plaintiffs would owe WHA under Plaintiffs' employment agreement. This analysis showed that the projected increase in the Plaintiffs' earnings would be several times more than required to pay their liquidated damages.

36. On December 3, 2001, Harper met with the remaining WHA cardiologists and WHA's president. The purpose of this meeting was for Harper to inform WHA of Plaintiffs' decision to consider leaving WHA. Plaintiffs had originally planned to meet on the evening of January 8, 2002 and then proceed with terminating their employment with WHA. . . . WHA terminated Harper on January 8, the day before he planned to resign. On January 10,

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2002, Calhoun, P. Patel, H. Patel, and Murphy all submitted their ninety-day resignation notice to WHA as required by their respective Employment Agreements.

37. On or about January 10, 2002, the Plaintiffs executed Articles of Organization for their new practice and shortly thereafter executed an Operating Agreement. Also, on or about January 10, 2002, the Plaintiffs executed a “Memorandum of Understanding” for their new practice. Said document includes a covenant that requires any doctor who leaves the practice before April 1, 2005, to continue to pay his or her proportionate share of the expenses through that date.

...

39. On or about April 10, 2002, the Plaintiffs opened their cardiology practice in New Hanover County, North Carolina under the name Wilmington Cardiology, PLLC. Without dispute, the Plaintiffs provide physician services in the “Restricted Territory” as defined in their respective agreements with WHA. Plaintiffs have never paid WHA, nor offered to pay WHA, any amount so that the Plaintiffs may compete without violating their Agreements with WHA. However, in response to Judge Jones’s April 18, 2002 order, the Plaintiffs have posted a bond in the amount of liquidated damages.

40. Plaintiffs Calhoun, H. Patel, and P. Patel testified at the hearing that they had no plans to leave the area and, if the covenant not to compete was determined to be enforceable, they were prepared to take all necessary steps to ensure continued presence in the medical community and continued treatment of patients, even if that meant paying the liquidated damages agreed to in their contracts with WHA.

41. As required by the April 18, 2002 order, Plaintiffs posted a Letter of Credit with the Clerk of Superior Court of New Hanover County in the amount of One Million Five Hundred Fifty-Nine Thousand Seven Hundred Sixty-Seven Dollars (\$1,559,767.00). As a result, Plaintiffs demonstrated the ability to pay the liquidated damages set forth in the restrictive covenant.

...

43. Plaintiffs failed to demonstrate they were unable to pay liquidated damages or that they would leave Wilmington or otherwise

cease practicing if they are required to pay the liquidated damages set forth in their respective agreements.

...

51. In general, the Plaintiffs comprise a collection of uniquely qualified and talented and skilled physicians. Without dispute, the Plaintiffs provide valuable medical services to a substantial patient base in the "Restricted Area." The Court acknowledges that a Doctor-Patient relationship is a relationship of trust and is developed over time and that patients can be adversely affected if this relationship is disrupted. The Court also acknowledges that a patient's right to choose his own doctor is especially important to the quality of healthcare provided. Patients should have the right to continuity of healthcare by a doctor of their own choosing. Categorically preventing the Plaintiffs from practicing medicine in the "Restricted Area" would cause a substantial health risk to actual and prospective patients in need of the Plaintiffs' services.

52. However, in this case, the Plaintiffs were provided with a simple choice: Pay the liquidated damages and practice in the "Restricted Area;" or, practice in violation of the terms of their respective employment contracts and subject themselves to litigation. The Plaintiffs chose the latter. . . .

53. The liquidated damages set forth in Plaintiff's agreement are conservative compared to the actual damages WHA had already sustained after 12 months of the 18 month restricted period. In the first 12 months since Plaintiffs left WHA to open their competing practice, WHA's cardiology department suffered a decrease in gross professional and ancillary charges of \$7.7 million, equating to a \$2.9 million decrease in net revenues. Using the departing cardiologists' past net contribution to corporate overhead of 51.6 percent of net collections, the net loss to WHA for this 12-month period alone approximates \$1,520,483. Despite aggressive recruiting, it took WHA approximately six months to recruit two replacement cardiologists. As of the trial date, WHA had already expended \$128,795 in efforts to recruit replacement cardiologists. Thus, the net losses in the 12-month period from Plaintiffs' departure to the time of trial alone exceed \$1,641,278 compared to liquidated damages of \$1,587,157.

...

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57. The amounts stipulated in Plaintiffs' respective agreements as liquidated damages were a reasonable estimate of the damages that would probably be caused by a breach of their covenants.

...

59. The amounts stipulated in Plaintiffs' respective agreements as liquidated damages are reasonably proportionate to the damages which have actually been caused by Plaintiffs' breach of their respective covenants.

Based on these and other related findings, the trial court concluded:

2. Plaintiffs' agreements allow them to practice in the "Restricted Area" upon payment of specified liquidated damages and therefore said agreements are not subject to strict scrutiny as to reasonableness and public policy. Nevertheless, said agreements survive a strict scrutiny examination as to reasonableness and public policy.

3. Plaintiffs' agreements are each based on valuable consideration.

4. The enforcement of the liquidated damages provisions in the agreements between Plaintiffs and WHA create no substantial question of potential harm to the public health and consequently said agreements are not void as against public policy.

5. The restrictive covenants contained in the agreements between Plaintiffs and WHA are reasonable as to time and territory restrictions and are based on a legitimate business purpose.

6. The liquidated damages provisions and restrictive covenants contained in the employment agreements of Plaintiffs Murphy and H. Patel are enforceable notwithstanding Policy E-9.02 of the AMA Code of Medical Ethics.

7. The liquidated damages set forth in each of the Plaintiffs' employment agreements with WHA are reasonable in amount and do not constitute a penalty.

8. Each Plaintiff has breached [his or her] respective agreements with WHA by competing with WHA in the restricted area within 18 months of the termination of [his or her] employment.

...

10. Plaintiffs are obligated to pay the liquidated damages set forth in their respective employment agreements with WHA. 11. Section 6-21.2 of the North Carolina General Statutes allows for the recovery of attorneys' fees for the failure of Plaintiffs to pay their liquidated damages upon demand from Defendant. In the Court's discretion, the Court determines that the Defendant is entitled to an award of attorney fees.

Plaintiffs appeal.

I. Right to Trial by Jury

[1] We initially address plaintiffs' argument that the trial court erred in dismissing the jury and serving as the finder of fact because plaintiffs had a statutory right to trial by jury on all issues of fact. Plaintiffs instituted this action pursuant to the North Carolina Declaratory Judgment Act, N.C. Gen. Stat. § 1-253, *et seq.* (2005). The Declaratory Judgment Act states, "When a proceeding under this Article involves the determination of an issue of fact, such issue may be determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending." N.C. Gen. Stat. § 1-261 (2005). This Court has held, under the Declaratory Judgment Act, the trial court may determine only questions of law absent a waiver of jury trial. *Hall v. Hall*, 35 N.C. App. 664, 665, 242 S.E.2d 170, 172 (1978). The only factual determination of the trial court that plaintiffs challenge in this portion of their brief is that the trial court "made the decisive Findings of Fact on the public policy issue." However, "[s]ince the determinative question is one of public policy, the reasonableness and validity of the contract is a question for the court and not for the jury, to be determined from the contract itself and admitted or proven facts relevant to the decision." *Kadis v. Britt*, 224 N.C. 154, 158, 29 S.E.2d 543, 545 (1944). *See also Farr Assocs. v. Baskin*, 138 N.C. App. 276, 279, 530 S.E.2d 878, 881 (2000) ("[t]he reasonableness of a non-compete agreement is a matter of law for the court to decide"). Accordingly, the trial court did not err in dismissing the jury, and this assignment of error is without merit.

II. Valuable consideration

[2] Plaintiffs next argue that the trial court erred in concluding that the agreements of Calhoun and Harper were based on valuable consideration. We disagree.

Our standard of review of a declaratory judgment is the same as in other cases. N.C. Gen. Stat. § 1-258 (2005). Accordingly, in a dec-

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laratory judgment action where the trial court decides questions of fact, we review the challenged findings of fact and determine whether they are supported by competent evidence. *Insurance Co. v. Allison*, 51 N.C. App. 654, 657, 277 S.E.2d 473, 475 (1981). If we determine that the challenged findings are supported by competent evidence, they are conclusive on appeal. *Finch v. Wachovia Bank & Tr. Co.*, 156 N.C. App. 343, 346-47, 577 S.E.2d 306, 308-09 (2003) (citations omitted). We review the trial court's conclusions of law *de novo*. *McConnell v. McConnell*, 151 N.C. App. 622, 626, 566 S.E.2d 801, 804 (2002).

Under North Carolina law, covenants not to compete are valid and enforceable if: "(1) in writing; (2) made part of a contract of employment; (3) based on valuable consideration; (4) reasonable both as to time and territory; and (5) not against public policy." *QSP, Inc. v. Hair*, 152 N.C. App. 174, 176, 566 S.E.2d 851, 852 (2002). This Court has held, "the promise of new employment is valuable consideration and will support an otherwise valid covenant not to compete contained in the initial employment contract." *Wilmar, Inc. v. Corsillo*, 24 N.C. App. 271, 273, 210 S.E.2d 427, 429 (1974) (citations omitted). However, "[w]hen the employment relationship is established before the covenant not to compete is executed, there must be separate consideration to support the covenant, such as a pay raise or other employment benefits or advantages for the employee." *Stevenson v. Parsons*, 96 N.C. App. 93, 97, 384 S.E.2d 291, 292-93 (1989) (citations omitted).

When a company buys-out another company and offers that company's personnel an employment contract, the offer of new employment constitutes valuable consideration supporting a restrictive covenant in the employment contract. *QSP, Inc.*, 152 N.C. App. at 178, 566 S.E.2d at 854 ("QSP's buyout, once effective, would have left defendant unemployed but for QSP's offer of employment to defendant and defendant's subsequent acceptance. This offer . . . was an offer of new employment and therefore constituted valuable consideration"). Thus, when WHA, the newly formed entity that employed the physicians formerly employed by Wilmington Health, offered new employment to Harper and Calhoun, this amounted to valuable consideration sufficient to support the restrictive covenants at issue in this case. Since Harper's and Calhoun's covenants not to compete were supported by valuable consideration, WHA's offer of new employment, we need not reach the issue of whether the trial court violated the parol evidence rule in admitting evidence of other consideration supporting the covenants not to compete.

III. Validity of the Covenants Not to Compete

[3] Plaintiffs argue that non-competition provisions in physician employment agreements should be deemed *per se* against public policy. Our courts have long held, covenants not to compete are not *per se* unenforceable, *United Laboratories, Inc. v. Kuykendall*, 322 N.C. 643, 648, 370 S.E.2d 375, 379 (1988), and “medical doctors are by no means immune from such agreements.” *Iredell Digestive Disease Clinic, P.A. v. Petrozza*, 92 N.C. App. 21, 30, 373 S.E.2d 449, 454 (1988). See also *Eastern Carolina Internal Med., P.A. v. Faidas*, 149 N.C. App. 940, 945, 564 S.E.2d 53, 56 (2002), *affirmed per curiam*, 356 N.C. 607, 572 S.E.2d 780 (2002). Accordingly, this assignment of error is without merit.

[4] Plaintiffs next argue that “the trial court committed reversible error in concluding as a matter of law that the restrictive covenants were not [strictly scrutinized] as to public policy.” “Covenants not to compete restrain trade and are scrutinized strictly.” *Kennedy v. Kennedy*, 160 N.C. App. 1, 9, 584 S.E.2d 328, 333 (2003). However, forfeiture clauses are not strictly scrutinized. *Faidas*, 149 N.C. App. at 945, 564 S.E.2d at 56.

In *Faidas*, a panel of this Court held that a provision in an employment contract whereby a physician had to pay a sum of money if he competed against his former employer in three particular counties within one year following his termination of employment was a forfeiture clause rather than a covenant not to compete. *Id.* Judge Wynn argued in dissent,

the instant case concerns not the forfeiture of future or prospective post-termination benefits paid by the employer, but the required payment by the employee of a large sum to the employer as compensation for ‘competing’ with the employer. I fail to see a meaningful distinction between the ‘Cost Sharing’ provision at issue herein and a traditional covenant not to compete coupled with a damages provision for breach thereof, as both involve a restraint of trade based upon a disincentive to compete in the form of damages required to be paid by the former employee.

Id., 149 N.C. App. at 950, 564 S.E.2d at 58-59. On appeal as of right, our Supreme Court *per curiam* affirmed the majority opinion in *Faidas*. 356 N.C. 607, 572 S.E.2d 780 (2002).

Although we note the incongruous results substantively between our facts and the facts of *Faidas*, in form, the provisions at issue in

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this case are a non-compete clause and a damages provision. See *Hudson v. Insurance Co.*, 23 N.C. App. 501, 502, 209 S.E.2d 416, 417 (1974) (“A covenant not to compete, is a provision embodied in an employment contract whereby an employee promises not to engage in competitive employment with his employer after termination of employment”). Paragraph 13.1 of the agreement, stated *supra*, contains an unequivocal non-compete clause, and Paragraph 13.8, *supra*, contains a damages provision “[i]n the event the Physician desires to practice *in violation* [of the non-compete clause].” (Emphasis added). Accordingly, under established case law, the provisions are strictly scrutinized as to reasonableness and public policy. See *Kennedy, supra*.

The trial court concluded, “Plaintiffs’ agreements allow them to practice in the ‘Restricted Area’ upon payment of specified liquidated damages and therefore said agreements are not subject to strict scrutiny as to reasonableness and public policy. Nevertheless, said agreements survive a strict scrutiny examination as to reasonableness and public policy.” Plaintiffs challenge the trial court’s determination that the restrictive covenants are valid when strictly scrutinized. Specifically, plaintiffs argue, “the undisputed evidence and the trial court’s findings of fact nos. 45-51, established that if [plaintiffs] were prevented from practicing medicine, such enforcement not only had the potential to cause, but also actually would cause, substantial harm to public health.” We disagree.

The test for determining whether a covenant not to compete violates public policy was set forth in *Petrozza*:

If ordering the covenantor to honor his contractual obligation would create a substantial question of potential harm to the public health, that the public interests outweigh the contract interests of the covenantee, and the court will refuse to enforce the covenant. But if ordering the covenantor to honor his agreement will merely inconvenience the public without causing substantial harm, then the covenantee is entitled to have his contract enforced.

Iredell Digestive Disease Clinic v. Petrozza, 92 N.C. App. 21, 27-28, 373 S.E.2d 449, 453 (1988) (citations omitted). This Court considers the following factors in determining the risk of substantial harm to the public: “the shortage of specialists in the field in the restricted area, the impact of . . . establishing a monopoly . . . in the area, including the impact on fees in the future and the availability of a doctor at

all times for emergencies, and the public interest in having a choice in the selection of a physician.” *Statesville Medical Group v. Dickey*, 106 N.C. App. 669, 673, 418 S.E.2d 256, 259 (1992) (citations omitted). The trial court made findings 40-44, stated *supra*, that establish that there is no potential harm to public health given that the physicians were able to pay the liquidated damages and had no plans to leave the area. Plaintiffs assign error to these findings as having “no bearing on the issue of whether enforcement of the restrictive covenants creates a substantial question of potential harm to public health.” However, the issue of plaintiffs’ ability to pay, coupled with their intent to remain in the area even if ordered to pay, directly relates to the issue of whether enforcement of the contract will harm public health. Additionally, the trial court’s findings regarding WHA’s financial investment and the benefits plaintiffs received from practicing with WHA are not irrelevant since they relate to whether the liquidated damages provision is reasonable in amount.

Given that there is no potential harm to public health on these facts, there is strong public policy in favor of enforcing the provisions at issue:

[P]ublic policy requires the enforcement of contracts deliberately made which do not clearly contravene some positive law or rule of public morals. Since the right of private contract is no small part of the liberty of the citizen, the usual and most important function of courts is to enforce and maintain contracts rather than to enable parties to escape their obligations[.]

Land Co. v. Wood, 40 N.C. App. 133, 141, 252 S.E.2d 546, 552 (1979) (internal citation and quotation omitted). For the foregoing reasons, we hold that the trial court did not err in determining that the covenant not to compete at issue was not against public policy and should be enforced.

IV. The Effect of AMA’s Code of Medical Ethics on Validity of the Restrictive Covenants

[5] As stated *supra*, Paragraph 14 of H. Patel’s and Murphy’s employment contract stated, “no provision of this Agreement shall be enforceable by Company or Physician or any court of competent jurisdiction where local, state or federal laws and regulations and/or *the AMA Code of Professional Ethics prohibits and/or discourages the conduct described in or intent of the provision(s) sought to be*

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enforced.” (Emphasis added). The trial court made findings that relate to the provision as follows:

24. Diane Atkinson, the Executive Director of WHA, testified that the above provision was included in WHA’s employee physician agreements to assuage concerns of potential physician candidates that WHA’s contracts gave WHA the power to direct physicians to take unnecessary medical measures. She indicated that this provision was not intended to absolve the restrictive covenant. 25. At the time Murphy and H. Patel executed their Employee Physician Services Agreements and at the time of their departure from WHA, Policy E-9.02 of the AMA Code of Medical Ethics provided: Covenants-not-to-compete restrict competition, disrupt continuity of care, and potentially deprive the public of medical services. The (AMA) Council on Ethical and Judicial Affairs discourages any agreement which restricts the right of a physician to practice medicine for a specified period of time or in a specified area upon termination of employment, partnership or corporate agreement. Restrictive covenants are unethical if they are excessive in geographic scope or duration in the circumstances presented, or if they fail to make reasonable accommodation of patients’ choice of physician. (Emphasis in original).

Plaintiffs argue that the trial court improperly admitted evidence of the purpose behind including Paragraph 14 in the employment contract. The related assignment of error states, “The Court’s Finding of Fact No. 24 in the Order and Final Judgment pertaining to Defendant-Appellee’s alleged purpose or intent for including Paragraph 14 in the employment agreements of Drs. Murphy and H. Patel, on the grounds such finding is irrelevant and contrary to the law.” In their brief, plaintiffs do not argue that testimony relating to the purpose of Paragraph 14 was irrelevant but rather that the testimony was inadmissible under the parol evidence rule and could not be used to interpret an unambiguous provision of the contract. Since plaintiffs have failed to argue their portion of the assignment of error that stated the testimony was irrelevant, this portion of the assignment of error is abandoned pursuant to N.C. R. App. P. 28(b)(6) (2006).

[6] Plaintiffs have also failed to preserve the portion of their assignment of error that stated finding 24 is “contrary to the law.” North Carolina Rule of Appellate Procedure 10 states:

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

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appeal in accordance with this Rule 10. . . . (c)(1) . . . Each assignment of error shall, so far as practicable, be confined to a single issue of law; and *shall state plainly, concisely and without argumentation the legal basis upon which error is assigned.*

N.C. R. App. P. 10(a), 10(c)(1) (2006) (emphasis added). “Assignments of error that are . . . broad, vague, and unspecific . . . do not comply with the North Carolina Rules of Appellate Procedure.” *May v. Down East Homes of Beulaville, Inc.*, 175 N.C. App. 416, 417, 623 S.E.2d 345, 346 (2006). Because the assignment of error at issue states that the challenged finding was “contrary to law” without stating any specific reason that the finding is “contrary to law” it fails to identify the issues briefed on appeal. *See id.* (holding that assignments of error stating that the trial court’s rulings were “contrary to the caselaw of the jurisdiction” failed to properly preserve a plaintiffs’ arguments for appellate review); *Wetchin v. Ocean Side Corp.*, 167 N.C. App. 756, 759, 606 S.E.2d 407, 409 (2005) (“This assignment—like a hoopskirt—covers everything and touches nothing” (citation and quotations omitted)). Since plaintiffs failed to properly preserve this argument, we do not address it. *See Viar v. N.C. Dep’t of Transp.*, 359 N.C. 400, 401, 610 S.E.2d 360, 360 (2005) (“The North Carolina Rules of Appellate Procedure are mandatory and failure to follow these rules will subject an appeal to dismissal” (citation and quotations omitted)).

[7] Plaintiffs also argue that the trial court erred in failing to declare *as a matter of law* that the restrictive covenants were unenforceable based on Paragraph 14 and the AMA Code of Medical Ethics. Specifically, plaintiffs contend: 1) Paragraph 14 of the agreement was unenforceable if the AMA Code of Medical Ethics discouraged the provision, and 2) the AMA Code of Medical Ethics discouraged “any agreement which restricts the right of a physician to practice medicine for a specified period of time or in a specified area upon termination of employment, partnership or corporate agreement.” Plaintiffs additionally argue that the contract language was unambiguous and thus a matter of law for the court to decide, citing *Young v. Lumber Co.*, 147 N.C. 20, 31, 60 S.E. 654, 656 (1908). In the applicable assignment of error, plaintiffs fail to assign error to the denial of their motion for summary judgment on this issue or assign error on the basis that the trial court erred in failing to consider this issue as a matter of law. Rather, the assignment of error states,

The Court’s Conclusion of Law No. 6 in the Order and Final Judgment that the liquidated damages provisions and restric-

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tive covenants contained in the employment agreements of Drs. Murphy and H. Patel are enforceable notwithstanding Policy E-9.02 of the AMA Code of Medical Ethics, on the grounds Paragraph 14 of the employment agreements of Drs. Murphy and H. Patel renders the restrictive covenant void and unenforceable as a result of Policy E-9.02 of the AMA Code of Medical Ethics.

It is significant that plaintiffs did not assign error based on the trial court's failure to determine the issue as a matter of law because, as explained *supra*, plaintiffs have failed to properly assign error to finding 24, regarding the intent behind Paragraph 14 and, thus, finding 24 is binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). Finding 24 establishes that Paragraph 14 "was not intended to absolve the restrictive covenant." Since this finding addresses the issue of the intent behind the provision and is binding on appeal, it supports the trial court's conclusion that "[t]he . . . restrictive covenants contained in the employment agreements of Plaintiffs Murphy and H. Patel are enforceable notwithstanding Policy E-9.02 of the AMA Code of Medical Ethics." Accordingly, given that plaintiffs did not assign error based on the trial court's failure to determine this issue as a matter of law, we do not address this issue on appeal. *See Viar, supra*.

V. Counsel Fees

[8] Plaintiffs next argue that the trial court erred in awarding counsel fees to WHA because there is no statutory authority supporting an award of counsel fees on these facts. Specifically, plaintiffs contend that the General Assembly intended N.C. Gen. Stat. § 6-21.2 (2005) to apply to "commercial transactions" and that employer-employee agreements do not amount to a "commercial transaction."¹

The general rule in this state is "a successful litigant may not recover attorneys' fees, whether as costs or as an item of damages, unless such a recovery is expressly authorized by statute." *Southland Amusements and Vending, Inc. v. Rourk*, 143 N.C. App. 88, 94, 545 S.E.2d 254, 257 (2001) (internal quotations omitted). Defendant contends that statutory authority for counsel fees on these facts arises under N.C. Gen. Stat. § 6-21.2 (2005), which states:

1. We note that plaintiffs argue on appeal that the agreement at issue does not fall within the intended scope of N.C. Gen. Stat. § 6-21.2. Plaintiffs make no argument that the agreement at issue otherwise fails to qualify as "evidence of indebtedness," and we do not address this issue.

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Obligations to pay attorneys' fees upon any note, conditional sale contract or other evidence of indebtedness, in addition to the legal rate of interest or finance charges specified therein, shall be valid and enforceable, and collectible as part of such debt, if such note, contract or other evidence of indebtedness be collected by or through an attorney at law after maturity . . .

Id. In *Enterprises, Inc. v. Equipment Co.*, our Supreme Court considered N.C. Gen. Stat. § 6-21.2 and stated, since the statute is remedial, it "should be construed liberally to accomplish the purpose of the Legislature and to bring within it all cases fairly falling within its intended scope." 300 N.C. 286, 293, 266 S.E.2d 812, 817 (1980). Our Supreme Court further clarified the legislature's intended scope:

Although G.S. 6-21.2 was not itself codified as a constituent section of Chapter 25 of the General Statutes (the Uniform Commercial Code), we believe its legislative history clearly demonstrates that it was intended to supplement those principles of law generally applicable to commercial transactions. As with the Uniform Commercial Code in general, it would appear that some of the purposes underlying the enactment of G.S. 6-21.2 are "to simplify, clarify, and modernize the law governing commercial transactions" among the various jurisdictions, and "to permit the continued expansion of commercial practices through custom, usage, and agreement of the parties" G.S. 25-1-102(2)(a) and (b).

300 N.C. 286, 293, 266 S.E.2d 812, 817 (1980). Within this framework, our Supreme Court specifically held, "evidence of indebtedness" includes "any printed or written instrument, signed or otherwise executed by the obligor(s), which evidences on its face a legally enforceable obligation to pay money." *Enterprises, Inc.*, 300 N.C. at 294, 266 S.E.2d at 817.

Our review of the trial court's order reveals that it made no findings of fact whether the contract at issue is a "printed or written instrument, signed or otherwise executed by the obligor(s), which evidences on its face a legally enforceable obligation to pay money" or whether this contract relates to commercial transactions. These determinations are questions of fact that should not be initially decided by this Court. *Eddings v. Southern Orthopedic & Musculoskeletal Assocs.*, 356 N.C. 285, 569 S.E.2d 645 (2002), *per curiam reversing for the reasons stated in* 147 N.C. App. 375, 385, 555 S.E.2d 649, 656 (2001) (Greene, J., dissenting). Accordingly,

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we remand this matter to the trial court for appropriate factual determinations.

Plaintiffs have failed to argue their remaining assignments of error on appeal, and we deem them abandoned pursuant to N.C. R. App. P. 28(b)(6) (2006). Because of our resolution of plaintiffs' assignments of error, we need not address WHA's cross-assignments of error.

Affirmed in part; remanded in part.

Judges BRYANT and STEELMAN concur.

WILLIAM DAVIS, EMPLOYEE, PLAINTIFF-APPELLEE v. HARRAH'S CHEROKEE CASINO, EMPLOYER, LEGION INSURANCE COMPANY, (NOW ASSIGNED TO THE NORTH CAROLINA INSURANCE GUARANTY ASSOCIATION), CARRIER, DEFENDANTS-APPELLANTS

No. COA05-1153

(Filed 1 August 2006)

1. Workers' Compensation— aggravation of existing back injury—fall at home not an intervening event

A fall at home by a workers' compensation plaintiff aggravated his existing compensable back injury and was not an intervening event that barred further compensation.

2. Workers' Compensation— findings—more than recitation of evidence required

A workers' compensation finding was adequate where the last sentence reflected the Industrial Commission's consideration of the evidence. Recitations of a physician's testimony and written surgery notes would not in themselves constitute a finding of fact.

3. Workers' Compensation— findings—general and specific—propensity to degenerative back disease following surgery

There was no evidence in the record to support the Industrial Commission's specific finding about this plaintiff's propensity to develop degenerative disease following back surgery, although there was competent evidence to support the Industrial Commission's general statement of such a propensity.

4. Workers' Compensation— back injury—degenerative changes following surgery—causation—findings

The evidence supported the Industrial Commission's finding that the narrowing of the spinal canal of a workers' compensation plaintiff with a back injury was caused by the prominence of a primary spinal ligament (the ligamentum flavum) and scarring from surgery.

5. Workers' Compensation— back injury—second surgery compensable—supported by findings

The Industrial Commission's conclusion that a workers' compensation plaintiff's second back surgery was a consequence of his compensable injury was supported by the findings. Testimony about degenerative changes was not addressed, given the viable finding that plaintiff's stenosis was caused by scar tissue from his first surgery.

6. Workers' Compensation— back injury—release for work but not from medical care—continued pain—findings supported by evidence

Findings in a workers' compensation back case that plaintiff had been released for work but not from medical care and that he continued to suffer pain were supported by medical notes and testimony.

7. Workers' Compensation— credibility—Industrial Commission as sole judge

The Industrial Commission is the sole judge of credibility in workers' compensation cases. A finding that plaintiff's testimony was credible was upheld.

8. Workers' Compensation— ongoing disability—findings

The Industrial Commission properly concluded that a workers' compensation plaintiff suffered an ongoing disability. The Commission found that a physician had written plaintiff out of work, that he was injured in a fall on ice, that the medical testimony was that a person who has undergone spinal surgery is more likely to suffer worse symptoms from an injury to the back and that plaintiff's activity was limited by pain. Plaintiff testified about the effect the pain had on his ability to work as well as his qualification for social security disability, and the Commission found plaintiff's testimony to be credible and sufficient to prove the ongoing nature of his disability.

Judge STEPHENS dissenting.

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Appeal by defendants from opinion and award entered 20 June 2005 by the North Carolina Industrial Commission. Heard in the Court of Appeals 19 April 2006.

The Law Offices of Lee and Smith, P.A., by D. Andrew Turman, for plaintiff-appellee.

Hedrick Eatman Gardner & Kincheloe, L.L.P., by C.J. Childrers, for defendants-appellants.

McGEE, Judge.

William Davis (plaintiff) worked as a games performance technician for Harrah's Cherokee Casino (Harrah's). Plaintiff's job duties included repairing and performing preventative maintenance on gaming machines. Plaintiff was lifting a thirty-five-pound monitor out of a slot machine on 26 May 2001 when he felt a pain in his lower back. Plaintiff did not report the injury and continued to work until 26 June 2001, when he sought medical attention for recurring pain in his left leg. Plaintiff was treated by a chiropractor who ordered an MRI scan that revealed a herniated disc in plaintiff's back. Dr. John M. Silver (Dr. Silver) performed back surgery on plaintiff on 7 September 2001. Plaintiff returned to work at Harrah's on 31 October 2001 and continued working until 27 December 2001.

Plaintiff called Dr. Silver's office on 7 November 2001 complaining of pain in his left leg. Plaintiff was prescribed steroid medication. Plaintiff underwent an MRI scan of his back on 20 December 2001, which showed scar tissue around a nerve and "some degenerative changes."

At a follow-up visit with Dr. Silver on 31 December 2001, plaintiff reported he had slipped and fallen onto his back while walking up a ramp at his home. Plaintiff told Dr. Silver he had experienced significant pain in his back and down both legs since his fall. Dr. Silver wrote plaintiff out of work from 27 December 2001 until 1 February 2002. Dr. Silver ordered a myelogram and CAT scan on 2 April 2002, which revealed what Dr. Silver deemed "appropriate degenerative changes for [plaintiff's] age and the postoperative changes[.]" Dr. Silver performed a second back surgery on plaintiff on 22 April 2002. The purpose of the second surgery was to decompress nerves in plaintiff's spinal canal, which had become narrowed. Following his second surgery, plaintiff was kept out of work for a period of time that exhausted his leave under the Family Medical Leave Act. Thereafter, plaintiff was fired by Harrah's for not returning to work.

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A hearing on the matter was held before a deputy commissioner on 23 January 2004. The deputy commissioner concluded that plaintiff sustained a compensable injury by accident on 26 May 2001, but that plaintiff had failed to show that his ongoing back problems after October 2001 were related to the 26 May 2001 compensable injury. Plaintiff appealed to the Industrial Commission (the Commission), which heard the matter on 17 May 2005. In an opinion and award filed 20 June 2005, the Commission modified and affirmed the opinion and award of the deputy commissioner. The Commission concluded that plaintiff's second surgery on 22 April 2002 was a consequence of plaintiff's compensable 26 May 2001 injury. The Commission also concluded that plaintiff's slip and fall in late 2001 aggravated the May 2001 injury, and that the pain and medical consequences plaintiff suffered were a "natural progression" of the May 2001 injury. The Commission awarded plaintiff ongoing medical and indemnity benefits from 27 December 2001 forward. Defendants appeal.

Defendants assign error to four findings of fact, arguing the findings are not supported by competent evidence. Defendants assign error to five conclusions of law, arguing the conclusions are not supported by competent findings of fact and are erroneous as a matter of law.

Defendants concede that plaintiff suffered a compensable injury on 26 May 2001. They further concede their responsibility to compensate plaintiff for medical expenses related to his 7 September 2001 surgery and for lost wages from 26 June 2001 through 31 October 2001. The issues on appeal are: (1) whether plaintiff's slip and fall in late 2001 was an intervening event sufficient to bar plaintiff from further compensation after the fall; (2) whether plaintiff's surgery on 22 April 2002 was a consequence of plaintiff's compensable May 2001 injury; and (3) whether plaintiff proved an ongoing disability after returning to work following his September 2001 surgery.

Our Court reviews decisions of the Commission to determine "whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000) (citing *Adams v. AVX Corp.*, 349 N.C. 676, 509 S.E.2d 411 (1998)). The Commission's findings of fact are conclusive on appeal if supported by competent evidence, even when there is evidence to support contrary findings. *Id.*

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at 115, 530 S.E.2d at 552-53. “[S]o long as there is some evidence of substance which directly or by reasonable inference tends to support the findings, this Court is bound by such evidence, even though there is evidence that would have supported a finding to the contrary.” *Shah v. Howard Johnson*, 140 N.C. App. 58, 61-62, 535 S.E.2d 577, 580 (2000), *disc. review denied*, 353 N.C. 381, 547 S.E.2d 17 (2001) (internal quotation omitted). Moreover, “[t]he evidence tending to support plaintiff’s claim is to be viewed in the light most favorable to plaintiff, and plaintiff is entitled to the benefit of every reasonable inference to be drawn from the evidence.” *Poole v. Tammy Lynn Ctr.*, 151 N.C. App. 668, 672, 566 S.E.2d 839, 841 (2002) (quoting *Adams* at 681, 509 S.E.2d at 414). The Commission’s conclusions of law are reviewed *de novo* by our Court. *Grantham v. R.G. Barry Corp.*, 127 N.C. App. 529, 534, 491 S.E.2d 678, 681 (1997), *disc. review denied*, 347 N.C. 671, 500 S.E.2d 86 (1998).

I. Plaintiff’s slip and fall

[1] Defendants concede their responsibility for plaintiff’s lost wages from 26 June 2001 through 31 October 2001, the period plaintiff was out of work due to his first surgery. Defendants contend that plaintiff’s fall in late 2001 barred any recovery by plaintiff thereafter. In concluding that plaintiff’s fall was not a bar to recovery, the Commission relied upon our Court’s decision in *Horne v. Universal Leaf Tobacco Processors*, 119 N.C. App. 682, 459 S.E.2d 797, *disc. review denied*, 342 N.C. 192, 463 S.E.2d 237 (1995). We held in *Horne*:

The aggravation of an injury is compensable if the primary injury arose out of and in the course of employment, and the subsequent aggravation of that injury is a natural consequence that flows from the primary injury. Unless the subsequent aggravation is the result of an independent, intervening cause attributable to [a] claimant’s own intentional conduct, the subsequent aggravation of the primary injury is also compensable.

Id. at 685, 459 S.E.2d at 799 (internal citation omitted). In *Horne*, the claimant suffered a compensable back injury while removing sheets of tobacco from a conveyer belt, and subsequently was involved in an automobile accident. *Id.* at 683, 459 S.E.2d at 798. Our Court concluded the automobile accident was compensable because it was an aggravation of the claimant’s prior compensable injury, and there was no evidence the accident was attributable to the claimant’s own intentional conduct. *Id.* at 687, 459 S.E.2d at 801.

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In the present case, the Commission applied *Horne* to conclusions six and seven, which defendants contest:

6. Also at issue is whether the fall that plaintiff suffered outside his home in late November or early December 2001 was an intervening causal event sufficient to bar plaintiff from further compensation. For this to be the case, any injury resulting from [plaintiff's] fall would have to be entirely independent of the compensable injury. . . . The slip and fall on ice aggravated the earlier injury and the pain and medical consequences were a natural progression of the early injury.

7. There has been no allegation that plaintiff's slip and fall on the ice was in any way of his own volition. . . .

First, as defendants do not present any argument in their brief regarding conclusion number seven, their assignment of error to conclusion seven is deemed abandoned. *See* N.C.R. App. P. 28(b)(6). Accordingly, conclusion of law number seven is binding on appeal.

In conclusion six, the Commission's determination that plaintiff's slip and fall aggravated plaintiff's compensable injury is supported by the Commission's uncontested findings five and six. In finding five, the Commission found as fact that plaintiff complained of pain in his left leg before the fall, and then complained of pain in both legs after the fall. In finding six, the Commission found as fact that plaintiff "was in increased pain from the slip on ice." These uncontested findings support the Commission's conclusion that plaintiff's fall aggravated his compensable back injury.

Under *Horne*, an aggravation of a compensable injury is compensable "[u]nless [it] is the result of an independent intervening cause attributable to [a] claimant's own intentional conduct[.]" *Horne* at 685, 459 S.E.2d at 799. As stated above, the Commission determined there was no allegation that plaintiff's slip and fall was in any way a result of his own intentional conduct. Accordingly, the Commission was correct, under *Horne*, in determining that plaintiff's disability resulting from the slip and fall, which aggravated the May 2001 injury and was not the result of plaintiff's own intentional conduct, was compensable. Plaintiff's slip and fall in late 2001 was not an intervening event that barred plaintiff from further compensation. Defendants' assignments of error pertaining to conclusions six and seven are overruled.

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II. Plaintiff's second surgery

[2] Defendants assign error to the Commission's finding number fourteen:

14. While Dr. Silver opined at his deposition that the second surgery was primarily to correct degenerative changes, he did indicate that changes seen on the MRI relating to scarring and fibrosis around the nerve were related to plaintiff's first surgery. The report from the April 1, 2002, MRI indicated moderate to severe stenosis at the same level as the earlier surgery *due to the prominence of the ligamentum flavum and the scar tissue*. Furthermore, Dr. Silver's actual surgery notes reveal several instances of recisioning scar tissue[.] [The Commission quotes Dr. Silver's surgery notes at length.] It is clear from this description that *in addition to the degenerative changes to plaintiff's ligamentous flavum, the second surgery involved the removal of scar tissue from the first surgery*.

(Emphasis added). We note this finding is largely comprised of recitations of Dr. Silver's testimony and written surgery notes, which in themselves do not constitute findings of fact. *See, e.g., Bailey v. Sears Roebuck & Co.*, 131 N.C. App. 649, 653, 508 S.E.2d 831, 835 (1998) (noting that recitations of testimony do not constitute findings of fact and "reluctantly" accepting the Commission's recitations as findings of fact). Our Court has stated that "it is the Commission's duty to find the ultimate determinative facts, not to merely recite evidentiary facts and the opinions of experts. This is especially important in light of the requirement that the Commission demonstrate its consideration of the relevant evidence." *Davis v. Weyerhaeuser Co.*, 132 N.C. App. 771, 776, 514 S.E.2d 91, 94 (1999). However, as the last sentence of finding fourteen reflects the Commission's consideration of the evidence recited, we find finding fourteen is adequate as a factual finding. Moreover, the evidence recited by the Commission is competent evidence of record to support the Commission's finding. Dr. Silver explained during his deposition that "the scarring and the fibrosis around the nerve[] obviously related to the surgery." The Commission's statement that the stenosis was "due to the prominence of the ligamentum flavum and the scar tissue" is supported by the report from plaintiff's 1 April 2002 myelogram, which notes that the myelogram revealed "moderate to severe spinal canal stenosis . . . secondary to prominence of the ligamentum flavum and the scar tissue." The Commission's statement that plaintiff's surgery

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involved the removal of scar tissue is supported by Dr. Silver's operative notes in which he recorded that he "dissected" scar tissue from plaintiff's bone and nerve root.

[3] Defendants next assign error to finding number fifteen:

15. As has already been found as fact above, plaintiff's first surgery would have made him more prone to develop degenerative changes, specifically ligamentous changes. The ligamentum flavum Dr. Silvers removed is a primary spinal ligament, and was identified, along with the scarring, as a primary cause of the stenosis seen on the April 1, 2002, MRI.

The first sentence of finding fifteen refers to finding number thirteen, in which the Commission recited a portion of Dr. Silver's testimony, and found that testimony as fact:

13. . . . The other thing [spinal surgery] does is, by taking down part of the joint and by disrupting ligaments, there is also more of a propensity to develop degenerative changes at that level over time[.]

Defendants do not assign error to finding number thirteen, which is therefore presumed to be supported by competent evidence and is binding on appeal. *See Anderson Chevrolet/Olds v. Higgins*, 57 N.C. App. 650, 653, 292 S.E.2d 159, 161 (1982). In finding thirteen, the Commission found as fact that someone who has undergone back surgery is more prone to develop degenerative disease. In finding fifteen, the Commission restated Dr. Silver's generalized statement, but made it specific to plaintiff. Our Court tends to distinguish between general and specific statements relating to causation and propensity. *See Lewis v. N.C. Dep't of Corr.*, 167 N.C. App. 560, 564-66, 606 S.E.2d 199, 202-03 (2004) (finding competent evidence that a claimant's work-related injury exacerbated his pre-existing condition where testifying physicians made general statements that stress could exacerbate diabetes and specific statements that the plaintiff's posttraumatic stress disorder exacerbated his diabetes); *Bondurant v. Estes Express Lines, Inc.*, 167 N.C. App. 259, 262, 606 S.E.2d 345, 347 (2004) (noting that testifying physicians spoke in terms "both generally and in [the] plaintiff's case"). In the present case, while there is competent evidence of record to support the general statement of propensity in finding thirteen, there is no evidence in the record to support the Commission's more specific finding as to plaintiff's propensity to develop degenerative changes.

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[4] We next address the second sentence of finding number fifteen, that the ligamentum flavum Dr. Silvers removed in the second surgery “was identified, along with the scarring, as a primary cause of the stenosis seen on plaintiff’s 1 April 2002 MRI.” We note that the imaging performed on 1 April 2002 was a myelogram and CAT scan, and not an MRI. As noted above, according to a report dated 1 April 2002, the myelogram and CAT scan showed “moderate to severe spinal canal stenosis . . . secondary to prominence of the ligamentum flavum and the scar tissue.” This evidence supports the Commission’s finding that the ligamentum flavum and scarring caused the narrowing of plaintiff’s spinal canal.

[5] From its findings, the Commission concluded as a matter of law, and defendants contest:

3. As a consequence of his [May 2001] back injury, plaintiff required medical treatment, including the surgery performed by Dr. Silver on September 7, 2001, *and the second surgery, performed on April 22, 2002*. Defendants are responsible for payment of all such reasonably necessary medical treatment incurred by plaintiff for the lower back injury, including said surgeries, and follow-up to those surgeries[.]

(Emphasis added). Defendants contest this conclusion to the extent the Commission determined plaintiff’s second surgery was a consequence of his May 2001 back injury and determined defendants were responsible for payments related to the second surgery. Defendants argue this conclusion is unsupported by the Commission’s viable findings of fact and is erroneous as a matter of law. We disagree.

The Commission’s viable findings on this issue establish: (1) as a result of his compensable injury, plaintiff underwent back surgery in September 2001; (2) plaintiff underwent a second back surgery in April 2002 to correct compression of nerves caused by the narrowing of the spinal canal; and (3) the narrowing of plaintiff’s spinal canal was caused by thickened ligamentum flavum and by scar tissue from the first surgery. From these findings, the Commission concluded that plaintiff’s second surgery was a consequence of his compensable May 2001 injury. We hold that these findings support the Commission’s conclusion.

Defendants argue that Dr. Silver gave conflicting testimony on whether plaintiff’s degenerative changes were due to the first surgery, or whether the degenerative changes were merely a consequence of

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plaintiff's age. However, given the viable factual finding that plaintiff's stenosis was caused in part by scar tissue from his first surgery, we need not address Dr. Silver's testimony regarding plaintiff's degenerative changes. Plaintiff has shown that scar tissue from his first surgery, which is an undisputed consequence of his compensable injury, was a causal factor in the stenosis that led to plaintiff's second surgery. Accordingly, plaintiff's second surgery is also compensable.

III. Plaintiff's ongoing disability

[6] On the issue of plaintiff's ongoing disability, defendants assign error to the following findings of fact:

4. . . . Although [plaintiff] had been released to work [on 31 October 2001], plaintiff had not been released from medical care and continued to suffer pain.

. . .

18. Once plaintiff reestablished his disability when Dr. Silver took him back out of work in December 2001, the burden was again shifted back to defendants. Moreover, plaintiff's entirely credible testimony regarding his condition, history of continuing medical treatment, and qualification for Social Security Disability go far beyond mere presumptions in proving the ongoing nature of his disability and its direct link to his compensable specific traumatic incident.

Finding number four is supported by competent evidence of record. First, Dr. Silver noted on plaintiff's medical chart on 29 October 2001 that he would "see [plaintiff] back in 6 weeks. . . . For now, he is released back to work and will call me if he has any problems." Further, Dr. Silver testified in his deposition that plaintiff called Dr. Silver's office on 7 November 2001 complaining of pain. Plaintiff testified that he suffered back pain from 31 October to 27 December 2001. This assignment of error is overruled.

[7] Finding eighteen contains statements of fact and law. The second sentence of finding eighteen states in part that the Commission found plaintiff's testimony to be credible. It is well settled that the Commission is the sole judge of the credibility of evidence, and so we uphold that part of the finding. *See Deese*, 352 N.C. at 116, 530 S.E.2d at 553. The remainder of the finding pertains to the legal question of plaintiff's burden in proving ongoing disability. We will address that issue of law below.

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[8] The Commission made the following conclusions of law, which defendants contest:

4. As a consequence of his [May 2001] back injury, plaintiff was unable to earn wages in any employment and was temporarily totally disabled from . . . December 27, 2001, and continuing. . . . Defendants are responsible for payment to plaintiff of wage loss compensation at the rate of \$283.09 per week during this period. N.C. Gen. Stat. § 97-29.

. . .

8. With regard to plaintiff's continuing inability to earn wages, the Court of Appeals affirmed a series of earlier holdings which have held that "medical evidence that a plaintiff suffers from genuine pain as a result of a physical injury, combined with the plaintiff's own credible testimony that his pain is so severe that he is unable to work, may be sufficient to support a conclusion of total disability." *Knight v. Wal-Mart*, 149 N.C. App. 1, 7-8, 562 S.E.2d 434, 439[-]40 (2002). . . . The *Knight* court also held that the concept of maximum medical improvement (MMI) is not relevant to the determination of entitlement to the continuation of temporary total disability (or TTD) benefits. *Knight* at 10, 441.

Defendants argue the Commission's conclusion that plaintiff was disabled from 27 December 2001 is unsupported by the Commission's viable findings of fact and is erroneous as a matter of law. We disagree.

The burden of proving disability under N.C. Gen. Stat. § 97-2(9) for the period subsequent to 27 December 2001 is on plaintiff. See *Russell v. Lowes Product Distribution*, 108 N.C. App. 762, 425 S.E.2d 454 (1993). Under *Russell*, a plaintiff may meet this burden of proof by presenting medical evidence that, as a consequence of the work-related injury, the plaintiff is unable to work in any employment. *Id.* at 765, 425 S.E.2d at 457. As the Commission notes in conclusion eight, our Court has held that "medical evidence that a plaintiff suffers from genuine pain as a result of a physical injury, combined with the plaintiff's own credible testimony that his pain is so severe that he is unable to work, may be sufficient to support a conclusion of total disability by the Commission." *Knight v. Wal-Mart Stores, Inc.*, 149 N.C. App. 1, 8, 562 S.E.2d 434, 440 (2002), *aff'd*, 357 N.C. 44, 577 S.E.2d 620 (2003). Here, in finding six, the Commission found as fact that Dr. Silver wrote plaintiff out of work from 27 December 2001

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through 1 February 2002, and that plaintiff was in increased pain from his fall on the ice. Dr. Silver testified that plaintiff's symptoms following his fall, which we have ruled does not bar continuing compensation, were "related to the fall" and that a person who has undergone spinal surgery is more likely to suffer "worse symptoms" from an injury to the back. Dr. Silver also testified that plaintiff's activity was "limited by pain." Plaintiff testified at length about the effect his pain had on his ability to work, as well as his qualification for Social Security disability compensation. The Commission found plaintiff's testimony to be credible and sufficient to prove the ongoing nature of his disability. We agree that this evidence satisfies plaintiff's burden under *Russell and Knight*. Accordingly, we uphold the Commission's conclusion that plaintiff suffered an ongoing disability after 27 December 2001.

Affirmed.

Judge HUNTER concurs.

Judge STEPHENS dissents with a separate opinion.

STEPHENS, Judge, dissenting.

"[The] rule of causal relation is the very sheet anchor of the [Workers'] Compensation Act. It has kept the Act within the limits of its intended scope,—that of providing compensation benefits for industrial injuries, rather than branching out into the field of general health insurance benefits." *Duncan v. City of Charlotte*, 234 N.C. 86, 91, 66 S.E.2d 22, 25 (1951) (citations omitted). Because I do not believe that the medical evidence in this case is sufficient to support the existence of a causal relationship between Plaintiff's compensable back injury of 26 May 2001 and the second surgical procedure performed on his back on 22 April 2002, I respectfully dissent from the majority opinion.

It is undisputed that, sometime around the end of November 2001, Plaintiff slipped on a ramp at his house and fell, landing on his "tailbone or . . . butt." It is further undisputed that approximately a month earlier, Plaintiff had returned to full-time, full-duty work for his employer in a job that required him to repair gaming machines weighing several hundred pounds. Dr. Silver's uncontradicted testimony establishes that, according to Plaintiff, he had been doing "very well" at the time he was released to go back to work, but after

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the fall, he “began to have problems with significant pain in his back and pain down both legs.” When conservative treatment failed to relieve Plaintiff’s symptoms, Dr. Silver performed a second surgery. The majority agree with the Commission that Plaintiff’s slip and fall aggravated his earlier compensable injury, and thus, the second surgery is compensable under the causation theories applied in *Horne v. Universal Leaf Tobacco Processors*, 119 N.C. App. 682, 459 S.E.2d 797, *disc. review denied*, 342 N.C. 192, 463 S.E.2d 237 (1995). I disagree.

This Court’s decision in *Horne* reveals that, following a compensable on-the-job injury, Mr. Horne underwent two surgical procedures on his back. While he was still out of work and recovering from the second surgery, he was involved in an automobile accident. Mr. Horne’s treating neurosurgeon, Dr. Tomaszek, recommended a fusion to treat Mr. Horne’s worsened condition. Owing to the occurrence of the automobile accident, Mr. Horne’s employer denied that the need for the third surgery was causally related to the on-the-job injury. In reversing the Commission’s denial of benefits, this Court noted the *uncontradicted* testimony of Dr. Tomaszek that (1) the recurrent disk rupture shown on the MRI obtained after the automobile accident was actually present before that accident at the same lumbar level as Mr. Horne’s compensable first surgery, (2) Mr. Horne was complaining of “moderately severe” back and leg pain before the automobile accident and was not “comfortable” with his surgical results, (3) the automobile accident worsened the abnormal disk, and (4) the “pathology” leading Dr. Tomaszek to recommend a fusion after the automobile accident “all stems back to the work-related accident.” *Horne*, 119 N.C. App. at 686-87, 459 S.E.2d at 800. On this uncontradicted evidence, this Court concluded that the automobile accident aggravated Mr. Horne’s prior compensable injury, and thus, the consequences of that aggravation were also compensable. It is incomprehensible that a different result could have been reached.

Similarly, in *Roper v. J.P. Stevens & Co.*, 65 N.C. App. 69, 73, 308 S.E.2d 485, 488 (1983), *disc. review denied*, 310 N.C. 309, 312 S.E.2d 652 (1984), this Court determined that plaintiff was entitled to compensation for complications of phlebitis, arthritis, and severe body pain following a compensable on-the-job leg injury because it was “not disputed” that such complications “were the result of plaintiff’s compensable injury.” *Accord, Heatherly v. Montgomery Components, Inc.*, 71 N.C. App. 377, 382, 323 S.E.2d 29, 31 (1984) (plaintiff’s second injury was a “refracture” of his first compensable frac-

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ture), *disc. review denied*, 313 N.C. 329, 327 S.E.2d 890 (1985); *Mayo v. City of Washington*, 51 N.C. App. 402, 407, 276 S.E.2d 747, 750 (1981) (subsequent incidents “reinjured” plaintiff’s original knee injury).

No such evidence can be found in this case. On the contrary, the uncontradicted testimony of Plaintiff’s treating neurosurgeon, Dr. Silver, establishes the following: (1) Plaintiff sustained a ruptured disc at the lowest level of his lumbar spine as a result of his on-the-job injury, for which Dr. Silver performed a microdiscectomy on the left to remove the disc fragment that was compressing the nerve; (2) Plaintiff did “very well” after that surgery and was able to return full time to physically demanding work; (3) the left leg pain for which Dr. Silver prescribed a steroid medication for Plaintiff over the phone within a week of his return to work was not “an uncommon thing[;]” (4) Dr. Silver next saw Plaintiff almost two months later after Plaintiff fell at home, and Plaintiff told Dr. Silver that since that fall, “he had problems with pain in his back and pain now actually down both legs[;]” whereas the pain from his work injury had been limited to his left leg; (5) the symptoms which Plaintiff experienced after the fall on the ramp were “related to the fall[;]” (6) the degenerative changes seen on the imaging studies performed after the fall were “related to a normal aging process[;]” and (7) the surgery performed by Dr. Silver after the fall was a *bilateral* hemilaminectomy and facetectomy to remove a portion of the lamina of the bone (the vertebrae) on each side and to remove thickened ligaments to decompress the nerves and “give [them] more room[;]” because Plaintiff’s spinal canal had become narrowed “due to degenerative change, including thickening of the joints themselves and thickening of the ligaments of the joints.” Moreover, when Dr. Silver was directly asked whether “this thickening” that he removed to decompress the nerves in Plaintiff’s spinal canal was “due to postsurgical changes from the first surgery[;]” he unequivocally responded, “No. . . . *This was due to degenerative change at that same level [as the first surgery], not actually scar tissue but rather degenerative changes there.*” (Emphasis added). This testimony is undisputed.

Dr. Silver was not asked whether the slip and fall aggravated Plaintiff’s earlier work injury. Indeed, the only question he was asked about the potential relationship between the condition for which he performed the second surgery and the preexisting condition of Plaintiff’s back from the work injury was whether the thickening of the joints and ligaments that he removed during that surgery was

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“due to postsurgical changes from the first surgery[] [or] [w]as this scar tissue[?]” As noted above, his uncontradicted answer was unequivocally in the negative, and his explanation establishes that he operated on Plaintiff’s back a second time because of degenerative changes which Plaintiff failed to prove were related in any way to the work injury. In fact, answering questions about his second surgery, Plaintiff testified, “[Dr. Silver] said that I had arthritis . . . around my sciatic nerve that was causing the pain down my leg. . . . He said he removed the arthritis around the sciatic nerve.”

Thus, unlike the uncontradicted evidence which overwhelmingly established that a subsequent accident had aggravated the preexisting compensable condition of Mr. Horne’s back, which supported this Court’s holding that “the subsequent aggravation of [the primary compensable] injury is a natural consequence that flows from the primary injury[,]” *Horne*, 119 N.C. App. at 685, 459 S.E.2d at 799 (citation omitted), the evidence in this case fails to establish that Plaintiff’s fall aggravated his primary compensable injury. There is thus no basis for the Commission’s conclusion, under *Horne*, that Plaintiff’s “pain and medical consequences [after the fall] were a natural progression of the earlier injury.” Furthermore, because there is no evidence that the subsequent fall aggravated Plaintiff’s earlier injury, it is not necessary to reach the issue of whether Plaintiff’s fall was a result of his own intentional conduct. In any event, as the majority notes, the Commission’s determination that Plaintiff’s slip and fall was not “of his own volition[.]” was not a contested issue in the case. It is simply an irrelevant issue unless aggravation is first proved.

I agree with the majority’s conclusion that the Commission’s finding of propensity (*i.e.*, that Plaintiff’s first surgery made him more prone to develop degenerative changes) is unsupported by the evidence. I disagree, however, with the majority’s approval of the Commission’s selection of information from the medical records to provide support for its conclusion that a causal relationship exists between Plaintiff’s compensable work injury and second surgery, that is, that because Dr. Silver’s operative report indicates that he also removed scar tissue when he removed the thickened joints and ligaments, the second surgery was necessitated by the original compensable injury. I disagree because, as has already been discussed, Dr. Silver unequivocally testified that he performed the second surgery to relieve narrowing of the spinal canal, and that the narrowing was caused by degenerative changes, specifically thickening of the joints and ligaments, not by “postsurgical changes[,]” and not by scar

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tissue. This testimony was elicited by Plaintiff. Given Dr. Silver's unambiguous explanation about the reason that he performed the second surgery, it appears that the removal of scar tissue under these circumstances was merely incidental.

Allowing the Commission to ignore the expert's uncontradicted and unequivocal testimony, and to instead substitute its interpretation of the medical records to arrive at a different opinion than the expert has expressed, goes far beyond viewing the evidence in the light most favorable to the employee. Moreover, in my opinion, acquiescing in the Commission's actions here contravenes the directives of our Supreme Court which has repeated time and again that in cases involving complicated medical questions, "only an expert can give competent opinion evidence as to the cause of the injury." *Click v. Pilot Freight Carriers, Inc.*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980) (citing *Gillikin v. Burbage*, 263 N.C. 317, 139 S.E.2d 753 (1965)). Significantly, the *Click* Court recognized and relied upon "the continuing medical difficulty in determining the etiology of intervertebral diseases and injuries[]" in holding that "[r]eliance on Commission expertise is not justified where the subject matter involves a complicated medical question." *Id.* at 168, 265 S.E.2d at 391 (citation omitted). Instead,

[i]n the absence of guidance by expert opinion as to whether the accident could or might have resulted in his injury, the Commission could only speculate on the probable cause of his condition. Medical testimony was therefore needed to provide a proper foundation for the Commission's finding on the question of the injury's origin.

Id. at 169, 265 S.E.2d at 392.

The question is no less complicated because it concerns the aggravation of a preexisting condition rather than the direct cause of an injury. In fact, the medical causation issues are probably more complex in cases such as this one, involving the existence of a causal link between a traumatic injury and conditions that occur unrelated to trauma, complicated further by the impact of significant recovery from the original traumatic injury before the occurrence of another injurious incident. I am of the opinion that, as in *Click*, medical testimony was necessary in this case to establish whether Plaintiff's subsequent fall aggravated his original work-related injury. For the reasons stated, I am of the opinion that the evidence fails to estab-

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lish the requisite causal connection to make Plaintiff's subsequent surgery compensable. I thus vote to reverse the decision of the Commission.

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OPERATING CORPORATION, DEFENDANT

No. COA05-420

(Filed 1 August 2006)

1. Public Records— hospital's contract to purchase medical practice—not competitive health care information

A public hospital's contract to purchase the practice of the only gastroenterologist in the county was not exempt from the Public Records Act as containing competitive health care information, and the trial court correctly granted summary judgment for plaintiff newspaper. The legislature did not intend to keep confidential dealings such as this, which do not involve trade secret information or competitive price lists. N.C.G.S. §§ 131E-97.3, 131E-99.

2. Pleadings— denial of motion to amend—no abuse of discretion

The trial court did not abuse its discretion by denying plaintiff's motion to amend its complaint to allege a violation of the Open Meetings Law where defendant was not given notice of the purported violation and was not prepared to respond to it. There was likewise no abuse of discretion in the denial of costs and fees.

Judge CALABRIA concurring in part and dissenting in part.

Appeal by defendant from an order entered 24 January 2005 by Judge James M. Webb in Wilkes County Superior Court. Heard in the Court of Appeals 2 November 2005.

Willardson, Lipscomb & Miller, LLP, by John S. Willardson, for plaintiff-appellee.

McElwee Firm, PLLC, by John M. Logsdon, for defendant-appellant.

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The Bussian Law Firm, PLLC, by John A. Bussian, for North Carolina Press Association, amicus curiae.

Linwood L. Jones for North Carolina Hospital Association, amicus curiae.

BRYANT, Judge.

Wilkes Regional Medical Center Hospital Operating Corporation (“defendant”) appeals the trial court’s order granting summary judgment in favor of Carter-Hubbard Publishing Company, Inc. (“plaintiff”). Plaintiff appeals the trial court’s denial of motions to amend the complaint and to tax costs and attorney fees against defendant. For the reasons stated herein, we affirm.

Plaintiff publishes the *Wilkes Journal Patriot*, a major news source for the citizens of Wilkes County. Defendant is the governing body of Wilkes Regional Medical Center (“WRMC”), a public hospital owned by the Town of North Wilkesboro. In 2004, defendant purchased Dr. Nicholas Cirillo’s (“Dr. Cirillo”) medical practice. This purchase took place because “Dr. Cirillo was the only gastroenterologist located in Wilkes County, and WRMC [wanted] to assure the continued availability of gastroenterological services to [WRMC’s] patients.” Subsequently, plaintiff requested a copy of defendant’s purchase agreement with Dr. Cirillo (the “contract”). Defendant refused to provide the contract, contending that the contract amounted to “competitive health care information” under N.C. Gen. Stat. § 131E-97.3 and, therefore, was not subject to disclosure. Plaintiff believed, under the North Carolina Public Records Act, defendant was required to disclose the contract.

On 8 September 2004, plaintiff filed suit, pursuant to N.C. Gen. Stat. § 132-9, seeking an order compelling defendant to disclose the contract. On 25 October 2005, defendant filed an Answer stating the contract was not subject to disclosure because it was considered “competitive health care information” within the meaning of N.C. Gen. Stat. § 131E-97.3. On 20 January 2005, at a hearing held in Wilkes County Superior Court, the court granted summary judgment in favor of the plaintiff, concluding that the contract did not contain “competitive health care information” and “should be produced in its entirety.” Defendant moved to stay the court’s order pending appeal. The trial court denied defendant’s motion and ordered defendant to produce the contract. Defendant filed a Petition for Writ of Superseadeas with this Court on 25 January 2005. On 16 February 2005,

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we granted defendant's motion and stayed the trial court's order pending appeal.

On review of a motion for summary judgment, this Court considers whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that any party is entitled to judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2005). In this case, there were no genuine issues of material fact and summary judgment was appropriate. However, we consider *de novo* whether the trial court properly concluded that *plaintiff* was entitled to judgment as a matter of law. *Hasnick v. Federated Mut. Ins. Co.*, 136 N.C. App. 320, 323, 524 S.E.2d 386, 388, *aff'd in part on other grounds*, 353 N.C. 240, 539 S.E.2d 274 (2000).

In its order the trial court stated: "The contract in question does not contain 'competitive health care information' within the meaning of [N.C. Gen. Stat. §] 131E-97.3 . . . and should be produced[.]" In this appeal we decide whether the trial court erred in finding the contract at issue is a public record and granting summary judgment for plaintiff. Therefore, in this case of first impression, we determine whether a public hospital's contract to purchase a medical practice should be considered "competitive health care information" and therefore exempt from the Public Records Act. *See* N.C. Gen. Stat. § 131E-97.3 (2005).

[1] Under the Public Records Act, our Legislature granted liberal access to public records. *See McCormick v. Hanson Aggregates Southeast, Inc.*, 164 N.C. App. 459, 596 S.E.2d 431 (2004); *see also* N.C. Gen. Stat. §§ 132-1(b), 132-6 (2005) (defining public records as "the property of the people" and allowing examination of public records).

"Public records" include:

all documents, papers, letters, maps, books, photographs, films, sound recordings, magnetic or other tapes, electronic data-processing records, artifacts, or other documentary material, regardless of form or characteristics, made or received pursuant to law or ordinance in connection with the transaction of public business by any agency of North Carolina government or its subdivisions[.]

N.C. Gen. Stat. § 132-1(a) (2005). "Absent clear statutory exemption or exception, documents falling within the definition of 'public

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records' in the Public Records Law must be made available for public inspection." *Virmani v. Presbyterian Health Servs. Corp.*, 350 N.C. 449, 462, 515 S.E.2d 675, 685 (1999) (citation omitted). Exceptions and exemptions to the Public Records Act must be construed narrowly. *See News & Observer Publ'g Co. v. Poole*, 330 N.C. 465, 412 S.E.2d 7 (1992) (In the absence of clear statutory exemption or exception, documents falling within the definition of "public records" in the Public Records Act must be made available for public inspection.); *see also Three Guys Real Estate v. Harnett County*, 345 N.C. 468, 472, 480 S.E.2d 681, 683 (1997) ("If the language of the statute is clear and is not ambiguous, we must conclude that the legislature intended the statute to be implemented according to the plain meaning of its terms."); *State v. Hooper*, 358 N.C. 122, 125, 591 S.E.2d 514, 516 (2004) ("Where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must construe the statute using its plain meaning.") (internal quotations and citations omitted).

Defendant argues the contract at issue amounts to "competitive health care information" and is therefore exempt from the public records statute. We note that our legislature has exempted from the definition of "public record" what it refers to as "competitive health care information."

Information relating to competitive health care activities by or on behalf of hospitals and public hospital authorities shall be confidential and not a public record under Chapter 132 of the General Statutes; provided that any contract entered into by or on behalf of a public hospital or public hospital authority, as defined in G.S. 159-39, shall be a public record unless otherwise exempted by law, or the contract contains competitive health care information[.]

N.C.G.S. § 131E-97.3 (2005).

Defendant contends the legislature has linked the term "competitive health care information" with the term "confidential commercial information"¹ in determining what is protected under

1. *See* N.C. Gen. Stat. § 132-1.2:

Confidential information. Nothing in this Chapter shall be construed to require or authorize a public agency or its subdivision to disclose any information that:

(1) Meets all of the following conditions:

a. Constitutes a "trade secret" as defined in G.S. 66-152(3).
 b. Is the property of a private "person" as defined in G.S. 66-152(2).

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N.C.G.S. § 131E-97.3 (2005). Defendant therefore urges this court to take a very broad view of the term. However, “competitive health care information” is not specifically defined in our statute. “Health care” is defined in the American Heritage Dictionary as “[t]he prevention, treatment, and management of illness and the preservation of well-being through the services offered by the medical and allied health professions.” The American Heritage College Dictionary 626 (3rd ed. 1997). Pursuant to N.C. Gen. Stat. § 131E-99 “competitive health care information” includes “financial terms” of a contract and any “health care information directly related to financial terms in a contract.” N.C. Gen. Stat. § 131E-99 (2005). North Carolina General Statutes, Section 131E-99 is the only statute that gives some indication of what the legislature intended by its use of the term “competitive health care information.”

“The cardinal principle of statutory construction is that the intent of the legislature is controlling. In ascertaining the legislative intent courts should consider the language of the statute, the spirit of the statute, and what it seeks to accomplish.” *State ex rel. Util. Comm'n v. Public Staff*, 309 N.C. 195, 210, 306 S.E.2d 435, 444 (1983) (citations omitted). “ ‘Other indicia considered by this Court in determining legislative intent are the legislative history of an act and the circumstances surrounding its adoption[.]’ ” *County of Lenoir v. Moore*, 114 N.C. App. 110, 115, 441 S.E.2d 589, 592 (1994) (quoting *In Re Banks*, 295 N.C. 236, 239-40, 244 S.E.2d 386, 389 (1978)), *aff'd*, 340 N.C. 104,

c. Is disclosed or furnished to the public agency in connection with the owner's performance of a public contract or in connection with a bid, application, proposal, industrial development project, or in compliance with laws, regulations, rules, or ordinances of the United States, the State, or political subdivisions of the State.

d. Is designated or indicated as “confidential” or as a “trade secret” at the time of its initial disclosure to the public agency.

(2) Reveals an account number for electronic payment as defined in G.S. 147-86.20 and obtained pursuant to Articles 6A or 6B of Chapter 147 of the General Statutes or G.S. 159-32.1.

(3) Reveals a document, file number, password, or any other information maintained by the Secretary of State pursuant to Article 21 of Chapter 130A of the General Statutes.

(4) Reveals the electronically captured image of an individual's signature, date of birth, drivers license number, or a portion of an individual's social security number if the agency has those items because they are on a voter registration document.

N.C.G.S. § 132-1.2 (2005); *see also* N.C. Gen. Stat. § 1A-1, Rule 26 (2005) (“Protection of Confidential Information”).

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455 S.E.2d 158 (1995). When multiple statutes address a single matter or subject, they must be construed together, *in pari materia*, to determine the legislature's intent. *Whittington v. N.C. Dept. of Human Res.*, 100 N.C. App. 603, 606, 398 S.E.2d 40, 42 (1990). Statutes *in pari materia* must be harmonized, "to give effect, if possible, to all provisions without destroying the meaning of the statutes involved." *Id.* Where there is one statute dealing with a subject in general and comprehensive terms, and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy; but, to the extent of any necessary repugnancy between them, the special statute, or the one dealing with the common subject matter in a minute way, will prevail over the general statute[.]" *Food Stores v. Bd. of Alcoholic Control*, 268 N.C. 624, 628-29, 151 S.E.2d 582, 586 (1966) (quoting 82 C.J.S. *General and Specific Statutes* § 369 (1953)).

Under a prior version of N.C.G.S. § 131E-97.3 any contract entered into by a public hospital (whether or not it contained competitive healthcare information) was a public record unless otherwise exempted.

Information relating to competitive health care activities by or on behalf of hospitals shall be confidential and not a public record under Chapter 132 of the General Statutes; *provided that any contract entered into by or on behalf of a public hospital, as defined in G.S. 59-39, shall be a public record unless otherwise exempted by law.*

N.C. Gen. Stat. § 131E-97.3 (1994) (emphasis added). Thereafter the statute was amended and in its current version allows a contract entered into by a public hospital to be exempt from the public records requirement only if the contract contains competitive health care information. *See* N.C.G.S. § 131E-97.3 (2005). Because N.C.G.S. § 131E-99 appears to be one of the few statutes to guide us as to what the legislature intended by using the N.C.G.S. § 131E-97.3 term "competitive health care information," we construe these two statutes together. N.C. Gen. Stat. § 131E-99 limits as confidential and not a public record, only that information relating to "financial terms and other competitive health care information directly related to financial terms" in a *health care services contract*. Such language, while arguably applicable to financial terms of a contract involving the "prevention, treatment, and management of illness" does not encompass

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the acquisition of a medical practice. Further, the contracts under this statute are between the hospital and those who pay the hospital as opposed to employees or potential employees.

The financial terms and other competitive health care information directly related to the financial terms in a health care services **contract between a hospital or a medical school and a managed care organization, insurance company, employer, or other payer** is confidential and not a public record under Chapter 132 of the General Statutes. . . .

N.C.G.S. § 131E-99 (2005).

Reading these two statutes together the contract terms that are not financial nor financially related would not be considered competitive health care information and therefore would not be exempt. Unlike the price lists in *Wilmington Star-News*, which specified costs and reimbursement rates of medical services to customers, and which “a reasonable trier of fact could conclude that the price lists constituted trade secrets,” the contract here is a contract with a public hospital to purchase a medical practice. There is nothing in the record to suggest that other hospitals or entities were competing for Dr. Cirillo’s medical practice, and therefore nothing to suggest this contract contained “financial terms” or health care information directly related to financial terms such that this contract should be kept confidential.

Defendants cite contract terms such as price, assets and liabilities, future obligations (e.g. performance bonuses) and other financial information as “competitive health care information.” Defendants claim disclosure of such information would place the hospital at a future competitive disadvantage, impair the ability to acquire future confidential information and is a type of information that would not customarily be released between two non-public entities. Defendants argue that the public may be outraged at learning the purchase price without understanding future profit implications.

We decline defendant’s offer to more broadly define the term “competitive health care information.” Defendant’s definition is based on competitive business aspects of public hospital operations, aspects which, unless they involve trade secret information, are also likely subject to disclosure. We do not think the legislature intended such business dealings—which do not involve trade secret informa-

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tion nor competitive price lists—to be kept confidential. We do not read N.C.G.S. § 131E-97.3 nor 131E-99 separately or *in para materia* to require such secrecy.

Wilmington Star-News v. New Hanover Reg'l Med. Ctr., 125 N.C. App. 174, 480 S.E.2d 53, *appeal dismissed*, 346 N.C. 557, 488 S.E.2d 826 (1997), analyzed the prior version of this statute. In *Wilmington Star-News* this Court held a public hospital and HMO were not entitled to the benefit of the statutory exemption from disclosing price lists in a contract between the public hospital and the HMO. *Id.* The price lists were not property of a private person within the meaning of N.C. Gen. Stat. § 132-1.2(1)(b),² therefore the information was not exempted from disclosure. *Id.*

We recognize that this holding arguably may adversely affect public hospitals' ability to compete with nongovernmental entities but we consider that question an appropriate legislative issue. As to any arguable competitive disadvantage to [the public hospital], we consider appropriate the succinct observation of the United States District Court for the District of Columbia, "disclosure of prices charged the Government is a cost of doing business with the Government." *Racal-Milgo Gov't Sys. v. Small Business Admin.*, 559 F. Supp. 4, 6 (D.C. 1981).

Wilmington Star-News at 182, 480 S.E.2d at 57 (emphasis added).

Even though the statute changed such that contracts between public hospitals and HMOs were not automatically considered public record, such public hospital contracts are nevertheless subject to the determination of whether they contain "competitive health care information" before any exemption applies. Moreover, the spirit of the public records statute survives—public records are the "property of the people"; and the language of the United States District Court for the District of Columbia is equally applicable—"disclosure of prices charged the Government is a cost of doing business with the Government[.]" *Racal-Milgo Gov't Sys. v. Small Business Admin.*, 559 F. Supp. 4, 6 (D.C. 1981). Therefore, after careful review of the record on appeal, including review of the contract previously viewed by the trial court *in camera*, we hold that the trial court properly determined the contract "does not contain competitive health care information" and therefore should be disclosed to the public.

2. This section protects the property of a private person which property constitutes trade secret information as defined in N.C. Gen. Stat. § 66-152(2).

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Cross-Assignments

[2] Plaintiff raises two cross-assignments of error: (1) the trial court erred in denying its motion to amend the complaint to allege violations by the defendant of the North Carolina's Open Meeting Law; and (2) the trial court erred in denying plaintiff's request to tax costs and attorney fees against the defendant. On appeal, we review both a trial court's denial of a motion to amend a complaint and a trial court's denial of costs and fees under an abuse of discretion standard. *See Thorpe v. Perry-Riddick*, 144 N.C. App. 567, 570, 551 S.E.2d 852, 855 (2001); *Martin v. Hare*, 78 N.C. App. 358, 360-61, 337 S.E.2d 632, 634 (1985). An abuse of discretion occurs "where a court's ruling is manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision." *Thorpe*, 144 N.C. App. at 570, 551 S.E.2d at 855.

As to the denial of the motion to amend, the trial court declared no reason for the denial of the motion. We may, however, examine any "apparent reasons for such denial." *Hare*, 78 N.C. App. at 360-61, 337 S.E.2d at 634. It is evident from the transcript that defendant was not given notice of the purported open meetings law violation and, therefore, was not prepared to respond to it. As such, the trial court's denial of plaintiff's motion did not amount to an abuse of discretion. Likewise, the record reveals no abuse of discretion in the trial court's denial of costs and fees.

Affirmed.

Judge HUDSON concurs.

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

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

I fully concur with the portion of the majority's opinion dealing with plaintiff's cross-assignments of error. However, I must respectfully dissent from the majority's narrow interpretation of the scope of the "competitive health care information" exemption under N.C. Gen. Stat. § 131E-97.3 (2005), despite the absence of any words of limitation in the plain language of the applicable statute. Because N.C. Gen. Stat. § 131E-97.3 establishes that the General Assembly sought to place public and private hospitals on equal terms in negotiating con-

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tracts containing *any type* of competitive health care information, my approach would be to interpret N.C. Gen. Stat. § 131E-97.3 more broadly to effectuate our Legislature's intent.

Under the Public Records Act, our Legislature has generally granted liberal access to public records. *See, e.g., Knight Publ'g v. Charlotte-Mecklenburg Hosp. Auth.*, 172 N.C. App. 486, 489, 616 S.E.2d 602, 605 (2005). Thus, “[i]n the absence of [a] clear statutory exemption or exception, documents falling within the definition of ‘public records’ in the Public Records Act must be made available for public inspection.” *Id.* (citation and internal brackets omitted) (emphasis added). *See also* N.C. Gen. Stat. §§ 132-1(b), 132-6 (2005) (defining public records as “the property of the people” and allowing examination of public records).

Our Legislature has created a clear statutory exemption from the definition of “public record” for what it refers to as “competitive health care information”:

Information relating to competitive health care activities by or on behalf of hospitals and public hospital authorities shall be confidential and not a public record under Chapter 132 of the General Statutes; provided that any contract entered into by or on behalf of a public hospital or public hospital authority, as defined in G.S. 159-39, shall be a public record unless otherwise exempted by law, or the contract contains competitive health care information[.]

N.C. Gen. Stat. § 131E-97.3 (2005).

In this case of first impression, we are asked to consider the scope of “competitive health care information.” Defendant argues the contract at issue amounts to “competitive health care information.” In support of this argument, defendant produced, *inter alia*, an affidavit of the President and Chief Operating Officer of WRMC, Ted Chapin (“Chapin”). Chapin stated,

If a private provider were allowed to have access to the terms and conditions of the contracts of a public hospital such as WRMC, the private provider would have a substantial competitive advantage when negotiating for physician practices based on having superior information. If the substantive provisions of an existing contract were available to a different physician practice during subsequent negotiations, WRMC would be at a competitive disadvantage during the negotiations. Essentially, WRMC would be

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negotiating against itself, based upon its prior contracts. By contrast, a private health care provider which does not have to disclose the contents of its contracts would not be constrained during negotiations by any of the terms in prior or existing contracts.

Plaintiff counters, via its affidavit of Julius C. Hubbard, Jr. ("Hubbard"), the Vice President of Carter-Hubbard, that:

If public funds are utilized to purchase a physician's practice, the public has the right to know how those funds are being spent. Year-end profits and losses of Wilkes Regional Medical Center will certainly be influenced by the expenditure of funds for acquisition of physician's practices and the public has a right to know how those funds have been spent. To hide behind the guise of "competitive health care information" as justification for providing that information is to deprive the citizens of Wilkes County . . . information to which they are justly entitled.

In order to interpret our Legislature's intent, it is necessary to begin with the plain language of the statute. *State v. Hooper*, 358 N.C. 122, 125, 591 S.E.2d 514, 516 (2004) ("Where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must construe the statute using its plain meaning") (citations omitted). The plain language of the statute exempts from the term "public record" contracts that include "competitive health care information." "Competitive" is derived from the term "competition." "Competition" means "[t]he effort or action of two or more commercial interests to obtain the same business from third parties." Blacks Law Dictionary 7th Edition (1999). "Healthcare" means "[t]he prevention, treatment, and management of illness and the preservation of well-being through the services offered by the medical and allied health professions." The American Heritage College Dictionary 3rd Edition (1997).

Pursuant to the plain language of the statute, I would hold the contract at issue amounts to "competitive health care information." The contract relates to "healthcare" in that the purchase of Dr. Cirillo's private practice ensured the "prevention, treatment, and management" of gastroenterological services to Wilkes County residents. Likewise, the agreement is "competitive" in that public and private hospitals commonly compete in the marketplace to obtain physician practices. The contract remains "competitive" even in the absence of specific evidence in the record that hospitals were directly competing for Dr. Cirillo's particular practice because of the impact

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the release of the specific terms of the contract would have on future negotiations of WRMC by placing WRMC in an inferior negotiating position for health care services compared to private hospitals. Thus, the contract at issue is within the scope of the exemption stated in N.C. Gen. Stat. § 131E-97.3.

This plain language analysis is further supported by the history of N.C. Gen. Stat. § 131E-97.3. *See Cochran v. North Carolina Farm Bureau Mut. Ins. Co.*, 113 N.C. App. 260, 262, 437 S.E.2d 910, 911-12 (1994) (noting it is appropriate to consider “circumstances surrounding the enactment of the act with an eye towards the evil sought to be remedied when determining the legislative intent”).

A prior version of this statute read:

Information relating to competitive health care activities by or on behalf of hospitals shall be confidential and not a public record under Chapter 132 of the General Statutes; *provided that any contract entered into by or on behalf of a public hospital, as defined in G.S. 59-39, shall be a public record unless otherwise exempted by law.*

N.C. Gen. Stat. § 131E-97.3 (1994) (emphasis added).

Under this prior version of the statute, this Court held,

The plain language of this section exempts certain information from the Public Records Act when two requirements are met: (1) The material must relate to competitive health care; and (2) *the material must not be a contract executed with a public hospital.*

Wilmington Star News, Inc. v. New Hanover Regional Medical Center v. PHP, Inc., 125 N.C. App. 174, 178-79, 480 S.E.2d 53, 55 (1997) (emphasis added). Thus, under the prior version of this statute, if a contract was “entered into . . . by or on behalf of a public hospital” it would be considered a public record, unless otherwise exempted. N.C. Gen. Stat. § 131E-97.3 (1994).

In a case analyzing the prior version of the statute, this Court held that price lists in a contract between a public hospital and a private HMO were subject to disclosure under the North Carolina Public Records Act. *Wilmington Star News, Inc.*, 125 N.C. App. at 179, 480 S.E.2d at 55. Because the price lists were included in a contract executed with a public hospital, under the plain language of

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the prior statute, the price lists were not exempt from the Public Records Act. *Id.*

At the time of the *Wilmington* case, the Legislature had already enacted N.C. Gen. Stat. § 131E-99 of the Hospital Licensure Act, entitled “Confidentiality of health care contracts.” Ch. 713, 1995 N.C. Sess. Laws 345. The version in effect at the time of the *Wilmington* case stated:

The financial terms or other competitive health care information in a contract related to the provision of health care between a hospital and a managed care organization, insurance company, employer, or other payer is confidential and not a public record under Chapter 132 of the General Statutes.

Ch. 713, 1995 N.C. Sess. Laws 345 (emphasis added). However, this Court was unable to rely on N.C. Gen. Stat. § 131E-99 in the *Wilmington* case because, at the time, N.C. Gen. Stat. § 131E-99 “specifically provided that [it shall] not affect any litigation pending prior to ratification on 21 June 1996 and shall expire on 1 June 1997.” *Wilmington Star News, Inc.*, 125 N.C. App. at 178, 480 S.E.2d at 55.

Subsequently, in 1997, the Legislature amended § 131E-99 to read:

The financial terms and other competitive health care information *directly related to the financial terms* in a health care services contract between a hospital or a medical school and a managed care organization, insurance company, employer, or other payer is confidential and not a public record under Chapter 132 of the General Statutes.

An Act Pertaining to Confidentiality of Healthcare Contracts, ch. 123, 1997 N.C. Sess. Laws 238 (emphasis added). The Legislature also removed the expiration date set forth in the earlier version. *See* ch. 123, 1997 N.C. Sess. Laws 238. Accordingly, as of May 1997, contracts between public hospitals and private HMOs were exempt from disclosure under this separate provision.

In 2001, the Legislature amended § 131E-97.3 to its current version. N.C. Gen. Stat. § 131E-97.3 (2005). Prior to the amendment, all contracts of public hospitals constituted public records unless otherwise exempted. N.C. Gen. Stat. § 131E-97.3 (1994). As stated previously, contracts between public hospitals and HMOs were already exempt under the separate provision of N.C. Gen. Stat. § 131E-99. However, the Legislature amended the statute to also exempt con-

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tracts of public hospitals that contain “competitive health care information.” N.C. Gen. Stat. § 131E-97.3.

Amicus Curiae North Carolina Press Association (“Press Association”) argues that exemptions to the Public Records Act must be narrowly construed and that “‘competitive health care information’ as used by the General Assembly reaches only financial information that relates directly to the provision of health care services on a competitive basis to HMOs and similar entities.” While I agree with the Press Association’s contention that generally our courts interpret exemptions to the Public Records Act narrowly, I disagree with the Press Association regarding our Legislature’s intent in using the term “competitive health care information.” If our Legislature intended to give information categorized as “competitive health care information” this narrow meaning, it would be redundant to enact N.C. Gen. Stat. § 131E-97.3 since this particular exemption already existed in N.C. Gen. Stat. § 131E-99. *See State v. Benton*, 276 N.C. 641, 658, 174 S.E.2d 793, 804 (1970) (“It is always presumed that the [L]egislature acted with care and deliberation and with full knowledge of prior and existing law” (citations omitted)).

To the contrary, the plain language of these statutes indicates that they are not equivalent. North Carolina General Statute § 131E-99 is a narrow statute that enumerates specific financial terms and other competitive health care information relating to financial terms as exempt from public record status. Pursuant to N.C. Gen. Stat. § 131E-99, only contracts between certain enumerated entities are exempt and the information at issue must be financial terms or other competitive health care information directly related to financial terms in a “health care services contract.” On the other hand, N.C. Gen. Stat. § 131E-97.3 states no limitations on either the parties to the contract (except that the contract must be by or on behalf of a public hospital or public hospital authority) or the type of contract, and there is no evidence in the language of the statute or our review of the scant legislative history that our Legislature intended to include these constraints. If the Legislature intended to include such constraints it would have done so explicitly as it did when it changed the language of N.C. Gen. Stat. § 131E-99 from “financial terms or other competitive health care information in a contract . . .” to “financial terms and other competitive health care information *directly related to the financial terms*.” (Emphasis added). Because of the absence of any of the constraints our Legislature included in other statutory exemptions, I would hold that “competitive health care information” in-

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cludes all contracts that “relat[e] to competitive health care activities” by or on behalf of a public hospital or public hospital authority. N.C. Gen. Stat. § 131E-97.3(a). *See also Gibbons v. Cole*, 132 N.C. App. 777, 780, 513 S.E.2d 834, 836 (1999) (“[Our courts] are without power to create provisions and limitations not contained in the language of the statute itself” (citation omitted)).

For reasons previously mentioned, I would hold that the purchase of a medical practice is a competitive health care activity, and thus, the contract at issue is “competitive health care information.” In contrast, other hospital contracts such as a pure construction contract would not amount to a contract regarding competitive health care information because a construction contract does not directly relate to “[t]he prevention, treatment, and management of illness and the preservation of well-being through the services offered by medical and allied health professions.” *The American Heritage College Dictionary 3rd Edition* (1997). For the foregoing reasons, I would remand to the trial court for entry of summary judgment in favor of defendant.

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DEFENDANT

No. COA05-1320

(Filed 1 August 2006)

1. Appeal and Error—broadside assignments of error—public interest issues—Appellate Rule 2

An appeal from an order involving a group home in a subdivision with contrary restrictive covenants was heard under Appellate Rule 2 despite broadside assignments of error because the case presented public interest issues.

2. Deeds—restrictive covenants—group home—public policy

Plaintiff’s attempt to enforce its restrictive covenants to prohibit use of a house as a family care home for girls with emotional or mental disabilities who are not dangerous to others was void as against public policy under N.C.G.S. § 168-23.

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Appeal by Plaintiff from orders filed 20 December 2004 by Judge Craig Croom and 21 February 2005 by Judge Shelley Desvousges in Wake County District Court. Heard in the Court of Appeals 12 April 2006.

BEWLAW, PLLC, by Brent E. Wood, for Plaintiff-Appellant.

Manning Fulton & Skinner, P.A., by William C. Smith, Jr., for Defendant-Appellee.

STEPHENS, Judge.

Chapter 168 of the North Carolina General Statutes establishes the public policy of this State “to provide persons with disabilities with the opportunity to live in a normal residential environment.” N.C. Gen. Stat. § 168-20 (2005). This case raises the issue of whether a home owned by Defendant in the Hedingham residential subdivision in east Raleigh, which is used to house up to four girls between the ages of ten and seventeen who have a primary diagnosis of mental illness or emotional disturbance, is protected by Chapter 168 from certain restrictive covenants and conditions sought to be enforced by Plaintiff, Hedingham Community Association. For the reasons which follow, we hold that the home in dispute qualifies as a “family care home” under N.C. Gen. Stat. § 168-21 and that consequently, the restrictions asserted by Plaintiff to limit or prohibit such use of the home are “void as against public policy” under N.C. Gen. Stat. § 168-23. We thus affirm the orders of Judge Croom and Judge Desvousges.

Plaintiff brought this action by a complaint filed on or about 23 October 2003 alleging that Defendant was in violation of the Declaration of Covenants, Conditions, and Restrictions (“restrictive covenants”) related to leasing or subdividing of “units” in the Hedingham subdivision, or using the “unit” to conduct a prohibited business. Plaintiff sought a preliminary and permanent injunction to restrain Defendant from violating its restrictive covenants. By answer filed on or about 18 November 2003, Defendant denied that it had violated the specific covenants in question. Defendant further asserted that it was operating a group home for children on Defendant’s property and that Plaintiff’s complaint was “a thinly disguised objection to the lawful operation of a group home.”

On 11 June 2004, Judge Craig Croom heard Plaintiff’s motion for a preliminary injunction and by order filed 20 December 2004 *nunc*

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pro tunc 11 June 2004, concluded that Defendant's lessee, Hunter Alternatives, Inc.,¹ was operating a family care home on Defendant's property which was protected by N.C. Gen. Stat. § 168-23 from enforcement of the restrictive covenants urged by Plaintiff. Concluding further that Plaintiff had failed to show a likelihood of success at a trial on the merits of Plaintiff's case, Judge Croom denied the motion for a preliminary injunction.

The case was then tried nonjury before Judge Shelley Desvousges on 9 February 2005. At trial, Plaintiff's evidence tended to show the following:

Hedingham is a large planned-unit subdivision with approximately 2,350 single-family homes in east Raleigh. Plaintiff is a North Carolina nonprofit corporation formed for the purpose of performing the duties and responsibilities set out in Hedingham's Declaration of Covenants, Conditions, and Restrictions for Hedingham. Defendant is a North Carolina corporation owned by Grady L. Hunter. Defendant owns 4301 Dyer Court, a single-family home in Hedingham ("the Dyer house").

When this case was initiated, Defendant was leasing the Dyer house to Hunter Alternatives, Inc., a North Carolina corporation owned in equal parts by Mr. Hunter and Dorothy George. Hunter Alternatives is the original licensee through the State of North Carolina Department of Health and Human Services, Division of Facility Services, to operate a group home for up to four disabled minors at the Dyer house. The license is now held by Triangle Alternatives² ("Triangle") to which all the shares of Hunter Alternatives were sold during the course of this case. Ms. George is Triangle's director.

The Dyer house is licensed under 10A N.C.A.C. 27G. 1300 (May 1996), which is titled "Residential Treatment for Children and Adolescents Who Are Emotionally Disturbed or Who Have A Mental Illness." Criteria for residence in homes licensed under this section are that the residents be "children and adolescents who have a primary diagnosis of mental illness or emotional disturbance . . . and for whom removal from home . . . to a community-based residential setting is essential to facilitate treatment." 10A N.C.A.C. 27G. 1300(a) and (c) (May 1996).

1. This entity is also called "Hunter Alternative, Inc." at various times in the record and testimony.

2. This entity is also variously referred to as "Triangle Alternative."

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Ms. George testified that only girls have lived at the Dyer house during the time it has been licensed and that, whereas it can accommodate up to four girls at a time, “the most that there’s been there is three.” At the time of trial, only one resident was living at the house. The youngest resident placed at the house was ten years old, and the oldest was sixteen. Ms. George estimated that in the two and a half years before trial, no more than ten total residents had lived at the house, none of whom was biologically related. The girls who are placed there have behavior and developmental disabilities.

As Triangle’s director, Ms. George said her primary responsibility is to make certain the services offered at the Dyer house “are provided in the appropriate way that the state rules and regulations require us to operate under.” To provide those services, Triangle employs three staff persons who work in eight-hour shifts to monitor and supervise the residents twenty-four hours a day. No staff person lives at the Dyer house, and the staff people “cannot sleep because the residents have to be supervised 24 hours.” Regarding the services that are provided for the residents, Ms. George testified as follows:

Treatment is not provided to these children on this property. . . . We provide . . . care for these children 24 hours around the clock making sure that they [get] to their therapist’s appointments, their doctor’s appointments, and whatever other appointments they have in the community. . . .[W]e don’t provide mental health services at this location. These children are transported for their services. We provide the transportation for them.

Ms. George testified further that staff people also make the children’s meals and “do all the caretaking while they’re placed in our care.” Staff employees must have an NCI (North Carolina Interventions) certification, know CPR, and be certified to give medications. A physician must order residents into the program for at least 120 days. Ms. George could not recall more than one resident who remained in the program at the Dyer house for more than six months. Medicaid pays Triangle \$232.36 per child per day for the services provided at the Dyer house.

Triangle does have “a qualified mental health professional on call at any time that is needed in case of an emergency. . . [and] a counselor that comes in once a week [to] talk with the children.” The counselor usually sees the children at Triangle’s office location unless “there is an emergency and the counselor has to go to the home[.]” Emergency situations include suicide threats and crisis intervention

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“to de-escalate the situation before it develops into a crisis.” At the Dyer house, according to Ms. George, “we’ve had nothing that has been out of control. Nobody has gotten hurt. . . .”

Ms. George testified that police officers have been called to the Dyer house on several occasions when a child has walked away from the property and been gone for more than fifteen minutes. “Fifteen minutes after we cannot see a child in our sight, we have to call the police because we have to report that they’ve walked away from the program.” Ms. George estimated that police officers had been called to the Dyer house about ten times between December 2002 and December 2003.³

Plaintiff also called as a witness Geri Blackford, the community manager at Hedingham for approximately ten years. Ms. Blackford testified that she became familiar with the Dyer house property because of the complaints she received from other Hedingham residents. She said that she drove by the property “one day and there were four police cars out front[.]” The officers informed Ms. Blackford that “there was a problem going on and they were sitting there to try and resolve it.” That was the only incident at the Dyer house that Ms. Blackford had observed. She testified further that parking at the property had been “an issue . . . [f]rom time to time.”

Ms. Blackford conceded that the Hedingham restrictive covenants do not prohibit group homes or family care homes “*per se*.” She agreed that the covenants permit leases, although not subleases, and that Plaintiff has no right to “disapprove a lease[.]” She was not aware of any other group homes at Hedingham, but acknowledged that there are day-care facilities in the subdivision “run out of people’s houses . . . that were . . . otherwise built for residential homes[.]” She also conceded that she was aware of “domestic situations[.]” “break-ins . . . and other matters” requiring police officers to answer calls at other residences in Hedingham.

Ms. Blackford agreed that the Dyer house is “just a regular single-family residence construction[.]” with no signs out front identifying it as a group or family care home, that has not been modified in any way to give it an “institutional character[.]” She agreed further that the yard is “well kept” and the house is well maintained as far as she can see from the outside. Ms. Blackford had no evidence that the resi-

3. Officers were also called to the home during 2004, but Ms. George did not know how many times.

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dents of the Dyer house had ever been violent, or hurt someone, or been a danger to anyone.

At the close of Plaintiff's evidence, Defendant moved to dismiss Plaintiff's case under N.C. Gen. Stat. § 1A-1, Rule 41(b). The trial judge allowed the motion and in a written order filed 21 February 2005, made the following pertinent findings of fact:

3. Plaintiff proffered the testimony of Gerry [sic] Blackford who . . . testified that she believed the maintenance of the [Dyer] Home was in violation of certain restrictive covenants applicable to Hedingham.

4. Blackford further testified that she had witnessed four police cars responding to a call at the Home on one occasion.

5. Blackford provided no testimony that the residents or staff at the Home had ever caused or threatened to cause injury to any person or property at Hedingham.

. . . .

7. [Dorothy] George testified that the residents of the Home suffered from mental illness or emotional disturbance.

8. George testified that the Home housed up to four girls at one time, up to the age of 17, for stays that could exceed six months. George further testified that the residents were not dangerous to others, and had not inflicted or attempted to inflict or threatened to inflict serious bodily harm on others.

9. George testified that the Home provides only room, board, and transportation services for the residents.

Upon these findings, Judge Desvousges concluded that (1) the Dyer house is a "family care home" within the meaning of N.C. Gen. Stat. § 168-21(1); (2) the residents of the home are "handicapped persons"⁴ as defined in N.C. Gen. Stat. § 168-21(2); (3) the residents are not "dangerous to others" as defined in N.C. Gen. Stat. § 122C-3(11)(b); (4) Plaintiff "made no showing that the Home or its residents fall outside the protections provided under N.C. Gen. Stat. § 168 *et. seq.*," and Plaintiff failed to show any right to relief; and (5) any attempt to use the Hedingham restrictive covenants to prohibit the use of the Dyer house as a family care home "or its current use as

4. By amendment effective 1 September 2005, "[p]ersons with disabilities" was substituted for "handicapped persons" in this provision.

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a facility licensed under 10A N.C.A.C. 27(G).1300, is void as against public policy. . . ." The court thus dismissed Plaintiff's complaint with prejudice. Plaintiff appeals.

[1] To challenge the trial court's rulings in this case, Plaintiff made the following assignments of error:

1. The Trial Court erred in denying Plaintiff's Motion for Preliminary and Permanent Injunction, since the facts presented warranted the entry of an injunction as a matter of law.

2. The Trial Court erred in dismissing the Plaintiff's claims pursuant to Rule 41(b) of the North Carolina Rules of Civil Procedure, since the Plaintiff had shown a right to relief.

3. The Trial Court erred in its conclusions of law entered on February 21, 2005.

4. The Trial Court denied due process of law to the Plaintiff by granting judgment for the Defendant.

To support assignment of error one, Plaintiff references the pages in the Record on Appeal at which the entire orders of Judge Croom and Judge Desvousges appear. To support the additional three assignments of error, Plaintiff references the pages where the entire order of Judge Desvousges appears. Plaintiff brings forward all four assignments of error under one argument in its brief that "[t]he trial court erred in dismissing Plaintiff's claims . . . because Plaintiff has established a right of relief by showing Defendant violated the declaration."

Rule 10(c)(1) of the North Carolina Rules of Appellate Procedure governs the form required for assigning error to actions of the trial tribunal. In pertinent part, this Rule requires that:

Each assignment of error shall, so far as practicable, be confined to a single issue of law; and shall state plainly, concisely and without argumentation the legal basis upon which error is assigned. An assignment of error is sufficient if it directs the attention of the appellate court to the *particular error* about which the question is made, with clear and *specific* record or transcript references.

N.C.R. App. P. 10(c)(1) (2005) (emphasis added). Assignments of error which are "broad, vague, and unspecific [sic] . . . do not comply with the North Carolina Rules of Appellate Procedure[.]" *In re Lane*

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Company-Hickory Chair Div., 153 N.C. App. 119, 123, 571 S.E.2d 224, 226-27 (2002). Moreover, “the appellant must except and assign error separately to each finding or conclusion that he or she contends is not supported by the evidence, then state which assignments support which questions in the brief.” *Concrete Serv. Corp. v. Investors Group, Inc.*, 79 N.C. App. 678, 684, 340 S.E.2d 755, 759-60, *cert. denied*, 317 N.C. 333, 346 S.E.2d 137 (1986). Additionally, although questions challenging the sufficiency of evidence to support a “*particular*” finding of fact may be combined with challenges against any conclusions of law “based upon such . . . findings,” N.C.R. App. P. 10(c)(3) (emphasis added), failure to assign error to specific findings of fact of the trial court renders those findings binding on this Court, which must conclude that they are supported by competent evidence. *Koufman v. Koufman*, 330 N.C. 93, 408 S.E.2d 729 (1991).

In *Viar v. N.C. DOT*, 359 N.C. 400, 610 S.E.2d 360, *reh'g denied*, 359 N.C. 643, 617 S.E.2d 662 (2005), our Supreme Court admonished this Court for considering the merits of an appeal despite several violations of the appellate rules. Noting that the Rules of Appellate Procedure are mandatory, the Court held that “[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*, 359 N.C. at 402, 610 S.E.2d at 361.

Since *Viar*, this Court has struggled with when it may still be appropriate to invoke the provisions of Rule 2 to “suspend or vary the requirements” of the Rules “[t]o prevent manifest injustice to a party, or to expedite decision in the public interest,” N.C.R. App. P. 2 (2005), and thereby to reach the merits of cases in which Rule violations would subject the appeal to dismissal. (See North Carolina Association of Defense Attorneys, *Appellate Procedures and Technicalities*, 29th Annual Meeting (2006), for a survey of post-*Viar* decisions in this Court and our Supreme Court.) In this case, Plaintiff’s appeal is plainly subject to dismissal for broadside, non-specific assignments of error which “‘essentially amount to no more than an allegation that the “court erred because its ruling was erroneous.” ’” *Hubert Jet Air, LLC v. Triad Aviation, Inc.*, 177 N.C. App. 445, 448, 628 S.E.2d 806, 808 (2006) (citation omitted); *see also In re Election Protest of Fletcher*, 175 N.C. App. 755, 625 S.E.2d 564 (2006). Such assignments of error “allow counsel to argue anything and everything they desire in their brief on appeal[] [and] ‘like a hoop-skirt-cover[] everything and touch[] nothing.’” *Wetchin v. Ocean*

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Side Corp., 167 N.C. App. 756, 759, 606 S.E.2d 407, 409 (2005) (citation omitted). Nonetheless, because we believe that the question presented by this case raises “public interest” issues, we choose to exercise our authority under Rule 2 and consider the merits of the appeal despite the violations of Rule 10.

[2] “Where there is a trial by the court, sitting without a jury, the appropriate motion by which a defendant may test the sufficiency of plaintiff’s evidence to show a right to relief is a motion for involuntary dismissal.” *Vernon v. Lowe*, 148 N.C. App. 694, 695, 559 S.E.2d 288, 290, *rev’d on other grounds*, 356 N.C. 421, 571 S.E.2d 584 (2002) (citation omitted). Rule 41(b) of the North Carolina Rules of Civil Procedure provides, in pertinent part:

After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant . . . , may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this section . . . , operates as an adjudication upon the merits.

N.C. Gen. Stat. § 1A-1, Rule 41(b) (2005). “A dismissal under Rule 41(b) should be granted if the plaintiff has shown no right to relief or if the plaintiff has made out a colorable claim but the court nevertheless determines as the trier of fact that the defendant is entitled to judgment on the merits.” *Hill v. Lassiter*, 135 N.C. App. 515, 517, 520 S.E.2d 797, 800 (1999). The trial court’s findings of fact are conclusive on appeal if supported by competent evidence, even if there is evidence to the contrary. *Lumbee River Electric Membership Corp. v. City of Fayetteville*, 309 N.C. 726, 741, 309 S.E.2d 209, 219 (1983) (citation omitted). Where the findings of fact in turn support the court’s conclusions of law, the court’s ruling is binding on appeal. *Id.* “The trial court’s judgment therefore must be granted the same deference as a jury verdict.” *Id.* (citing *Murray v. Murray*, 296 N.C. 405, 250 S.E.2d 276 (1979)).

Chapter 168 defines a “family care home” as “a home with support and supervisory personnel that provides room and board, per-

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sonal care and habilitation services in a family environment for not more than six resident persons with disabilities.” N.C. Gen. Stat. § 168-21(1). The statute defines “persons with disabilities” (formerly “handicapped persons”) as “a person with a temporary or permanent physical, emotional, or mental disability including but not limited to mental retardation, . . . [and] emotional disturbances. . . .” N.C. Gen. Stat. § 168-21(2). It excludes from this definition “mentally ill persons who are dangerous to others as defined in G.S. 122C-3(11)b.” *Id.* Chapter 122 provides in pertinent part that

“[d]angerous to others” means that within the relevant past, the individual has inflicted or attempted to inflict or threatened to inflict serious bodily harm on another, or has acted in such a way as to create a substantial risk of serious bodily harm to another, or has engaged in extreme destruction of property[.]

N.C. Gen. Stat. § 122C-3(11)b.

If a group home qualifies under Chapter 168 as a “family care home,” the statute expressly prohibits “[a]ny restriction, reservation, condition, exception, or covenant in any subdivision plan, deed, or other instrument of or pertaining to the . . . lease, or use of property which would . . . prohibit the use of such property as a family care home. . . .” N.C. Gen. Stat. § 168-23. Such restrictions on the use of residential property are “void as against public policy and shall be given no legal or equitable force or effect.” *Id.* Our Supreme Court has stated that Chapter 168, “being remedial, should be construed liberally, in a manner which assures fulfillment of the beneficial goals for which it is enacted and which brings within it all cases fairly falling within its intended scope.” *Burgess v. Joseph Schlitz Brewing Co.*, 298 N.C. 520, 524, 259 S.E.2d 248, 251 (1979) (citations omitted).

On appeal, Plaintiff argues that the provisions of Chapter 168 are not applicable here for various reasons, including (a) Plaintiff’s contention that the operation of the Dyer house constitutes a business enterprise inconsistent with the residential character of Hedingham, (b) the Dyer house is a residential treatment facility and not a family care home, (c) the record is unclear with respect to the extent of the disabilities of the residents of the Dyer house, and (d) the evidence establishes that the residents of the Dyer house are dangerous to others. Plaintiff’s arguments have no merit for the following reasons:

The trial court’s findings of fact include findings that (1) the Dyer house, through Triangle Alternatives, is duly licensed by the State of

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North Carolina, has appropriate zoning approval, and is in compliance with all applicable laws and ordinances; (2) the only services provided to the residents of the Dyer house are room, board and transportation; (3) the residents of the home suffer from mental illness or emotional disturbance; and (4) the home houses no more than four girls at one time. As Plaintiff has not assigned error to any of these findings, they are conclusive on appeal, *Koufman*, 330 N.C. at 97, 408 S.E.2d at 731 (“Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal.”), and our inquiry is thus limited to a determination of whether the findings of fact support the trial court’s conclusions of law on the issues that control the outcome of the case. In our opinion, these findings fully support the court’s Conclusion of Law 4 that the Dyer house is a family care home, “or a home with support and supervisory personnel that provides room and board, personal care and habilitation services in a family environment for not more than six resident handicapped persons” (now “persons with disabilities”). N.C. Gen. Stat. § 168-21(1). They also support the court’s Conclusion of Law 5 that the residents of the Dyer house are “‘handicapped persons’ or persons with temporary or permanent emotional or mental disabilities including emotional disturbances [under] N.C. Gen. Stat. § 168-21(2).”

The trial court additionally found that (1) the residents of the Dyer house have never caused or threatened to cause injury to any person or property at Hedingham, (2) are not dangerous to others, and (3) have not inflicted or attempted to inflict or threatened to inflict serious bodily harm on others. Not having been challenged by a specific assignment of error, these findings of fact are likewise binding on this appeal, and they support the court’s Conclusion of Law 6 that the Dyer house is not precluded from offering its services to its residents under the exclusion for “mentally ill persons who are dangerous to others as defined in G.S. 122C-3(11)(b).” N.C. Gen. Stat. § 168-21(2). Since the trial court properly concluded upon binding findings of fact that the Dyer house is a family care home for persons with emotional or mental disabilities who are not dangerous to others, the court further properly ruled that Plaintiff’s attempt to enforce its restrictive covenants to prohibit the use of the Dyer house as a family care home is void as against public policy under N.C. Gen. Stat. § 168-23. The court thus properly dismissed Plaintiff’s action with prejudice under Rule 41(b) of the North Carolina Rules of Civil Procedure.

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Our determination of these issues renders it unnecessary to address Plaintiff's remaining arguments that Defendant's use of the Dyer house violates the restrictive covenants applicable to all Heddingham residents. For the reasons stated, the orders of the trial court are

Affirmed.

Judges McGEE and HUNTER concur.

DOROTHY DAVIS, PETITIONER-APPELLANT v. THE MACON COUNTY BOARD
OF EDUCATION, RESPONDENT-APPELLEE

No. COA05-1337

(Filed 1 August 2006)

1. Appeal and Error— assignment of error—failure to cite record pages

An appeal was heard despite the failure to cite record pages corresponding with each assignment of error where the appellate court was able to determine the issues in the case.

2. Administrative Law— appeal from school board—issue of fact—whole record review

The trial court correctly engaged in whole record review where a Board of Educations's motivation for not renewing a teacher's contract was manifestly a question of fact.

3. Schools and Education— teacher's contract—not renewed—whole record review—evidence sufficient

The trial court did not misapply the whole record standard of review in an appeal from the school board's decision not to renew a teacher's contract. The court looked at all of the evidence, determined that there was substantial evidence to support the board's determination, and did not substitute its judgment for that of the board.

4. Schools and Education— teacher's contract not renewed—review of basis for recommendation

A school board's inquiry satisfied its duty to determine the substantive basis for the superintendent's recommendation not to

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renew a teacher's contract and thus to deny her tenure and its duty to assure that the nonrenewal was not for a prohibited reason. The contract was not renewed because petitioner threatened to be a counter-productive force for morale at the school.

5. Schools and Education— appeal of nonrenewal of teacher's contract—motion for reconsideration denied

The trial court did not abuse its discretion by not reconsidering a teacher's appeal of the decision not to renew her contract where the board had presented erroneous information. The whole record test was properly applied.

6. Appeal and Error— preservation of issues—assignment of error—argument not included

An argument not listed in the assignment of error was not addressed.

Appeal by petitioner from orders entered 10 June 2005 and 5 July 2005 by Judge James L. Baker, Jr. in Superior Court, Macon County. Heard in the Court of Appeals 11 May 2006.

Ferguson, Stein, Chambers, Gresham & Sumter, P.A., by S. Luke Largess, for petitioner-appellant.

Fisher & Phillips, LLP, by Shannon Sumerell Spainhour and Mason G. Alexander, for respondent-appellee.

Tharrington Smith, by Neal A. Ramee; and Allison B. Schafer, for the North Carolina School Boards Association, amicus curiae.

McGEE, Judge.

The Macon County Board of Education (the board) hired Dorothy Davis (petitioner) in August 2000 to teach high school English at Nantahala School. At the end of petitioner's fourth year of teaching, the principal of Nantahala School, Charles Baldwin (the principal), recommended to Superintendent of Macon County Schools Rodney Shotwell (the superintendent), that petitioner's contract not be renewed.

The superintendent conducted an investigation regarding the principal's recommendation not to renew petitioner's contract. The superintendent met with the principal and with petitioner, and re-

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viewed notes provided by each of them. The record tends to show the following regarding the principal's recommendation that petitioner's contract not be renewed. In April 2003, at a Nantahala School festival, petitioner squirted the principal in the face with a water pistol and walked away. A student saw petitioner squirt the water pistol and stated: "If she can do it so can I." The student then squirted the principal in the face with a water pistol. This same student had squirted the principal with a water pistol the year before and had received a paddling. After the second incident during the April 2003 festival, the principal administered corporal punishment to the student in the presence of petitioner. The principal wrote in the Nantahala School discipline log that petitioner's actions "demeaned [him] in front of students, faculty and parents[.]" and "degrade[d] [the] school's standing with . . . parents and community."

The record also shows that, during petitioner's fourth year of teaching at Nantahala School, she had requested to chaperone the junior/senior school trip. Petitioner's request was denied and she stated her "feelings were hurt that [she] was just ignored." According to the principal, petitioner admitted to him that she had complained to other teachers about having to cover classes for teachers who were chaperoning the trip. The principal told petitioner she was "fostering a negative attitude in the faculty." The principal also told petitioner she had been given an opportunity to chaperone a school ski trip, but had failed to properly do so because she had driven her own vehicle rather than riding on the bus with the students. Petitioner stated: "This was probably wrong of me, but I have seen other chaperones do the same thing on other trips[.]" Petitioner also said she asked the sponsoring teacher if she could drive her own vehicle and was told she could. The principal told petitioner she "was unprofessional because [she could] not ever admit [she] was wrong." The principal also told the superintendent that petitioner had raised her voice on several occasions during meetings with the principal.

The superintendent additionally reviewed two "Below Standard" performance evaluations of petitioner in the areas of facilitating instruction and performing non-instructional duties. The superintendent interviewed four staff members at the school and asked each of them whether they believed "the principal [had] a personal bias against [petitioner]." None of the staff members indicated that the principal was personally biased against petitioner. The superintendent provided a memorandum to the board in which the superintendent summarized his investigation and recommended that

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the board not renew petitioner's contract. The superintendent wrote the following:

After careful consideration and review, I am not recommending tenure status for [petitioner], English teacher, Nantahala School. This decision is based upon my investigation that followed the principal's recommendation to non-renew.

I have met with both [petitioner] and the principal on separate occasions to discuss each one's point of view. [Petitioner] did not know why the situation had progressed to the point that it is today. After speaking with [the principal] about [petitioner's] concerns, he expressed his interactions with [petitioner] over the past three years. On several occasions, the two of them had met in his office and the conference ended abruptly and with [petitioner's] voice being raised in the process. There was a water gun incident in which [petitioner] squirted the principal after being told not to do so. This was done in the presence of a student, who, in turn, felt he could do the same thing to [the principal].

While this may seem to be an isolated case, [the principal] feels that [petitioner] may be a counter-productive force concerning the morale of the faculty at Nantahala School. It is imperative that the morale of the school be first priority. [Petitioner] openly complained [about] covering classes for other teachers and about not being a chaperone on the Junior/Senior trip. The final blow came during [petitioner's] summative evaluation meeting with [the principal]. During this meeting, [petitioner] was told that she was marked down with "below standard" in two areas. Rather than inquiring into why this occurred, she proceeded to tell [the principal] that she was going to talk with her attorney.

The superintendent presented this information to the board. The minutes of the closed session of the board's meeting state: "The Board discussed [the] Superintendent[']s . . . recommendation to deny tenure to [petitioner]. The Superintendent reviewed [petitioner's] most recent evaluation with the Board . . . , which included two ratings below standard, and [the] Superintendent . . . read the attached memorandum . . . to the Board." The board voted not to renew petitioner's contract.

Petitioner filed an amended notice of appeal from the board's decision, alleging that the decision of the board "violated N.C.G.S.

§ 115C-325(m)(2) in that the decision was arbitrary and capricious or was based on personal considerations.” The trial court conducted a hearing on 26 May 2005 and entered an order on 10 June 2005 upholding the board’s decision. Petitioner filed a motion for reconsideration on 20 June 2005. In her motion, petitioner stated that at the hearing, the board “claimed it had a copy of the minutes from an April 2003 faculty meeting convened prior to the Spring Festival in which the ban on water pistols was announced—and that [p]etitioner had deliberately ignored that directive.” However, petitioner contended this was false in an affidavit filed with her motion for reconsideration. In an order entered 5 July 2005, the trial court denied petitioner’s motion for reconsideration. Petitioner appeals.

[1] We note petitioner failed to cite in the record on appeal the record pages corresponding to each of her assignments of error. The board filed a motion with this Court to dismiss petitioner’s appeal based on this violation of the North Carolina Rules of Appellate Procedure. Petitioner filed a written motion with this Court seeking leave to amend the record on appeal to correct the assignments of error. However, despite the Rules violation, we are able to determine the issues in this case. Since petitioner’s Rules violation is not “so egregious as to invoke dismissal[.]” *Symons Corp. v. Insurance Co. of North America*, 94 N.C. App. 541, 543, 380 S.E.2d 550, 552 (1989), we elect to review the significant issues of this appeal pursuant to N.C.R. App. P. 2. See *Symons*, 94 N.C. App. at 543, 380 S.E.2d at 552.

I.

[2] Petitioner first argues the trial court erred by (1) determining that it was required to apply the whole record test to its review of respondent’s decision and (2) failing to review respondent’s decision *de novo*. Petitioner states in her brief that she “agrees that her claim that the decision was arbitrary and capricious should be reviewed under the ‘whole record’ test[.]” However, petitioner contends the trial court should have applied *de novo* review to her argument that the board did not renew her contract for personal reasons. In its order filed 10 June 2005, the trial court found and concluded as follows:

The appropriate standard of review in this case is a review based upon the “whole record” of Respondent’s decision. A *de novo* standard of review is not applicable to any portion of [the trial

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court's] review of this appeal, according to *Spry v. City of Winston-Salem/Forsyth County Board of Education*, 105 N.C. App. 269, 412 S.E.2d 687 (1992), *aff'd* 332 N.C. 661, 422 S.E.2d 575 and N.C. Gen. Stat. § 115C-44(b).

N.C. Gen. Stat. § 115C-325(m)(2) (2005) provides that a school board, "upon recommendation of the superintendent, may refuse to renew the contract of any probationary teacher . . . for any cause it deems sufficient: Provided, however, that the cause may not be arbitrary, capricious, discriminatory or for personal or political reasons." Pursuant to N.C. Gen. Stat. § 115C-325(n) (2005),

any probationary teacher whose contract is not renewed under G.S. 115C-325(m)(2) shall have the right to appeal from the decision of the board to the superior court for the superior court district or set of districts as defined in G.S. 7A-41.1 in which the career employee is employed.

On appeal of a decision of a school board, a trial court sits as an appellate court and reviews the evidence presented to the school board. *In re Alexander v. Cumberland Cty. Bd. of Educ.*, 171 N.C. App. 649, 653-54, 615 S.E.2d 408, 413 (2005). The proper standard of review depends upon the nature of the asserted error. *Id.* at 654, 615 S.E.2d at 413. N.C. Gen. Stat. § 150B-51(b) governs judicial review of school board actions, *Farris v. Burke Cty. Bd. of Educ.*, 355 N.C. 225, 235, 559 S.E.2d 774, 781 (2002), and provides as follows:

Except as provided in subsection (c) of this section, in reviewing a final decision, the court may affirm the decision of the agency or remand the case to the agency or to the administrative law judge for further proceedings. It may also reverse or modify the agency's decision, or adopt the administrative law judge's decision if the substantial rights of the petitioners may have been prejudiced because the agency's findings, inferences, conclusions, or decisions are:

- (1) In violation of constitutional provisions;
- (2) In excess of the statutory authority or jurisdiction of the agency;
- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;

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(5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or

(6) Arbitrary, capricious, or an abuse of discretion.

N.C. Gen. Stat. § 150B-51(b) (2005). A *de novo* standard of review applies to asserted errors under subsections (1) through (4) of N.C.G.S. § 150B-51(b), while errors under subsections (5) and (6) of this statute are reviewed under the whole record test. *In re Alexander*, 171 N.C. App. at 654, 615 S.E.2d at 413.

“Under a *de novo* review, the superior court ‘consider[s] the matter anew[] and freely substitut[es] its own judgment for the agency’s judgment.’” *Mann Media, Inc. v. Randolph Cty. Planning Bd.*, 356 N.C. 1, 13, 565 S.E.2d 9, 17 (2002) (quoting *Sutton v. N.C. Dep’t of Labor*, 132 N.C. App. 387, 389, 511 S.E.2d 340, 341 (1999)). Pursuant to the whole record test, the reviewing court examines all competent evidence to determine whether a school board’s decision was based upon substantial evidence. *Zimmerman v. Appalachian State Univ.*, 149 N.C. App. 121, 129, 560 S.E.2d 374, 380 (2002). “Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Comr. of Insurance v. Rating Bureau*, 292 N.C. 70, 80, 231 S.E.2d 882, 888 (1977). Pursuant to N.C. Gen. Stat. § 115C-44(b) (2005), “[i]n all actions brought in any court against a local board of education, the order or action of the board shall be presumed to be correct and the burden of proof shall be on the complaining party to show the contrary.”

In *Spry v. Winston-Salem/Forsyth Bd. of Educ.*, 105 N.C. App. 269, 412 S.E.2d 687, *aff’d per curiam*, 332 N.C. 661, 422 S.E.2d 575 (1992), the plaintiff, a probationary teacher whose contract was not renewed by the school board, sued the school board under prior law, which allowed the right to a jury trial in such cases. *Id.* at 272-73, 412 S.E.2d at 689. The plaintiff argued, pursuant to N.C.G.S. § 115C-325(m)(2), that the school board’s decision not to renew her contract was arbitrary, capricious, or based upon personal considerations. *Id.* at 274, 412 S.E.2d at 690. Our Court held that the whole record test applied to the plaintiff’s appeal. *Id.* at 272, 412 S.E.2d at 689.

In the present case, despite petitioner’s contention, the trial court did not determine that whole record review was the only standard of review applicable to decisions of school boards. Rather, because of

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the nature of the asserted errors in the present case, the trial court correctly determined that the whole record test was the proper standard of review. Likewise, in its order on petitioner's Rule 59 and Rule 60 motions, from which petitioner also appealed, the trial court stated as follows:

This court did not conclude it could "only" review the case under the whole record standard, thereby disregarding and ignoring all other methods of review, as Petitioner contends; this court actually determined the specific nature of this controversy and then determined the whole record standard was the appropriate and proper standard of review for this particular case.

Moreover, whole record review was the proper standard of review to apply to petitioner's claim that the board terminated her contract for personal reasons. Our Court has held that "[i]ssues regarding the intent of the parties are issues of fact." *Harris-Teeter Supermarkets v. Hampton*, 76 N.C. App. 649, 652, 334 S.E.2d 81, 83, *disc. review denied*, 315 N.C. 183, 337 S.E.2d 857 (1985).

In *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 599 S.E.2d 888 (2004), a park ranger, Carroll, was demoted for, *inter alia*, having "willfully violated the Division Law Enforcement written guidelines on the use of emergency vehicles[.]" *Id.* at 656, 599 S.E.2d at 893. Carroll filed a petition for a contested case hearing and an administrative law judge entered a recommended decision directing that Carroll be reinstated with back pay. *Id.* at 652, 599 S.E.2d at 890. The State Personnel Commission (SPC) adopted the recommended decision and ordered that Carroll be reinstated with back pay. *Id.* However, the trial court reversed the SPC and our Court affirmed. *Id.*

In *Carroll*, our Supreme Court noted that fact-intensive issues receive whole record review. *Carroll*, 358 N.C. at 659, 599 S.E.2d at 894. The Court addressed the issue of whether "Carroll's alleged 'willful violation' of the Division's written guidelines for the use of emergency vehicles constituted 'just cause' for his demotion." *Id.* at 670, 599 S.E.2d at 901. One of the Division's guidelines permitted a law enforcement officer to "use emergency warning devices when the officer ha[d] a 'reasonable belief' that an emergency situation exist[ed]." *Id.* at 671, 599 S.E.2d at 902. The SPC found as a fact that Carroll had a reasonable belief that an emergency situation existed and the SPC concluded that Carroll's conduct did not constitute a willful violation of work rules. *Id.* Our Supreme Court held as follows:

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“The trial court reviewed the SPC’s findings regarding . . . Carroll’s motivations for his conduct under the whole record test. Because . . . Carroll’s subjective state of mind is manifestly a question of fact, this was the correct standard of review to apply.” *Id.*

In the present case, petitioner argues that the board did not renew her contract because it harbored personal bias towards petitioner. In essence, petitioner argues that the intent behind the board’s decision was personal. As in *Carroll*, because the board’s motivation for its decision not to renew petitioner’s contract was “manifestly a question of fact,” the trial court properly engaged in whole record review of this issue. *See Id.* Therefore, the trial court did not err and we overrule petitioner’s assignment of error.

II.

[3] Petitioner next argues the trial court misapplied the whole record test with regard to petitioner’s claim that the board’s decision was arbitrary. Specifically, petitioner argues that, because of a factual inaccuracy in the superintendent’s memorandum to the board, the trial court could not affirm the board’s decision without “substituting its judgment for the Board’s and deciding what the Board would have concluded if it had not received incorrect information.”

“An arbitrary or capricious reason is one ‘without any rational basis in the record, such that a decision made thereon amounts to an abuse of discretion.’” *Abell v. Nash County Bd. of Education*, 89 N.C. App. 262, 265, 365 S.E.2d 706, 708 (1988) (quoting *Abell v. Nash County Bd. of Education*, 71 N.C. App. 48, 52-53, 321 S.E.2d 502, 506 (1984), *disc. review denied*, 313 N.C. 506, 329 S.E.2d 389 (1985)). “A court applying the whole record test 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*.” *Watkins v. N.C. State Bd. of Dental Exam’rs*, 358 N.C. 190, 199, 593 S.E.2d 764, 769 (2004). “Only when there is no substantial evidence supporting administrative action should the court reverse an agency’s ruling.” *Mendenhall v. N.C. Dept. of Human Resources*, 119 N.C. App. 644, 650, 459 S.E.2d 820, 824 (1995).

In the present case, the trial court made the following unchallenged findings of fact:

11. The Superintendent prepared a memorandum regarding his recommendation and provided that memorandum to [the board]. While it appears the memorandum contains an inaccurate refer-

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ence (i.e., that before Petitioner squirted the principal with the squirt gun, she had been told not to), and may not include all information available, the preparation and presentation of the memorandum by itself does not render the Superintendent's recommendation or the ultimate decision arbitrary or capricious. This Court has duly considered the composition of the memorandum, and its use, and the arguments presented by counsel concerning the memorandum, in conducting the review of the [board's] decision.

12. The Superintendent's memorandum, which is part of the administrative record of the [board's] decision, indicates reasons for the decision that are not arbitrary, capricious, based upon personal considerations or are otherwise improper reasons, as designated in § 115C-325(m)(2).

The trial court properly applied the whole record test to the evidence presented to the board. The trial court looked at all of the evidence and determined there was substantial evidence to support the board's determination, even without the inaccurate information. The trial court did not "substitute its judgment" for that of the board. *See Watkins*, 358 N.C. at 199, 593 S.E.2d at 769. Accordingly, the trial court did not misapply the whole record standard of review and we overrule this assignment of error.

III.

[4] Petitioner also argues the trial court misapplied the whole record test by finding that the board conducted a sufficient inquiry into the substantive reasons for its decision not to renew petitioner's contract. In *Abell*, our Court recognized that "[a] school board may refuse to renew a probationary teacher's contract upon recommendation of the superintendent. That recommendation is only advisory, however; ultimate responsibility rests with the board." *Abell*, 71 N.C. App. at 52, 321 S.E.2d at 506. Our Court interpreted N.C.G.S. § 115C-325(m)(2) "to impose a duty on boards of education to determine the substantive bases for recommendations of non-renewal and to assure that non-renewal is not for a prohibited reason." *Id.* at 52, 321 S.E.2d at 506. Our Court held that "the advisory nature of the superintendent's recommendation to not rehire a non-tenured teacher places the responsibility on the Board to ascertain the rational basis for the recommendation before acting upon it." *Id.* at 53, 321 S.E.2d at 506. However, a school board need not "make exhaustive inquiries or formal findings of fact[.]" *Id.* Rather, "the administrative record, be

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it the personnel file, board minutes or recommendation memoranda, should disclose the basis for the board's action." *Id.* at 53, 321 S.E.2d at 506-07.

In *Spry*, the board of education hired the plaintiff as a probationary teacher and assigned a support team to evaluate her teaching performance. *Spry*, 105 N.C. App. at 270, 412 S.E.2d at 687-88. The support team informed the plaintiff that her teaching performance was unacceptable. *Id.* at 270, 412 S.E.2d at 688. However, the plaintiff complained to the principal that she had personality conflicts with the members of her support team. *Id.* The principal visited the plaintiff's class and then recommended, through a member of the support team, that the school board not renew the plaintiff's contract. *Id.* at 270-71, 412 S.E.2d at 688. The superintendent conducted an investigation and recommended that the school board not renew the plaintiff's contract, and the school board voted for non-renewal of the plaintiff's contract. *Id.* at 271, 412 S.E.2d at 688.

The plaintiff filed an action against the board under the prior law, which allowed the right to a jury trial in such cases. *Id.* at 272-73, 412 S.E.2d at 689. The jury found that the school board failed to renew the plaintiff's contract for arbitrary, capricious and personal reasons and awarded damages to the plaintiff. *Id.* at 271, 412 S.E.2d at 688.

The school board argued on appeal that the trial court erred by denying its motions for summary judgment, directed verdict and judgment notwithstanding the verdict. *Id.* The plaintiff argued that the school board's decision not to renew her contract was for arbitrary, capricious or personal reasons. *Id.* at 274, 412 S.E.2d at 690. Specifically, the plaintiff alleged that the members of her support team were personally biased against her. *Id.* However, in making its decision not to renew the plaintiff's contract, the school board considered the following information:

- (1) a memo from the school superintendent recommending that the Board not renew [the] plaintiff's contract;
- (2) the superintendent's exhibits which included materials prepared by [the] plaintiff's principal and support team; and
- (3) [the] plaintiff's exhibits, which included letters of recommendation, her letter to Principal Benjamin Warren outlining her concerns about her support team, and several evaluation forms. At the hearing, the Board also heard [the] plaintiff, her attorney, and a local teachers' organization representative speak on [the] plaintiff's behalf before it made its decision.

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Id. Our Court held that even if the plaintiff's allegations regarding her support team were true, the school board conducted a sufficient inquiry into the matter. *Id.* at 275, 412 S.E.2d at 690. Our Court also held that "the inquiry by the superintendent's office was sufficient to remove any taint that may have existed in the support team's evaluation." *Id.* Accordingly, our Court reversed the judgment of the trial court. *Id.* at 276, 412 S.E.2d at 691.

In the present case, the principal recommended that petitioner's contract not be renewed. The superintendent then conducted an investigation regarding the principal's recommendation. The superintendent met with the principal and with petitioner and reviewed notes provided by them. The superintendent also reviewed two "Below Standard" performance evaluations of petitioner in the areas of facilitating instruction and performing non-instructional duties. The superintendent interviewed four staff members at the school and asked each of them whether they believed "the principal [had] a personal bias against [petitioner]." None of the staff members indicated that the principal was personally biased against petitioner. The superintendent provided a memorandum to the board in which the superintendent summarized his investigation and recommended that the board not renew petitioner's contract. The superintendent presented this information to the board. The minutes of the closed session of the board's meeting state: "The Board discussed [the] Superintendent[s] . . . recommendation to deny tenure to [petitioner]. The Superintendent reviewed [petitioner's] most recent evaluation with the Board . . . , which included two ratings below standard, and [the] Superintendent . . . read the attached memorandum . . . to the Board." The board voted not to renew petitioner's contract.

Based upon the board's inquiry, and pursuant to *Abell*, the board satisfied its duties "to determine the substantive bases for recommendations of non-renewal and to assure that non-renewal [was] not for a prohibited reason." See *Abell*, 71 N.C. App. at 52, 321 S.E.2d at 506. The administrative record in the present case shows that petitioner's contract was not renewed because she threatened to be "a counter-productive force concerning the morale of the faculty at Nantahala School[]" based upon several instances of petitioner's conduct. Moreover, the inquiry conducted by the superintendent in the present case was similar to the inquiry conducted by the superintendent in *Spry*. As in *Spry*, the superintendent's investigation in the present case served to (1) provide non-arbitrary and non-personal reasons for petitioner's non-renewal and (2) "remove any taint that

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may have existed in the [principal's] evaluation." *See Spry*, 105 N.C. App. at 275, 412 S.E.2d at 690. We overrule petitioner's assignment of error.

IV.

[5] Petitioner argues the trial court abused its discretion by denying her motion for reconsideration. Specifically, petitioner assigned as error that "[t]he [trial] court erred in denying the Motion for Reconsideration where the Motion showed that the Board . . . had presented false information to the [trial] [c]ourt at the May 26 hearing."

We review the denial of Rule 59 and Rule 60 motions for an abuse of discretion. *Ollo v. Mills*, 136 N.C. App. 618, 624, 525 S.E.2d 213, 217 (2000). "A ruling committed to a trial court's discretion is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

In the present case, petitioner argued in her motion for reconsideration that the board deliberately misrepresented to the trial court that petitioner had been told not to squirt the principal with a squirt gun before she did so. In its order denying petitioner's motion, the trial court stated that

the [trial court] specifically addressed and considered this matter, and made reference to the situation in the Order entered after the May 26, 2005 hearing, recognizing that such information was evidently erroneous. Reference is made to Paragraph 11 of the [trial] court's June 2, 2005 Order. Having recognized and considered the inaccurate references in the [trial court's] earlier Order, no relief would be proper for the same reason, under Rules 59 or 60.

On appeal, petitioner argues "[t]he [trial] court's rationale for declining to reconsider that issue, even with a showing of false statements by the school system to the [trial] court, reflects the [trial] court's misapplication of the whole record test in this case." However, we have already held that the trial court properly applied the whole record test to this issue. For the same reasons, we conclude the trial court did not abuse its discretion.

[6] Petitioner also attempts to argue in her brief that the trial court abused its discretion by failing to reconsider its ruling that

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the *de novo* standard of review did not apply to the trial court's review of petitioner's action. However, petitioner did not list this specific argument in her assignment of error and therefore we do not address this issue. *See* N.C.R. App. P. 10(a). This assignment of error is overruled.

Affirmed.

Judges ELMORE and STEELMAN concur.

DIRECTV, INC. AND ECHOSTAR SATELLITE, L.L.C., PLAINTIFFS v. STATE OF NORTH CAROLINA, THE NORTH CAROLINA DEPARTMENT OF REVENUE, AND E. NORRIS TOLSON, IN HIS OFFICIAL CAPACITY AS SECRETARY OF REVENUE, DEFENDANTS

No. COA05-1250

(Filed 1 August 2006)

Taxation— satellite service—sales tax—commerce clause

The statute imposing a state sales tax on providers of “direct-to-home satellite service” but not on cable television service, N.C.G.S. § 105-164.4(a)(6), does not violate the Commerce Clause of the United States Constitution either facially or in practical effect because: (1) the differential tax results solely from differences between the nature of the provision of satellite and cable services, and not from the geographical location of the businesses; (2) neither satellite companies nor cable companies are properly characterized as an in-state or out-of-state economic interest; (3) the dormant Commerce Clause prohibits discrimination against the interstate marketing for multichannel video programming, but it does not necessarily prohibit discrimination against programmers in that market who deliver programming by satellite as opposed to cable; (4) the imposition of the sales tax on satellite companies has equalized the local franchise taxes already imposed on cable companies; and (5) the record is devoid of any evidence that this tax has created an undue burden on interstate commerce. U.S. Const. art. I, § 8, cl. 3.

Appeal by Plaintiffs from judgment entered 26 May 2005 by Judge Clarence E. Horton, Jr., in Superior Court, Wake County. Heard in the Court of Appeals 9 May 2006.

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Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by James D. Blount, Jr., Walter R. Rogers, Jr., Christopher G. Smith; and Steptoe & Johnson, by Betty Jo Christian and Mark F. Horning for plaintiff-appellants.

Attorney General Roy Cooper, by Special Deputy Attorney General Kay Linn Miller Hobart and Assistant Attorney General Michael D. Youth for the State.

WYNN, Judge.

A tax statute does not violate the Commerce Clause of the United States Constitution when the differential tax treatment of “two categories of companies results solely from differences between the nature of their businesses, [and] not from the location of their activities.”¹ In this case, Plaintiffs contend that section 105-164.4(a)(6) of the North Carolina General Statutes, which imposes a sales tax on “[d]irect-to-home satellite service,” but not on cable television service,² discriminates against satellite providers and favors cable companies on its face and in its practical effect. Because the differential tax results solely from differences between the nature of the provision of satellite and cable services, and not from the geographical location of the businesses, we affirm the trial court’s grant of summary judgment to the State of North Carolina.

The facts pertinent to this appeal indicate that Plaintiffs DIRECTV, Inc. and EchoStar Satellite, L.L.C., provide direct broadcast satellite service to subscribers in North Carolina, as well as to subscribers throughout the nation. To distribute satellite services to their customers, satellite operators beam television programming to receiver “dishes” affixed directly to subscribers’ homes from satellites stationed at fixed altitudes above the earth’s equator. In contrast, cable companies provide television programming to their customers using local distribution facilities. Specifically, cable companies distribute their programming using coaxial or fiber optic cables that are laid across the state in a ground-based network. Notwithstanding these differences in the provision of television programming to their customers, satellite and cable companies utilize satellites at some point to provide service to their subscribers, and both require ground equipment located in North Carolina and outside

1. *Amerada Hess Corp. v. Director, Div. of Taxation, New Jersey Dep’t of the Treasury*, 490 U.S. 66, 78, 104 L. Ed. 2d 58, 70 (1989) (citation omitted).

2. N.C. Gen. Stat. § 105-164.4(a)(6) (2003).

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North Carolina to effect delivery of their programming to North Carolina subscribers.

Before 2001, North Carolina's sales tax did not apply to the retail sale of either satellite or cable service. In 2001, the General Assembly enacted a new law entitled "Equalize Taxation of Satellite TV and Cable TV." 2001 N.C. Sess. Laws. 424, § 34.17. This new law, codified in section 105-164.4(a)(6) of the North Carolina General Statutes, amended the tax code to impose a state sales tax on providers of "direct-to-home satellite service" equal to five percent of the companies' gross receipts. Thus, section 105-164.4(a)(6) imposed a five percent sales tax on satellite companies, but did not impose a sales tax on cable companies. Since 1 January 2002, the effective date of section 105-164.4(a)(6), Plaintiffs have paid the five percent sales tax, which they recouped from their subscribers in a line item on subscribers' monthly bills.

On 30 September 2003, Plaintiffs filed suit in Superior Court, Wake County, seeking a refund of nearly \$30,000,000.00 in sales taxes paid pursuant to section 105-164.4(a)(6). In their complaint, Plaintiffs challenged the constitutionality of section 105-164.4(a)(6) on grounds that it (1) violates the Commerce Clause of the United States Constitution; (2) denies Plaintiffs equal protection of the laws in violation of the Equal Protection Clause of the United States Constitution; and (3) violates the rule of uniform taxation of Article V, Section 2, of the North Carolina Constitution.

On 18 January 2005, Plaintiffs moved for summary judgment on the Commerce Clause claim of their complaint, and the State simultaneously cross-moved for summary judgment on Plaintiffs' Commerce Clause and equal protection claims. On 26 May 2005, the trial court denied Plaintiffs' motion for summary judgment and granted the State's cross-motion for summary judgment in its entirety, thereby dismissing Plaintiffs' complaint. Plaintiffs appeal to this Court contending that section 105-164.4(a)(6) of the North Carolina General Statutes facially discriminates against interstate commerce; and the satellite service tax violates the Commerce Clause in its practical effect.

I.

The United States Constitution expressly grants to Congress the power to "regulate [c]ommerce with foreign [n]ations, and among the several [s]tates[.]" U.S. CONST. art. I, § 8, cl. 3. "[T]he Commerce Clause is more than an affirmative grant of power; it has a nega-

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tive sweep as well” in that “‘by its own force’ [it] prohibits certain state actions that interfere with interstate commerce.” *Quill Corp. v. North Dakota*, 504 U.S. 298, 309, 119 L. Ed. 2d 91, 104 (1992) (quoting *South Carolina State Highway Dep’t v. Barnwell Bros., Inc.*, 303 U.S. 177, 185, 82 L. Ed. 734, 739 (1938)). The United States Supreme Court has explained that the “dormant” Commerce Clause means that “[a] State is . . . precluded from taking any action which may fairly be deemed to have the effect of impeding the free flow of trade between States.” *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 278 n.7, 51 L. Ed. 2d 326, 330 n.7 (1977) (citations and internal quotation marks omitted).

It is well established that a law is discriminatory if it “tax[es] a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State.” *Chemical Waste Mgmt. v. Hunt*, 504 U.S. 334, 342, 119 L. Ed. 2d 121, 132 (1992) (internal quotation and citations omitted). “Discrimination” for purposes of the dormant Commerce Clause is “differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.” *Granholt v. Heald*, 544 U.S. 460, 472, 161 L. Ed. 2d 796, 809 (2005) (quoting *Oregon Waste Systems, Inc. v. Dep’t of Env’tl. Quality of Ore.*, 511 U.S. 93, 99, 128 L. Ed. 2d 13, 21 (1994)). Thus, no state may “impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business.” *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458, 3 L. Ed. 2d 421, 427 (1959), *superseded by statute as stated in*, *Silent Hoist & Crane Co. v. Director, Div. of Taxation*, 100 N.J. 1, 10 n.1, 494 A.2d 775, 779 n.1 (1985). There are three ways in which a statute can discriminate against out-of-state interests: (1) it may be facially discriminatory; (2) it may have a discriminatory intent; or (3) it may discriminate in its practical effect. *Amerada Hess Corp.*, 490 U.S. at 75, 104 L. Ed. 2d at 68.

The statute at issue in this appeal is section 105.164.4(a)(6) of the North Carolina General Statutes which provides:

(a) A privilege tax is imposed on a retailer at the following percentage rates of the retailer’s net taxable sales or gross receipts as appropriate. . . . (6) The rate of five (5%) applies to the gross receipts derived from providing direct-to-home satellite service to the subscribers in this State. A person engaged in the business of providing direct-to-home satellite service is considered a retailer under this Article.

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N.C. Gen. Stat. § 105-164.4(a)(6). The statute defines “[d]irect-to-home satellite service” as, “[p]rogramming transmitted or broadcast by satellite directly to the subscribers’ premises without the use of ground equipment or distribution equipment, except equipment at the subscribers’ premises or the uplink process to the satellite.” N.C. Gen. Stat. § 105-164.3(8) (2003).

On appeal, Plaintiffs contend that section 105-164.4(a)(6) discriminates against satellite providers and favors cable companies in two ways—on its face and in its practical effect.

II.

Plaintiffs first argue that section 105-164.4(a)(6) of the North Carolina General Statutes *facially discriminates* against interstate commerce. We disagree.

A state tax law is facially discriminatory where it (1) explicitly refers to state boundaries or uses other terminology that inherently indicates the tax is based on the in-state or out-of-state location of an activity, *see Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388, 407, 80 L. Ed. 2d 388, 403 (1984) (holding that a New York income tax provision that expressly provided a tax credit for shipping products from New York rather than other states violated the Commerce Clause); and (2) applies to entities similarly situated for Commerce Clause purposes. *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 299, 136 L. Ed. 2d 761, 780 (1997). “A facial challenge to a legislative act is . . . the most difficult challenge to mount successfully.” *United States v. Salerno*, 481 U.S. 739, 745, 95 L. Ed. 2d 697, 707 (1987). The challenger must establish that “no set of circumstances exists under which [the tax] would be valid.” *Id.* Moreover, the challenger must demonstrate there is an “explicit discriminatory design to the tax.” *Amerada Hess Corp.*, 490 U.S. at 76, 104 L. Ed. 2d at 69.

Plaintiffs contend that section 105-164.4(a)(6) is facially discriminatory because it conditions the applicability of the sales tax upon the in-state or out-of-state location of the programming distribution facilities. However, the plain language of section 105-164.4(a)(6) does not make any geographical distinctions, but merely describes one method of providing television programming services to North Carolina subscribers: the satellite companies’ method, as opposed to the cable companies’ method. The dormant Commerce Clause protects the interstate market for a particular product, but it does not

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protect “the particular structure or methods operation in a retail market.” *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127, 57 L. Ed. 2d 91, 101 (1978).

Plaintiffs argue that section 105-164.4(a)(6) is analogous to the tax exemption the United States Supreme Court struck down as unconstitutional in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 82 L. Ed. 2d 200 (1984). In *Bacchus*, a Hawaii statute exempted okolehao, a brandy distilled from the root of a shrub indigenous to Hawaii, and pineapple wine from the State’s liquor tax. *Id.* at 265, 82 L. Ed. 2d at 205. Because the tax exemptions applied only to locally produced beverages, the *Bacchus* Court concluded that the exemptions clearly had a discriminatory effect on interstate commerce. The Court noted that the legislature exempted okolehao and pineapple wine from the State’s liquor tax to encourage and promote the establishment of a new industry and to help in stimulating the local fruit wine industry. *Id.* at 273, 82 L. Ed. 2d at 211. Thus, because the exemptions were motivated by an intent to confer a benefit upon local industries not granted to out-of-state industries, the Court held that the exemptions were invalid.

The facts in *Bacchus* are easily distinguished from the facts in this case. Here, section 105-164.4(a)(6) does not discriminate against Plaintiffs in favor of a local industry. Contrary to Plaintiffs’ assertions, cable companies are no more “local” in nature than are satellite companies. Indeed, the record reveals that both businesses are interstate in nature, as they both utilize in-state and out-of-state equipment and facilities in providing service to North Carolina subscribers and both own property within the State of North Carolina. Thus, unlike the products exempted from Hawaii’s liquor tax in *Bacchus*, neither satellite companies nor cable companies are properly characterized as an in-state or out-of-state economic interest. Moreover, there is no evidence in the record on appeal to suggest that the General Assembly enacted section 105-164.4(a)(6) to encourage and promote the cable industry, which we have already determined is not a local industry.

As section 105-164.4(a)(6) merely distinguishes between two methods of providing television service to North Carolina subscribers, and such distinctions are permissible under the Commerce Clause, we conclude section 105-164.4(a)(6) is not facially discriminatory.

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III.

Plaintiffs next contend that even if section 105-164.4(a)(6) is not facially discriminatory, the statute *discriminates in its practical effect* against television providers that use out-of-state delivery facilities in favor of those that use local facilities.

“[A] state tax that favors in-state business over out-of-state business for no other reason than the location of its business is prohibited by the Commerce Clause.” *American Trucking Ass’ns v. Scheiner*, 483 U.S. 266, 286, 97 L. Ed. 2d 226, 244 (1987) (citation omitted); *see also Best & Co., Inc. v. Maxwell*, 311 U.S. 454, 456-57, 85 L. Ed. 275, 278 (1940) (holding that a North Carolina statute that taxed out-of-state retailers for hotel room use was discriminatory in practical effect because it discriminated in favor of intrastate businesses). Only actual, rather than hypothetical, discrimination violates the Commerce Clause. *Associated Indus. of Missouri v. Lohman*, 511 U.S. 641, 654, 128 L. Ed. 2d 639, 651 (1994); *see also Gregg Dyeing Co. v. Query*, 286 U.S. 472, 481, 76 L. Ed. 1232, 1239 (1932) (“Discrimination . . . is a practical conception. We must deal in this matter . . . with substantial distinctions and real injuries.”). Plaintiffs bear the initial burden of showing that a statute has a discriminatory effect on interstate commerce. *Hughes v. Oklahoma*, 441 U.S. 322, 336, 60 L. Ed. 2d 250, 262 (1979). If Plaintiffs meet that burden, the State bears the burden of establishing that the challenged tax “advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.” *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278, 100 L. Ed. 2d 302, 311 (1988) (citations omitted).

In determining whether section 105-164.4(a)(6) violates the dormant Commerce Clause in its practical effect, we find the United States Supreme Court’s decisions in *Amerada Hess*, 490 U.S. 66, 104 L. Ed. 2d 58 and *Exxon Corp.*, 437 U.S. 117, 57 L. Ed. 2d 91, instructive. In *Amerada Hess*, the United States Supreme Court held that a New Jersey statute that denied oil producers a state tax deduction for the federal “windfall profit tax” imposed on producers of crude oil did not discriminate against interstate commerce. *Amerada Hess*, 490 U.S. at 79, 104 L. Ed. 2d at 71. The plaintiffs in that case argued that the deduction denial discriminated against oil producers who market their oil in favor of independent retailers who do not produce oil. *Id.* at 78, 104 L. Ed. 2d at 70. Because New Jersey did not have any oil refineries, the plaintiffs argued that the state had singled out a business activity—oil production—conducted in other jurisdictions

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for a special tax burden. *Id.* The *Amerada Hess* Court held that the statute did not violate interstate commerce, explaining that the oil producing plaintiffs

operate both in New Jersey and outside New Jersey. Similarly, nonproducing retailers may operate both in New Jersey and outside the State. Whatever different effect the [deduction denial] may have on these two categories of companies results solely from differences between the nature of their businesses, [and] not from the location of their activities.

Id.

In *Exxon Corp.*, the United States Supreme Court reviewed a Maryland statute that prohibited oil producers or refiners from operating a retail service station within the state. *Exxon Corp.*, 437 U.S. 117, 57 L. Ed. 2d 91. Under the statute, all major oil companies, including Exxon, had to divest themselves of their retail service stations in the state. *Id.* at 125-26, 57 L. Ed. 2d at 100. Exxon argued that the statute protected in-state independent dealers in the gas retail market from out-of-state competition. The Court, noting that there were several major interstate marketers of petroleum that owned retail gas stations in Maryland that did not produce or refine gasoline, held that the relevant statute created no barriers, explaining,

[the statute] does not prohibit the flow of interstate goods, place added costs upon them, or distinguish between in-state and out-of-state companies in the retail market. . . . The fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce.

Id. at 126, 57 L. Ed. 2d at 100. Thus, in *Exxon Corp.*, the Court determined that the dormant Commerce Clause prohibits discrimination against the interstate market for retail gasoline, but that it does not specifically protect retailers in the interstate market who are oil producers. See also *Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200 (2d Cir. 2003) (relying on *Exxon*, the court held that the dormant Commerce Clause prohibits discrimination against the interstate market for retail cigarettes, but not discrimination against retailers in that market who sell cigarettes in a particular manner).

In the case *sub judice*, the relevant market is the interstate market for multichannel video programming. The relevant retailers are multichannel video programming service providers, including those

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companies that deliver programming by satellite and those that deliver programming by cable. Based on the United States Supreme Court's reasoning in *Amerada Hess* and *Exxon Corp.*, we conclude that the dormant Commerce Clause prohibits discrimination against the interstate marketing for multichannel video programming, but that it does not necessarily prohibit discrimination against programmers in that market who deliver programming by satellite as opposed to cable.

Plaintiffs argue that their delivery of television programming is inherently out-of-state and, therefore, they are unfairly subjected to the tax imposed upon them in section 105-164.4(a)(6). Specifically, Plaintiffs contend that satellites are by definition placed in outer space and the tax imposed under section 105-164.4(a)(6), therefore, always discriminates against out-of-state businesses. However, the United States Supreme Court rejected a similar argument in *Amerada Hess*. The *Amerada Hess* Court specifically noted that the oil producers could not move their oil-producing activities to New Jersey because no oil reserves exist there. Thus, the oil producing gas retailers in *Amerada Hess* were as inherently out-of-state as Plaintiffs are in this case. Indeed, the Court considered this fact to show that the statute could not have been intended to induce the plaintiffs to move their oil-producing activities to New Jersey because there were no oil reserves in New Jersey. Likewise, section 105-164.4(a)(6) could not have been implemented to induce Plaintiffs to move their provision of satellite services to North Carolina because satellites, by their nature, are inherently out-of-state businesses. Given this fact, "it is difficult to see how [the statute] unconstitutionally discriminates against interstate commerce." *Amerada Hess*, 490 U.S. at 78, 104 L. Ed. 2d at 70.

Plaintiffs' reliance on *Granholm*, 544 U.S. 460, 161 L. Ed. 2d 796, is misplaced. In *Granholm*, the Court struck down a New York statute as violating the Commerce Clause where the statute forbade out-of-state wineries from making direct sales unless they first established a distribution operation in New York. *Id.* at 493, 161 L. Ed. 2d at 822. The United States Supreme Court concluded that this statute discriminated against interstate commerce because the mandate to build a distribution system in New York was an "additional step[] that drive[s] up the cost of [out-of-state] wine[,]” that in-state producers did not have to incur. *Id.* at 474-75, 161 L. Ed. 2d at 810.

In the case *sub judice*, even if Plaintiffs were to establish an in-state distribution system for the delivery of satellite programming,

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they would still be subjected to the tax imposed under section 105-164.4(a)(6) because of the means that they use to deliver its services. Similarly, cable companies that have out-of-state distribution systems for the delivery of cable programming are still exempt from the tax imposed under section 105-164.4(a)(6) because of how they deliver their services. Thus, the geographical location of the business, whether in-state or out-of-state, has nothing to do with whether the business is subjected to the tax imposed under section 105-164.4(a)(6). Unlike the wineries in *Granholm*, whether a company is subjected to the tax under section 105-164.4(a)(6) depends only upon how companies deliver television programming services to its subscribers, and not whether the delivery of the programming services occurs inside or outside the state of North Carolina.

Plaintiffs further argue that section 105-164.4(a)(6) assesses a substantial cost disadvantage on satellite operators, and inhibits their ability to compete with cable companies. Specifically, Plaintiffs contend that the tax requires its subscribers to pay \$30.00 per year more than cable subscribers. Plaintiffs' argument is not persuasive.

The statute does not require Plaintiffs to recoup the sales tax from its subscribers. Plaintiffs have elected to pay this tax by passing the costs to its subscribers. Moreover, although cable subscribers do not pay \$30.00 per year in the sales tax imposed under section 105-164.4(a)(6), cable companies recoup local franchise taxes, which are approximately thirty-dollars per year, from their subscribers that satellite subscribers do not pay. Thus, as the title of the legislation that created section 105-164.4(a)(6)—“Equalize Taxation of Satellite TV and Cable TV”—suggests, *see* 2001 N.C. Sess. Laws. 424, § 34.17, the imposition of the sales tax on satellite companies has, in fact, equalized the local franchise taxes already imposed on cable companies.

Finally, the record is void of any evidence that this tax has created an undue burden on interstate commerce. Even after the imposition of the sales tax in 2002, Plaintiffs' number of subscribers and gross revenues have increased from 2001 to 2003 in North Carolina. Moreover, Plaintiffs' share of the North Carolina multichannel video programming market has continually increased and has remained higher than their share of the national multichannel video programming market. Therefore, Plaintiffs' success in this market with the imposition of the sales tax under section 105-164.4(a)(6) defeats any claims that they are being discriminated against in its practical effect. Because Plaintiffs have failed to provide sufficient

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evidence that the tax discriminates against them in its practical effect, much less evidence so clear that no reasonable doubt can arise, section 105-164.4(a)(6) of the North Carolina General Statutes must be sustained against their constitutional challenge. *See E. B. Ficklen Tobacco Co. v. Maxwell*, 214 N.C. 367, 371, 199 S.E. 405, 408 (1938) (holding that an act of the General Assembly will not be held invalid as violative of the Constitution unless it so appears beyond a reasonable doubt).

Affirmed.

Judges GEER and STEPHENS concur.

ARLENE KING, PLAINTIFF v. WINDSOR CAPITAL GROUP, INC., DEFENDANT

No. COA05-1354

(Filed 1 August 2006)

Employer and Employee— hotel manager—manual labor—no overtime

A manager in a hotel housekeeping services department who did manual labor when she was short-staffed nevertheless was primarily a manager, and the trial court correctly granted summary judgment against her in her action for overtime wages under the Fair Labor Standards Act.

Appeal by plaintiff from an order entered 29 June 2005 by Judge Charles P. Ginn in Buncombe County Superior Court. Heard in the Court of Appeals 12 April 2006.

Wimer & Jobe, by Michael G. Wimer, for plaintiff-appellant.

Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Stephen B. Williamson, for defendant-appellee.

JACKSON, Judge.

Arlene King (“plaintiff”) appeals an order granting summary judgment in favor of Windsor Capital Group, Inc. (“defendant”).

From June 1999 through March 2004, the Renaissance Hotel in Asheville, North Carolina employed plaintiff as Director of Services. In plaintiff's complaint, she alleged that she is entitled to overtime wages for hours worked during her employment.

Plaintiff testified in her deposition that she was hired as a manager in the housekeeping services department. Plaintiff was one of eight managers working for the general hotel manager. As Director of Services, plaintiff managed approximately twenty-five employees, including three supervisors. Plaintiff regularly worked as the manager on duty, supervising the entire hotel. Plaintiff worked approximately forty to fifty hours per week without being paid overtime wages. In addition, she testified that it was not her understanding that she would earn overtime when she was hired. Plaintiff maintained no record of the hours that she actually worked. She never had a conversation with any of the other managers about overtime wages.

As Director of Services, plaintiff managed the housekeeping, laundry, public area, and turndown service for the hotel. Plaintiff had the authority to fire employees, approve leave time, resolve guests' complaints, and handle employees' disciplinary matters. She did not, however, have the authority to hire housekeepers, although she made hiring recommendations. Plaintiff provided the general hotel manager with information regarding her department's budget needs. In addition, plaintiff, as manager, was provided an office with computer equipment with which to perform her duties. She made a weekly schedule for her supervised employees, and posted the schedule without receiving prior approval from the hotel general manager. Plaintiff did not schedule herself for manual labor or housekeeping work. Furthermore, she did not have to punch a time clock when she arrived or departed from work, although the employees she managed were required to do so. Moreover, plaintiff provided performance reviews for her staff. In addition, plaintiff completed daily time sheets for the employees she supervised, then compiled the daily time sheets into weekly time sheets.

On a daily basis, she arrived at work around 7:00 a.m. Plaintiff attended a daily meeting of her department, although her supervisors led the meeting. Occasionally, she inspected rooms after supervisors cleaned the rooms, she sent laundry personnel to clean the rooms, or she helped clean the rooms. In addition, she also performed manual labor such as making beds, inspecting and cleaning rooms, doing laundry, and completing seamstress work on an as needed basis.

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Plaintiff testified that until 2001, she spent approximately fifty percent of her time performing manual labor, and between 2001 and 2004, she spent approximately eighty percent of her time performing manual labor. Defendant terminated plaintiff in March 2004.

On 30 August 2004, plaintiff filed a complaint against defendant alleging violation of payday and overtime wages under “state and/or federal overtime wage laws” and breach of contract. Defendant filed a timely answer. On 21 June 2005, defendant filed a motion for summary judgment. On 29 June 2005, after a hearing on the motion, the Honorable Charles P. Ginn entered an order granting summary judgment in favor of defendant. Plaintiff appeals to this Court.

On appeal, plaintiff argues only that the trial court erred in granting summary judgment in favor of defendant because genuine issues of material fact exist regarding whether the Fair Labor Standards Act requires that defendant pay plaintiff overtime wages. We disagree.

Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law.” N.C. Gen. Stat. § 1A-1, Rule 56(c) (2005). The moving party bears the burden of showing that no triable issue of fact exists. *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985). This burden can be met by proving: (1) that an essential element of the non-moving party’s claim is nonexistent; (2) that discovery indicates the non-moving party cannot produce evidence to support an essential element of his claim; or (3) that the non-moving party cannot surmount an affirmative defense which would bar the claim. *Collingwood v. G.E. Real Estate Equities, Inc.*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989). Once the moving party has met its burden, the non-moving party must forecast evidence that demonstrates the existence of a *prima facie* case. *Id.*

In deciding a motion for summary judgment, a trial court must consider the evidence in the light most favorable to the non-moving party. *See Summey v. Barker*, 357 N.C. 492, 496, 586 S.E.2d 247, 249 (2003). If there is any evidence of a genuine issue of material fact, a motion for summary judgment should be denied. *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 471, 597 S.E.2d 674, 694 (2004). “On appeal, an order allowing summary judgment is reviewed *de novo*.” *Id.* at 470, 597 S.E.2d at 693.

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The Fair Labor Standards Act (“FLSA”) requires employers to pay their employees time and a half for work over forty hours a week unless they are “employed in a bona fide executive, administrative, or professional capacity.” 29 U.S.C. §§ 207(a)(1), 213(a)(1) (2005). In determining whether an employee is a bona fide executive, employees must satisfy either the “long test” or the “short test.” See *Donovan v. Burger King Corp.*, 675 F.2d 516, 517-18 (2d Cir. 1982).

On appeal, the parties agree that the United States Department of Labor’s “short test” applies in determining whether plaintiff was exempt from overtime pay under the Fair Labor Standards Act (“FLSA”) as an “executive employee.” As the Fourth Circuit has explained:

An employee will be exempt under the executive exemption’s short test if: (1) the employee’s primary duty consists of the management of the enterprise or of a customarily recognized department or subdivision thereof; and (2) includes the customary and regular direction of the work of two or more other employees therein.

Smith v. First Union Nat’l Bank, 202 F.3d 234, 250 (4th Cir. 2000). See also 29 C.F.R. § 541.1(f) (2003) (setting out the “short test”).¹ In this case, there is no dispute that plaintiff engages in the customary and regular direction of the work of two or more other employees in a customarily recognized department or subdivision of the Renaissance Hotel.

Further, the record establishes—and plaintiff does not seriously dispute—that she performed management functions. The Department of Labor states that whether a particular type of work constitutes managerial and supervisory functions is usually “easily recognized.” 29 C.F.R. § 541.102(a) (2003). Falling squarely within the Department’s list of types of work constituting exempt management work, 29 C.F.R. § 541.102(b) (2003), are (1) plaintiff’s supervision of 25 employees and the firing, evaluating, and disciplining of those employees; (2) her work as a manager on duty for the entire hotel; (3) her interviewing and recommendation of prospective employees; and (4) her scheduling of work in her department.

1. Effective 23 August 2004, the regulations regarding exemptions from overtime pay were modified. Since these amendments apply only prospectively, the prior version of the regulations is applicable. *Moore v. Tractor Supply Co.*, 352 F. Supp. 2d 1268, 1273 n.5 (S.D. Fla. 2004), *aff’d*, 150 Fed. Appx. 168 (2005).

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The sole dispute on appeal relates to the existence of a genuine issue of material fact regarding whether plaintiff's *primary duty* as an employee consisted of carrying out these managerial tasks. The Department of Labor's regulations specify that "[a] determination of whether an employee has management as his primary duty must be based on all the facts in a particular case." 29 C.F.R. § 541.103 (2003). We are, therefore, required to apply a "totality of the circumstances" test. *See Counts v. S.C. Elec. & Gas Co.*, 317 F.3d 453, 456 (4th Cir. 2003) ("It is clear from this language [in 29 C.F.R. §§ 541.103, 541.206 (2003)] that primary duty is meant to be assessed by the totality of the circumstances.").

The regulations set forth five factors for determining whether management is a primary duty, although these factors appear to be non-exclusive: (1) the amount of time spent in the performance of managerial duties; (2) the relative importance of the managerial duties as compared with other types of duties; (3) the frequency with which the employee exercises discretionary powers; (4) the employee's relative freedom from supervision; and (5) the relationship between the employee's salary and the wages paid other employees for the kind of nonexempt work performed by the manager. 29 C.F.R. § 541.103 (2003). *See also Jones v. Va. Oil Co.*, 69 Fed. Appx. 633, 636-37, 2003 U.S. App. LEXIS 14676, **8-9 (4th Cir. July 23, 2003) (*per curiam*) (setting forth and applying the "primary duty" test to a convenience store manager who spent seventy-five to eighty percent of her time helping employees when short-staffed);² *Donovan v. Burger King Corp.*, 675 F.2d 516, 520-21 (2d Cir. 1982) (*Donovan I*) (noting that 29 C.F.R. § 541.103 (2003) "lists five factors to be weighed in determining an employee's primary duty").

In arguing that management was not her "primary duty," plaintiff relies almost exclusively on the first factor: the time spent on managerial duties. In doing so, she overlooks the fact that the Department of Labor's regulations stress that "[t]ime alone . . . is not the sole test, and in situations where the employee does not spend over 50 percent of his time in managerial duties, he might nevertheless have management as his primary duty if the other pertinent factors support such a conclusion." 29 C.F.R. § 541.103 (2003). As the Fourth Circuit has explained:

2. Although *Jones* is an unpublished *per curiam* decision (by Judges Michael and Motz of the Fourth Circuit and Judge Beezer of the Ninth Circuit, sitting by designation), it has been relied upon by other courts as persuasive authority and provides an excellent summary of the law governing the short test for the executive exemption.

Thus, the amount of time spent on nonmanagement tasks is not dispositive, “particularly when nonmanagement duties are performed simultaneous to the supervision of employees or other management tasks and other factors support a finding that the employee’s primary duty is managerial.” *Horne v. Crown Central Petroleum, Inc.*, 775 F. Supp. 189, 190 (D.S.C. 1991). In other words, an employee will have management as her primary duty if while engaged in nonexempt work, the employee also “supervises other employees, directs the work of warehouse and delivery men, . . . handles customer complaints, authorizes payment of bills, or performs other management duties as the day-to-day operations require.” 29 C.F.R. § 541.103.

Jones, 69 Fed. Appx. at 637, 2003 U.S. App. LEXIS 14675, **9-10.

Similarly, in leading decisions in this area, both the First Circuit and Second Circuit have held that a strict time division is not necessarily a valid test. As the First Circuit explained “a strict time division is somewhat misleading here: one can still be ‘managing’ if one is in charge, even while physically doing something else.” *Donovan v. Burger King Corp.*, 672 F.2d 221, 226 (1st Cir. 1982) (*Donovan II*). According to the First Circuit, a focus on the percentage of time “seems better directed at situations where the employee’s management and non-management functions are more clearly severable than they are here.” *Id.* The Second Circuit similarly has held that an allocation of time spent on management and non-management duties is not dispositive when “much of the oversight of the operation can be carried out simultaneously with the performance of non-exempt work.” *Donovan I*, 675 F.2d at 521. *See also Scherer v. Compass Group USA, Inc.*, 340 F. Supp. 2d 942, 953 (W.D. Wis. 2004) (holding that even though the plaintiff spent seventy-five percent of his day preparing food and only twenty-five percent engaged in managerial duties, management still was his primary duty since “it is undisputed that plaintiff monitored the performance of other staff working in the kitchen during the time he spent preparing food”).

Here, plaintiff’s affidavit stated that she spent fifty percent to eighty percent of her time on “manual” tasks because she was short-handed. Her deposition, however, indicates that this work was not performed independently of her managerial oversight, but rather was done in conjunction with her managerial work, as was true in *Jones*, the two *Donovan* decisions, and *Scherer*. She did not schedule herself for manual labor, but rather pitched in whenever and however she deemed necessary in order to ensure that the hotel continued func-

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tioning. Courts have declined to view a manager as non-exempt simply because he or she filled in for regular employees while short-staffed, even when the lack of staffing was a chronic situation. *See, e.g., Jones*, 69 Fed. Appx. at 635, 2003 U.S. App. LEXIS 14675, **3-4 (noting that the plaintiff spent seventy-five to eighty percent of her time doing basic line-worker tasks, when, due to frequent short-staffing, the store otherwise would not have been able to serve its customers); *Moore*, 352 F. Supp. 2d at 1276 (noting that the plaintiff had to perform many non-exempt functions because payroll constraints kept him from hiring more staff).

Thus, a bald statement that fifty to eighty percent of her time was spent in “manual” tasks without taking into account simultaneously performed management functions does not accurately address the time factor. *See Jones*, 69 Fed. Appx. at 637, 2003 U.S. App. LEXIS 14675, **11 (“[E]ven assuming that Jones spent the bulk of her time performing such line-worker tasks as cooking, cleaning the store, and manning the cash register, the record reflects that Jones could simultaneously perform many of her management tasks. That is, while Jones was doing line-worker tasks, she also engaged in the supervision of employees, handled customer complaints, dealt with vendors, and completed daily paperwork.”); *Donovan II*, 672 F.2d at 226 (“[A]n employee can manage while performing other work, and . . . this other work does not negate the conclusion that his primary duty is management.”). Accordingly, plaintiff’s assertion regarding the division of her labor—disputed by defendant—is not sufficient to defeat summary judgment in light of the other factors specified by the Department of Labor, as numerous courts, addressing similar evidence, have held. *See, e.g., Smith*, 202 F.3d at 251 (employee claimed that eighty to ninety percent of her time was spent on non-management duties); *Moore*, 352 F. Supp. 2d at 1274 (surveying cases holding that even though an employee spent the majority of his or her time performing non-exempt work, management was still his or her primary duty).

Instead of applying a simple clock standard, we must, looking at all the circumstances, decide whether an issue of fact exists as to what was plaintiff’s “principal” or “chief” responsibility, *Donovan II*, 672 F.2d at 226 (holding that “the more natural reading of ‘primary’ is ‘principal’ or ‘chief,’ not ‘over one-half’ [the employee’s time]”). Alternatively, as one federal district court has held, “[u]nder the ‘short test,’ the employee’s primary duty will usually be what he does that is of principal value to the employer, not the collateral

tasks that he may also perform, even if they consume more than half his time.” *Kastor v. Sam’s Wholesale Club*, 131 F. Supp. 2d 862, 866 (N.D. Tex. 2001).

After the time factor, the second factor is the relative importance of an employee’s managerial tasks as compared to her non-managerial work. With respect to this factor, courts have typically looked at the significance of the managerial tasks to the success of the business. *Jones*, 69 Fed. Appx. at 637-38, 2003 U.S. App. LEXIS 14675, **11-12. *See also Donovan I*, 675 F.2d at 521 (stating, as to the second factor, that “it is clear that the restaurants could not operate successfully unless the managerial functions of Assistant Managers . . . were performed”).

While plaintiff talks in her affidavit about the need to keep rooms cleaned and laundry done so that guests may use the rooms, a review of her deposition leads to only one conclusion: the hotel could not function without plaintiff’s performing her managerial responsibilities. She testified that she supervised twenty-five employees, including three mid-level supervisors, and was “in charge of the back of the house: housekeeping, public area, turndown service.” She was solely responsible for scheduling the staff performing those services, for doing performance reviews of those employees, and for firing those employees when necessary. Plaintiff reported directly to the General Manager for the hotel and sometimes the controller and identified no one else who performed any aspect of her job as Director of Services. *Compare Meyer v. Worsley Cos., Inc.*, 881 F. Supp. 1014, 1020 (E.D.N.C. 1994) (noting that the plaintiff had identified other individuals who were the “real” managers of the store). Without plaintiff, the “back of the house” would have had no oversight or, phrased differently, there would have been no one steering the ship. *See Shockley v. City of Newport News*, 997 F.2d 18, 26 (4th Cir. 1993) (distinguishing “between a manager of a recognized subdivision and a mere supervisor of subordinate employees”). Further, plaintiff was one of a limited number of managers who regularly served as a manager on duty, on which occasions she supervised the entire hotel.

One cannot reasonably read this record without concluding that the hotel could not function without plaintiff’s managerial role. *See Jones*, 69 Fed. Appx. at 638, 2003 U.S. App. LEXIS 14675, **12-13 (holding that a fast-food restaurant manager’s managerial tasks were more important than her nonmanagerial work, even though it took up as much as seventy-five to eighty percent of her time, when “the Dairy Queen could not have operated successfully

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unless Jones performed her managerial functions, such as ordering inventory, hiring, training, and scheduling employees, and completing the daily paperwork”). Plaintiff’s principal value to the hotel and, indeed, the very purpose of her employment was to manage the “back of the house.” It was not to make beds. *See Kastor*, 131 F. Supp. 2d at 866-67 (“Although [plaintiff] contends that he spent [ninety] percent of his time performing non-managerial tasks, that was not the purpose of his employment. [Plaintiff] was hired by [the employer] to manage the bakery department.”).

The third and fourth factors—frequency of use of discretionary powers and relative freedom from supervision—are related considerations. There can be no serious dispute regarding plaintiff’s exercise of discretionary powers. She testified: “I was the one that did the firing.” *See* 29 C.F.R. §§ 541.1, 541.101 (2003) (providing that an executive has the authority to hire or fire employees or is also someone whose suggestions and recommendations as to the hiring or firing will be given particular weight). Discretion also was used by plaintiff in, among other areas, scheduling, performance reviews, and resolving complaints. *See Jones*, 69 Fed. Appx. at 638, 2003 U.S. App. LEXIS 14675, **14 (holding that the third and fourth factors supported exemption when the employee “had the discretion to hire, train, schedule, discipline, and fire employees” and had the discretion to handle customer complaints); *Donovan I*, 675 F.2d at 521 (holding that employees exercised discretionary powers when they scheduled work time for subordinate employees and oversaw whether the employees were performing their jobs). With respect to supervision, plaintiff has pointed to nothing more than the supervision received by any mid-level manager from the top-ranking manager. To view that level of supervision as sufficient to render a manager non-exempt would eviscerate the executive exemption.

When all of the factors on which evidence exists are considered,³ no genuine issue of material fact exists regarding whether plaintiff’s primary duty was management. *See Jones*, 69 Fed. Appx. at 639, 2003 U.S. App. LEXIS 14675, **16-17 (holding that employer had offered evidence sufficient as a matter of law to prove that plaintiff was a “bona fide” executive under the FLSA even though she testified that she spent as much as seventy-five to eighty percent of her time performing basic line-worker tasks at a restaurant). Although plaintiff

3. The record contains no concrete evidence regarding the final factor: the relationship between the employee’s salary and the wages paid employees doing similar non-exempt work.

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points to evidence that she did manual labor when she was short-handed, she still was functioning as a manager. When an employee is the exclusive manager of a major department of hotel—including twenty-two full-time employees and three full-time supervisors—and exercises such discretion as full firing and scheduling authority, then the employee qualifies as someone whose primary duty consists of the management of her department. Accordingly, the trial court properly granted defendant’s motion for summary judgment.

Because we affirm summary judgment, and plaintiff failed to assign error to summary judgment on her breach of contract claim, her contract claim is deemed abandoned. *See* N.C. R. App. P., Rule 28(a) (2006) (“Questions raised by assignments of error in appeals from trial tribunals but not then presented and discussed in a party’s brief, are deemed abandoned”). *See also State v. Wilson*, 289 N.C. 531, 223 S.E.2d 311 (1976).

AFFIRM.

Judges TYSON and GEER concur.

 IN THE MATTER OF: J.T.W., MINOR CHILD

No. COA05-1066

(Filed 1 August 2006)

1. Termination of Parental Rights— notice requirements met—jurisdiction obtained

The mandatory notice requirements of N.C.G.S. § 7B-1106.1(b) were met in a termination of parental rights proceeding, and the trial court had subject matter jurisdiction.

2. Termination of Parental Rights— standard of proof—sufficiently stated

While a termination of parental rights order must state that the allegations have been proven by clear and convincing evidence, there is no requirement as to how or where the statement must be included. Language in the court’s conclusion that “clear, cogent, and convincing evidence exists” satisfied the requirement. N.C.G.S. § 7B-807.

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3. Termination of Parental Rights— failure to make progress in correcting conditions—findings not sufficient

The findings in a termination of parental rights order did not support the conclusion that the child's mother failed to make reasonable progress in correcting the conditions that led to the child's removal. None of the findings touched directly on the mother's ability to provide proper care, supervision, and discipline, and no finding suggests that the child would be exposed to an injurious environment with the mother.

4. Termination of Parental Rights— neglect—no finding that recurrence likely

Termination of parental rights for neglect may not be based solely on past conditions which no longer exist. The trial court here erred by concluding that a child was neglected where the child was in DSS custody and none of the court's findings indicated that neglect was likely to recur if the mother regained custody.

5. Termination of Parental Rights— timeliness of hearing—prejudice not shown

The mother in a termination of parental rights proceeding did not show that scheduling the original hearing 23 days outside the statutory timetable was prejudicial (the hearing was held within the 90 day continuance period). Merely stating that she hoped to have her son in her life was not sufficient.

Chief Judge MARTIN dissenting.

Appeal by respondent mother from order entered 17 May 2004 by Judge Dale Graham in the District Court in Iredell County. Heard in the Court of Appeals 10 April 2006.

Michael J. Van Buren, for petitioner Iredell County Department of Social Services.

Holly M. Groce, attorney advocate, Guardian ad Litem.

Katharine Chester, for respondent mother.

HUDSON, Judge.

J.T.W. is the minor child of respondent mother. On 31 August 2001, Iredell County Department of Social Services ("DSS") filed a petition to remove J.T.W. from respondent mother and father, alleging

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a history of instability in the family. The juvenile court held an adjudication/disposition hearing on 1 November 2001, and adjudicated J.T.W. neglected. On 31 January and 2 May 2002, the court conducted review hearings. The court held a permanency planning meeting on 19 September 2002 changing the plan to one of concurrent attempts at reunification and termination of parental rights (“TPR”) and adoption. On 19 November 2002, following another permanency planning meeting, the court changed the plan of care to TPR and adoption only. DSS and the guardian *ad litem* jointly filed a TPR motion on 30 May 2003, seeking to terminate the rights of J.T.W.’s mother and father. Hearings were conducted 13 November 2003, 10 February and 23 March 2004, and the court terminated parental rights by order of 17 May 2004. Respondent father did not appeal, but mother appeals. As discussed below, we reverse.

DSS became involved in J.T.W.’s family in September 1998 before he was born. In August 2000, three of his older siblings were placed with relatives. On 31 August 2001, the district court held a hearing and granted guardianship of the older siblings to the relatives, and ordered DSS to take custody of J.T.W. On the same day, DSS filed a juvenile petition alleging that J.T.W. was neglected in that the child did not receive proper care, supervision or discipline and lived in an environment injurious to J.T.W. The petition further states that respondent mother had “a long history of instability that has led to the older three children being removed[,]” including an inability “to establish and maintain a residence or maintain stead [sic] employment.” On 1 November 2001, following a hearing, the juvenile court ordered that J.T.W. was neglected based upon the stipulation of respondent parents that the allegations in the petition were true.

In its order terminating respondent mother’s parental rights, the court made findings, including the following:

7. The Respondent Mother is presently a resident of Gaston County. She resides in a home at 501 East Third Street in Gastonia with two of her other infant children. The home is an acceptable home and has been visited by social workers from the Gaston County Department of Social Services. The mother has maintained this home since approximately May 2003.

8. Prior to occupying her present home, the mother was a resident of Catherine’s House, a residential treatment facility which assists mother with dependent children. While in residence at Catherine’s House, the mother completed at least two worthwhile

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programs, namely the Very Important Parents Program and the Stepping Stones to Success Program. The Court will find that through her participation, the mother did benefit from learning to budget to some degree and to become more open with those who are trying to assist her.

9. Since 1999, the Respondent Mother has lived in and out of approximately 24 residences. Until the mother took residence in Gastonia, the mother had been evicted or otherwise removed from every residence she occupied in Statesville and the surrounding community since 2000. Until recently, the mother had a different employer every couple of months, a pattern which continues through the time of this hearing.

10. The Respondent Mother has more or less been employed since her three children came into DSS custody. However, her employment, for the most part, has been sporadic in duration and almost always terminated by the mother being fired or by the mother voluntarily leaving employment after working for a short period of time.

11. During the pendency of this termination motion, the Respondent Mother has worked for three employers, the most recent employment being at a personal care facility where the mother works full time and earns \$8.50 an hour.

12. The mother has never had reliable transportation throughout the time the DSS has had custody over her children. Furthermore, the mother's license has remained suspended during this time due to the mother accumulating two traffic tickets. Despite the citations being years old, the mother has yet to take any affirmative action to clear the tickets and apply with the Department of Motor Vehicles to have her license reinstated. Further, the mother has no automobile insurance.

13. The Respondent Mother's transportation problems have repeatedly led to the mother losing her employment and contributed to difficulties with the mother visiting her children. The mother's voluntary departure from Statesville to Gastonia in 2003 has created further difficulties for the mother in visiting her children since she has no transportation which would allow her to visit them.

14. The Respondent Mother has been physically and financially able to be gainfully employed and pay child support since the

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minor children came into custody. The mother was very late getting support under order, has accumulated arrearages amounting to several thousands of dollars, and has only since May 2003 has she made regular payments.

15. The Respondent Mother has had no visits with any of her children who were placed in custody since December 2002. As a result, these children have no observable bond with the mother. The mother is virtually unknown to J[] in as much as he has been in care since he was an infant.

16. The respondent Mother has been incarcerated on several occasions during the minor children's stay in the custody of the DSS. On one occasion, the mother was incarcerated on a probation violation. Prior to that she had been incarcerated on a charge of failing to return rental property. On another occasion, the mother had been placed in jail after having been held in contempt related to accumulated child support arrearages.

[1] Respondent mother first argues that the trial court erred in terminating her parental rights when it lacked subject matter jurisdiction because mandatory notice requirements were not met. We disagree.

N.C. Gen. Stat. § 7B-1106.1(b) requires that notice in pending child abuse, neglect, or dependency cases include all of the following:

- (1) The name of the minor juvenile.
- (2) Notice that a written response to the motion must be filed with the clerk within 30 days after service of the motion and notice, or the parent's rights may be terminated.
- (3) Notice that any attorney appointed previously to represent the parent in the abuse, neglect, or dependency proceeding will continue to represent the parents unless otherwise ordered by the court.
- (4) Notice that if the parent is indigent, the parent is entitled to appointed counsel and if the parent is not already represented by appointed counsel the parent may contact the clerk immediately to request counsel.
- (5) Notice that the date, time, and place of hearing will be mailed by the moving party upon filing of the response or 30 days from the date of service if no response is filed.

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(6) Notice of the purpose of the hearing and notice that the parents may attend the termination hearing.

N.C. Gen. Stat. § 7B-1106.1(b) (2003). DSS filed notice of proceeding on both 3 September 2003 and on 10 October 2003 regarding the hearing on termination of respondent mother's parental rights. Each notice contains all of the information required by N.C. Gen. Stat. § 7B-1106.1(b), tracking the actual language used in the statute. The certificate of service attached to each notice of proceeding includes the names of all parties, including respondent mother and her counsel. This assignment of error is without merit.

[2] Respondent mother next argues that the trial court failed to state the proper standard of proof in its order. We do not agree.

"N.C. Gen. Stat. § 7B-807 requires the trial court to affirmatively state that the allegations in the petition have been proven by clear and convincing evidence. N.C. Gen. Stat. § 7B-807 (2003)." *In re O.W.*, 164 N.C. App. 699, 702, 596 S.E.2d 851, 853 (2004). The failure of a trial court to do so is reversible error. *Id.* However, "there is no requirement as to where or how such a recital of the standard should be included." *Id.* In *In re O.W.*, we held language in the trial court's order that it "CONCLUDES THROUGH CLEAR, COGENT AND CONVINCING EVIDENCE" sufficient under N.C. Gen. Stat. § 7B-807. *Id.* Here, the trial court's conclusion 2 states "Clear, cogent and convincing evidence exists . . ." We overrule this assignment of error.

[3] Respondent mother also argues that the trial court erred in terminating her parental rights on the ground that she willfully left her child in foster care for twelve months without making reasonable progress correcting the conditions that led to his removal. We agree.

In reviewing the termination of parental rights,

this Court must determine whether the trial court's findings of fact were based on clear, cogent, and convincing evidence, and whether those findings of fact support a conclusion that parental termination should occur on the grounds stated in N.C. Gen. Stat. § 7A-289.32. So long as the findings of fact support a conclusion based on § 7A-289.32, the order terminating parental rights must be affirmed.

In re Oghenekevebe, 123 N.C. App. 434, 435-36, 473 S.E.2d 393, 395-96 (1996) (internal citation omitted). The trial court is only required to find that one statutory ground for termination exists in order to pro-

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ceed to the dispositional phase and decide if termination was in the children's best interests. *In re Shermer*, 156 N.C. App. 281, 285, 576 S.E.2d 403, 406 (2003). N.C. Gen. Stat. § 7B-1111 specifies the permissible grounds for terminating parental rights, including that

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

N.C. Gen. Stat. § 7B-1111 (2006). "Under this section, willfulness means something less than willful abandonment . . . [and] does not require a showing of fault by the parent." *In re Oghenekevebe*, 123 N.C. App. at 439, 473 S.E.2d at 398. "In addition, willfulness is not precluded just because respondent has made some efforts to regain custody of the child." *Id.* at 440, 473 S.E.2d 398.

In conclusion 2, the trial court states that "for a period of twelve months next proceeding the filing of the TPR motion in this case, [respondent mother has] failed to show to the satisfaction of the court that reasonable progress has been made to correct the conditions which led to the removal of the minor child." Respondent mother contends that her poverty was the primary basis for termination and that petitioner produced no evidence of willfulness.

DSS removed J.T.W. because the child was not receiving proper care, supervision or discipline and lived in an injurious environment as evidenced by respondent mother's instability in housing and employment, allegations stipulated to at the time of the petition. However, there are no findings in the termination order showing that respondent mother has made no progress in correcting conditions that left J.T.W. without proper care, supervision or discipline and living in an injurious environment. Finding 7 states that respondent mother has an acceptable home which social workers had visited and which she had maintained for a number of months prior to the hearing. No finding suggests that J.T.W. would be exposed to an injurious environment with respondent mother.

Findings 12 and 13 touch on respondent mother's lack of transportation due to unresolved tickets and a suspended license, which

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has contributed to her difficulty in visiting her children. In addition, respondent mother moved from Statesville to Gastonia in 2003 to enter a residential treatment facility which assists mothers of dependent children, and that this had also contributed to her difficulty in visiting. The court found that she completed at least two “worthwhile” programs at the facility which will benefit her in “learning to budget to some degree and . . . become more open with those who are trying to assist her.” Findings 10 and 11 state that respondent mother has had constant but sporadic employment during the pendency of the motion, and that she was working full-time for \$8.50 per hour at the date of the hearing. Finding 14 states that respondent mother is in arrears in child support payments, but that she began making regular payments in May 2003. None of these findings touches directly on respondent mother’s ability to provide her child with proper care, supervision and discipline. These findings do not support the conclusion that respondent mother failed to make reasonable progress in correcting the conditions that led to J.T.W.’s removal.

[4] Respondent mother also argues that the trial court erred in concluding that J.T.W. was neglected. We agree.

In order to terminate parental rights, the evidence must show neglect at the time of the termination proceeding. *In re Ballard*, 311 N.C. 708, 716, 319 S.E.2d 227, 232 (1984).

During a proceeding to terminate parental rights, the trial court must admit and consider evidence, find facts, make conclusions and resolve the ultimate issue of whether neglect authorizing termination of parental rights under N.C.G.S. 7A-289.32(2) and 7A-517(21) is present at that time. N.C.G.S. 7A-289.30(d). The petitioner seeking termination bears the burden of showing by clear, cogent and convincing evidence that such neglect exists at the time of the termination proceeding. N.C.G.S. 7A-289.30(e).

Id. (citations omitted). Termination of parental rights for neglect may not be based solely on past conditions which no longer exist. *Id.* at 714, 319 S.E.2d at 231-32.

As discussed above, at the time of the petition to remove J.T.W., respondent mother stipulated to the allegations made by DSS that the child was neglected in that he did not receive proper care, supervision or discipline and lives in an environment injurious to him. As discussed above, the findings after the hearing do not support that either

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of these bases existed at the time of the hearing. Conclusion 2 states that “Clear, Cogent and Convincing evidence exists to find that the minor child has been neglected within the definition of N.C.G.S. 7B-101 and that such neglect would continue for the foreseeable future” if J.T.W. were returned to his mother. However, the order states that J.T.W. has been in the custody of DSS since 1 November 2001. None of the court’s findings indicate that neglect is likely to reoccur if respondent mother regains custody, and respondent mother did not stipulate to neglect of J.T.W. as at the time of the original neglect petition. *See In re Brim*, 139 N.C. App. 733, 742, 535 S.E.2d 367, 372 (2000) (holding that a “prior adjudication [of neglect], standing alone, will not suffice where the natural parents have not had custody for a significant period prior to the termination hearing.”)

[5] Respondent mother also argues that the trial court erred in terminating her parental rights by failing to protect her rights to due process by failing to hold a timely hearing and enter a timely order. We do not agree.

The hearing on the termination of parental rights is to be held no later than 90 days from the filing of the petition or motion. N.C. Gen. Stat. § 7B-1109(a) (2006). However, “time limitations in the Juvenile Code are not jurisdictional in cases such as this one and do not require reversal of orders in the absence of a showing by the appellant of prejudice resulting from the time delay.” *In re C.L.C.*, 171 N.C. App. 438, 443, 615 S.E.2d 704, 707 (2005). In addition,

[t]he court may for good cause shown continue the hearing for up to 90 days from the date of the initial petition in order to receive additional evidence including any reports or assessments that the court has requested, to allow the parties to conduct expeditious discovery, or to receive any other information needed in the best interests of the juvenile. Continuances that extend beyond 90 days after the initial petition shall be granted only in extraordinary circumstances when necessary for the proper administration of justice, and the court shall issue a written order stating the grounds for granting the continuance.

N.C. Gen. Stat. § 7B-1109(d) (2006).

Here, DSS filed the motion to terminate parental rights on 30 May 2003 and the hearing was initially set for 23 September 2003, less than one month outside that ninety-day window. The judge presiding at the

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23 September 2003 session of juvenile court recused herself because she had prior experience with respondent parents. The court filed a written continuance, and the hearing was rescheduled for 28 October 2003. By agreement of the parties, the hearing was again continued, and the continuance was again reduced to writing as required by statute in case the new trial date fell outside the statutory timetable. The hearing actually took place on 13 November 2003, within the ninety-day continuance period. Respondent mother does not show how the scheduling of the original hearing date some 23 days outside the statutory timetable prejudiced her. Her brief merely states that “the respondent-mother is still hopeful of having her son in her life” and then makes a blanket statement that the delay prejudiced “all parties.” Because she has failed to explain how the scheduling of the hearing prejudiced her, we overrule this assignment of error.

Respondent mother argues that the trial court erred in determining that termination is in the best interest of J.T.W. Termination of parental rights proceeding is a two-stage process: the trial court first determines whether sufficient grounds exist under N.C. Gen. Stat. § 7B-1111 to warrant termination; if the trial court determines that any one of the grounds for termination listed in N.C. Gen. Stat. § 7B-1111 exists, the trial court may then terminate parental rights consistent with the best interests of the child. *In re T.D.P.*, 164 N.C. App. 287, 288, 595 S.E.2d 735, 736-37 (2004), *aff’d*, 359 N.C. 405, 610 S.E.2d 199 (2005). Because we conclude that grounds did not exist pursuant to N.C. Gen. Stat. § 7B-1111 to support termination, we need not address this assignment of error.

Reversed.

Judge BRYANT concurs.

Chief Judge MARTIN dissents.

MARTIN, Chief Judge, dissenting.

I respectfully dissent. Because I disagree with the majority’s conclusion that the trial court erred in concluding that J.T.W. was neglected, I would affirm the order of the trial court terminating respondent’s parental rights.

A trial court can consider “prior adjudications of neglect” but “they will rarely be sufficient, standing alone, to support a termina-

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tion of parental rights, since the petitioner must establish that neglect exists at the time of the hearing.” *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). “[E]vidence of changed conditions in light of the history of neglect by the parent, and the probability of a repetition of neglect” are also factors that must be considered, and “visitation by the parent is a relevant factor in [neglect] cases.” *Id.*

Our Supreme Court noted in *In re Ballard* that it would be almost impossible to terminate parental rights on neglect grounds if the Court were “to require that termination of parental rights be based only upon evidence of events occurring after a prior adjudication of neglect which resulted in removal of the child from the custody of the parents.” 311 N.C. 708, 714, 319 S.E.2d 227, 232 (1984). The Court held that

evidence of neglect by a parent prior to losing custody of a child—including an adjudication of such neglect—is admissible in subsequent proceedings to terminate parental rights. The trial court must also consider any evidence of changed conditions in light of the evidence of prior neglect and the probability of a repetition of neglect.

Id. at 715, 319 S.E.2d at 232. “The determinative factors must be the best interests of the child and the fitness of the parent to care for the child *at the time of the termination proceeding.*” *In re Brim*, 139 N.C. App. 733, 742, 535 S.E.2d 367, 372 (2000) (emphasis in original).

A neglected juvenile is one “who does not receive proper care, supervision, or discipline from the juvenile’s parent . . . or who has been abandoned.” N.C. Gen. Stat. § 7B-101(15) (2005). “Abandonment has been defined as wilful neglect and refusal to perform the natural and legal obligations of parental care and support.” *In re Humphrey*, 156 N.C. App. 533, 540, 577 S.E.2d 421, 427 (2003). While failure to provide care and other necessities is the common conception of neglect, a conclusion of neglect may also be supported in “less tangible” ways including: “evidence of sporadic contact between parents and child” and their “complete failure to provide personal contact, love, and affection” to their child. *In re Pierce*, 67 N.C. App. 257, 263, 312 S.E.2d 900, 904 (1984) (citation omitted).

Respondent effectively abandoned J.T.W. by not visiting him. The trial court’s conclusion of neglect is supported by its finding that

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respondent “has had no visits with any of her children who were placed in custody since December 2002. . . . The mother is virtually unknown to [J.T.W.] in as much as he has been in care since he was an infant.” This, coupled with the trial court’s other findings about respondent’s chronic inability to maintain regular employment, stable housing, and make reasonable progress over the course of three years, do not show, contrary to the majority’s assertion, that the trial court failed to consider changed circumstances, but rather that it considered these changed conditions in light of the history of neglect and the probability of repetition of neglect if J.T.W. were returned to respondent’s care. Therefore, I vote to affirm the trial court’s order terminating respondent’s parental rights.

STATE OF NORTH CAROLINA v. DEVON MAURICE GLYNN

No. COA05-1460

(Filed 1 August 2006)

1. Aiding and Abetting— instructions—“somehow” contributing to crime—burden of proof

A clarifying instruction that the State must prove that an aider and abettor “somehow” contributed to the victim’s death did not lessen the State’s burden of proof. The instruction is supported by case law, and, taken as a whole, properly set out the elements of the crime and did not reduce the State’s burden of proof.

2. Homicide— first-degree murder—aiding and abetting— short form indictment

A short form indictment properly apprised defendant of the charge of first-degree murder based on aiding and abetting. Short form indictments have been held again and again to be sufficient to charge first degree murder on the basis of any theory set forth in N.C.G.S. § 14-17, and a defendant must be prepared to defend any and all legal theories supported by the facts when the facts are sufficiently pled. A bill of particulars may be requested to supplement the facts in the indictment, but this defendant did not do so.

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3. Homicide— aiding and abetting first degree murder—no variance between indictment and trial

There was no fatal variance between the allegations in the indictment and the evidence at trial in a first-degree murder prosecution. The State is not required to declare any specific theory for first degree murder prior to trial; the State's evidence here, regardless of the theory, supports the indictment.

4. Evidence— hearsay—statement offered to show effect on defendant—not offered for truth of the matter

A statement repeated in a prosecution for aiding and abetting a first-degree murder was not hearsay because it was not offered for the truth of the matter, but to show the effect it had on defendant regardless of its truth.

5. Homicide— first-degree murder—short form indictment—aiding and abetting

A short form indictment was sufficient to charge aiding and abetting first-degree murder. The North Carolina Supreme Court has repeatedly held such indictments sufficient, regardless of the theory under which the State proceeds.

Appeal by defendant from judgment entered 16 November 2004 by Judge Howard E. Manning, Jr. in Wake County Superior Court. Heard in the Court of Appeals 7 June 2006.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Jill Ledford Cheek, for the State.

Nora Henry Hargrove for defendant-appellant.

HUNTER, Judge.

Devon Maurice Glynn (“defendant”) appeals from a judgment dated 16 November 2004 entered consistent with a jury verdict finding him guilty of first degree murder. For the following reasons, we find defendant’s trial to be without error.

The State’s evidence tended to show that defendant and Brandie Bullock (“Bullock”) were involved in a romantic relationship, and Bullock believed they would get married someday, according to Christina Holder (“Holder”), Bullock’s friend. On 30 July 2003, while riding around Raleigh with defendant and friends, Bullock received a phone call from Christopher Moore (“Moore”), whom she had met

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previously at a club, a meeting staged by Jonathan Allen (“Allen”). Bullock told Allen that the caller was “the guy in the club you put me on[.]” Allen then told defendant the caller was the person who had given Allen counterfeit money for drugs. Holder testified that defendant responded, “m—— f——ers can’t get away with getting over on him.”

Defendant continued driving Bullock, Holder, Allen, and Lamont Turner (“Turner”) around Raleigh most of the day, making multiple stops at various places. During one stop, defendant and Allen went inside an apartment, quickly returning to the vehicle. Holder then noticed a gun on the floorboard by her foot. The group next went to an apartment belonging to Paula Lucas (“Lucas”), where drugs were frequently bought and sold. Allen, Bullock, and defendant went into a bedroom while the rest of the group waited in the living room. Bullock soon emerged carrying a pocketbook which held the gun.

The group returned to the vehicle, where defendant and Bullock sat in the front seat. Defendant again told Bullock, “m—— f——ers can’t get away with doing this[.]” Holder testified defendant instructed Bullock how to use the gun, and told Bullock to shoot Moore. Bullock responded that she knew how to use the gun.

Bullock and Moore exchanged additional telephone calls, making a plan for Moore to pick up Bullock and Holder at a McDonald’s restaurant. On the way to the restaurant, defendant told Bullock, “yo, boo, you can do this for me. Ain’t nobody else can do it, you can do it.” Defendant told Bullock, “I[’ve] got my cell phone and I’m going to be behind you all.”

At McDonald’s, the two girls got into the backseat of Moore’s vehicle, with Bullock seated behind Moore. Moore drove them to Tysean Lunsford’s (“Lunsford”) apartment complex. Bullock and Holder saw defendant following Moore’s vehicle to the apartment parking lot. As Moore began to park the vehicle, Bullock stated, “f— this s—,” and shot Moore in the back of the head. Bullock and Holder then jumped out of the vehicle and ran to defendant’s Suburban. Defendant drove away with Bullock and Holder, stating, “[m]y boo did it. My boo did it. . . . I won’t [sic] believe she did it, but my boo did it.”

The group drove around in search of marijuana, then went to Bullock’s apartment. Bullock told the group what had happened. She said she “had to do it” because if she had thought about it, she “would

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have never did [sic] it,” so she “just went ahead and did it.” Defendant responded, “my boo gangster,” and “my boo did it[.]” Defendant also told the group, “If you all want to hang around me, you all got to put in work[.]” which Holder testified meant that they had to “do dirt,” meaning to commit crimes.

The group eventually left for Lucas’s apartment, dropping off Allen before arriving. Once there, defendant handed Lucas the gun and told her she would be “going down” for the murder. Defendant then gave the gun to Turner, who disposed of the gun by burying it.

Around midnight on 31 July 2003, Lunsford and a friend discovered Moore slumped over in the driver’s seat of his vehicle in the parking lot of Lunsford’s apartment complex. They called the police, who found the front doors of Moore’s vehicle locked and the rear doors unlocked. Holder’s fingerprints were lifted from the right rear passenger window. The pathologist found that Moore’s death was caused by a gunshot wound to the back of the neck.

Defendant cross-examined Holder regarding her testimony at an earlier trial that defendant was not the leader of the group, and that defendant did not make anyone do anything they didn’t want to do. Holder testified at defendant’s trial that people did what defendant told them to do “the majority of the time.”

Defendant appeals after being found guilty of first degree murder and sentenced to life imprisonment without parole.

I.

[1] Defendant first contends that the jury instructions were erroneous and lessened the State’s burden of proof. We disagree.

Under the due process clauses of the Fifth and Fourteenth Amendments of the United States Constitution, the State carries the burden to prove the defendant’s guilt beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 362, 25 L. Ed. 2d 368, 374 (1970); *State v. Jordan*, 305 N.C. 274, 279, 287 S.E.2d 827, 831 (1982). Accordingly, the Sixth Amendment guarantee of a trial by jury requires a defendant be found guilty beyond a reasonable doubt. *Sullivan v. Louisiana*, 508 U.S. 275, 278, 124 L. Ed. 2d 182, 188 (1993).

Jury instructions must clearly show the State’s burden to prove each element beyond a reasonable doubt. *State v. Morgan*, 359 N.C. 131, 163, 604 S.E.2d 886, 906 (2004), *cert. denied*, 546 U.S. 830, 163

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L. Ed. 2d 79 (2005). The standard of review for jury instructions is well-established:

“This Court reviews jury instructions

‘contextually and in its entirety. The charge will be held to be sufficient if “it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed[.]” . . . “Under such a standard of review, it is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury.” ’ ”

State v. Blizzard, 169 N.C. App. 285, 296-97, 610 S.E.2d 245, 253 (2005) (citations omitted). When reviewed as a whole, “isolated portions of [a charge] will not be held prejudicial when the charge as a whole is correct. [T]he fact that isolated expressions, standing alone, might be considered erroneous will afford no ground for a reversal.” *State v. McWilliams*, 277 N.C. 680, 684-85, 178 S.E.2d 476, 479 (1971) (citations omitted); see also *State v. Rich*, 351 N.C. 386, 393-94, 527 S.E.2d 299, 303 (2000).

“All distinctions between accessories before the fact and principals to the commission of a felony” have been abolished by our statutes. N.C. Gen. Stat. § 14-5.2 (2005). A defendant may be convicted of first degree murder under a theory of aiding and abetting. *State v. Brewington*, 352 N.C. 489, 524, 532 S.E.2d 496, 516-17 (2000).

A person is guilty of a crime by aiding and abetting if (i) the crime was committed by some other person; (ii) the defendant knowingly advised, instigated, encouraged, procured, or aided the other person to commit that crime; and (iii) the defendant’s actions or statements caused or contributed to the commission of the crime by that other person.

State v. Goode, 350 N.C. 247, 260, 512 S.E.2d 414, 422 (1999).

The State asserted Bullock was the shooter, but that defendant was guilty of first degree murder by aiding and abetting Bullock. The judge initially instructed the jury:

[I]f you find from the evidence beyond a reasonable doubt that . . . [defendant] knowingly instigated, encouraged, advised or procured or aided Brandie Bullock to commit the crime of first degree murder of Christopher Moore, and that in so doing [defendant]’s actions or statements caused the commission of the

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crime by Brandie Bullock, it would your [sic] duty to return a verdict of guilty of first degree murder. However, if you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty of first degree murder.

After deliberations began, the jury asked the trial court for a definition of cause for element three of the charge. After hearing arguments by counsel, the trial court re-instructed the jury:

It is generally recognized that a person is criminally responsible for a homicide only if his act caused or directly contributed to the death of the victim. In this case, where the Defendant . . . is prosecuted as an aider and abetter of the crime of first degree murder, the State must prove beyond a reasonable doubt that the actions or statements of [defendant] *somehow* caused . . . the victim's death.

(Emphasis added.) The trial court then repeated the words of the original mandate, “and that in so doing [defendant]’s actions or statements caused the commission of the crime by Brandie Bullock[.]”

Defendant argues the word “somehow” lessened the State’s burden by vitiating the “knowing” aspect of defendant’s actions. However, the trial court’s instruction is supported by case law. In *State v. Davis*, 319 N.C. 620, 356 S.E.2d 340 (1987), our Supreme Court stated, “[i]n cases where a defendant is prosecuted as an accessory before the fact to murder, the [S]tate must prove beyond a reasonable doubt that the actions or statements of the defendant *somehow* caused or contributed to the actions of the principal, which in turn caused the victim’s death.” *Id.* at 624-25, 356 S.E.2d at 343 (emphasis added). Taken as a whole, the trial court’s clarifying instructions properly set out the elements of the crime and did not lessen the State’s burden of proof. Defendant’s assignment of error is overruled.

II.

[2] Defendant next contends the indictment was fatally defective, as it did not give defendant notice of the charge of aiding and abetting. Defendant further contends there was a fatal variance between the indictment and the proof at trial. We disagree.

Due process requires that a defendant receive notice and an opportunity for an appropriate hearing. *Hamdi v. Rumsfeld*, 542 U.S.

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507, 533, 159 L. Ed. 2d 578, 601 (2004). “At a minimum, due process requires adequate notice of the charges and a fair opportunity to meet them, and the particulars of notice and hearing must be tailored to the capacities and circumstances of those who are to be heard.” *State v. Young*, 140 N.C. App. 1, 7, 535 S.E.2d 380, 384 (2000) (citation omitted) (emphasis omitted). The indictment must be sufficiently specific to provide notice of the charges and allow the defendant to prepare his case. *State v. Thrift*, 78 N.C. App. 199, 201, 336 S.E.2d 861, 862 (1985).

An indictment is sufficient if the charge against the defendant is expressed “in a plain, intelligible, and explicit manner[.]” N.C. Gen. Stat. § 15-153 (2005). “[T]he indictment must allege all of the essential elements of the crime sought to be charged.” *State v. Westbrook*, 345 N.C. 43, 57, 478 S.E.2d 483, 492 (1996). The North Carolina Supreme Court has repeatedly held that the short form indictment which complies with N.C. Gen. Stat. § 15-144 is constitutionally and statutorily sufficient to charge first degree murder “on the basis of *any theory* set forth in N.C.G.S. § 14-17.” *State v. Garcia*, 358 N.C. 382, 388, 597 S.E.2d 724, 731 (2004), *cert. denied*, 543 U.S. 1156, 161 L. Ed. 2d 122 (2005).

“[T]he State is not required to elect between theories of prosecution [for first degree murder] prior to trial.” *Id.* at 389, 597 S.E.2d at 732. When the State sufficiently pleads the factual basis of the prosecution, “a defendant must be prepared to defend against any and all legal theories which [the] facts may support.” *State v. Holden*, 321 N.C. 125, 135, 362 S.E.2d 513, 522 (1987). *But see State v. Silas*, 360 N.C. 377, 383, 627 S.E.2d 604, 608 (2006) (“[i]f the State seeks an indictment which contains specific allegations of the intended felony, the State may not later amend the indictment to alter such allegations”).

Furthermore, a defendant may request a bill of particulars to supplement the facts in the indictment in order to better prepare his defense. *State v. Randolph*, 312 N.C. 198, 210, 321 S.E.2d 864, 872 (1984). A motion for such a bill “must request and specify items of factual information desired by the defendant which pertain to the charge and which are not recited in the pleading, and must allege that the defendant cannot adequately prepare or conduct his defense without such information.” N.C. Gen. Stat. § 15A-925(b) (2005). We note the record does not show that defendant requested a bill of particulars. As the short form indictment properly apprised defendant of the charges against him, this assignment of error is overruled.

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[3] Defendant further argues that a material variance existed between the indictment charging first degree murder and the evidence presented at trial. We disagree.

When a variance exists between allegations in the indictment and evidence presented at trial, the defendant may be deprived of adequate notice to prepare a defense. *State v. Norman*, 149 N.C. App. 588, 594, 562 S.E.2d 453, 457 (2002). Only a material variance warrants reversal, as it involves an essential element of the alleged crime. *Id.*

As discussed *supra*, the State is not required to declare any specific theory of prosecution for first degree murder prior to trial. *Garcia*, 358 N.C. at 389, 597 S.E.2d at 732. Here, defendant appears to contend that evidence presented at Bullock's trial presented a theory that defendant was the shooter. We note that defendant fails to point to any evidence presented at his trial that he was the shooter. The State's evidence, regardless of the theory, supported the indictment for first degree murder, and this assignment of error is overruled.

III.

[4] Defendant next asserts that testimony given by Bullock contained inadmissible hearsay which was erroneously admitted at trial. We disagree.

Hearsay is generally inadmissible. N.C. Gen. Stat. § 8C-1, Rule 802 (2005). " '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). However, out-of-court statements offered for a purpose other than to prove the truth of the matter asserted are not hearsay and are not excluded by the hearsay rule. *State v. Reid*, 335 N.C. 647, 661, 440 S.E.2d 776, 784 (1994). Statements used to explain the subsequent conduct of the person to whom the statement was made are admissible, as they are not offered to prove the truth of the matter asserted. *State v. Coffey*, 326 N.C. 268, 282, 389 S.E.2d 48, 56 (1990).

In the instant case, Holder testified that when the group was in the car, Bullock received a phone call on her cell phone. Bullock then told Allen that the caller was Moore, the same person Allen had pointed out to her at a club. The State argued, and the trial court agreed, that the statement was offered only to show its effect on defendant.

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As Bullock's statement was not offered to prove the truth of the matter asserted but rather to show its effect on defendant, regardless of its truth, the statement was admissible. Bullock's statement affected the subsequent conduct of defendant; he immediately began persuading Bullock to shoot Moore. Therefore, the trial court's admission of the statement was not error. Defendant's assignment of error is overruled.

IV.

[5] Defendant finally asserts the trial court was without jurisdiction to try defendant because the indictment was insufficient to charge first degree murder. We disagree.

As discussed *supra*, the short form indictment has repeatedly been held sufficient by the North Carolina Supreme Court to charge a defendant with first degree murder, regardless of the theory under which the State proceeds. *Garcia*, 358 N.C. at 388, 597 S.E.2d at 731. This Court is bound by decisions of the North Carolina Supreme Court. *Dunn v. Pate*, 334 N.C. 115, 118, 431 S.E.2d 178, 180 (1993). Defendant acknowledges that the North Carolina Supreme Court has upheld the constitutionality of the short form indictment, but raises the issue to preserve it in the event of further review and in anticipation of a change in the law on this issue. Defendant's assignment of error is overruled.

We find no error in the trial court's instructions to the jury, and no defect in the indictment for first degree murder or variance with the evidence presented at trial. We further find the trial court properly admitted non-hearsay statements. Defendant's trial was without error.

No error.

Judges BRYANT and CALABRIA concur.

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[178 N.C. App. 698 (2006)]

ELEANOR WOOTEN, WIDOW OF WALTER WOOTEN, DECEASED, EMPLOYEE, PLAINTIFF v. NEWCON TRANSPORTATION, INC., EMPLOYER, AND FIREMAN'S FUND INSURANCE CO./THE GOFF GROUP, CARRIER, DEFENDANTS

No. COA05-1107

(Filed 1 August 2006)

1. Workers' Compensation— *Pickrell* presumption—truck driver dying of heart attack

The Industrial Commission did not err in a workers' compensation case by finding that plaintiff was entitled to a presumption of compensability under *Pickrell v. Motor Convoy, Inc.*, 322 N.C. 363, (that death was work related when the causal connection between the work and the death was unknown) where her truck-driver husband died of a heart attack either before or during a traffic accident.

2. Workers' Compensation— truck driver dying of heart attack—*Pickrell* presumption—not rebutted

The Industrial Commission correctly concluded that the *Pickrell* presumption of compensability was not rebutted by defendants in a workers' compensation case where the decedent, a truck driver, died of a heart attack either before or during a traffic accident.

3. Workers' Compensation— hearsay—911 report with unknown callers—present sense impression

The Industrial Commission did not err in a workers' compensation proceeding involving a truck accident by admitting a 911 dispatch report that contained statements from unknown callers. The Rules of Evidence do not strictly apply in workers' compensation cases. Even so, these calls were admitted as present sense impressions; the callers may not have seen the accident, but they saw the aftermath and reported this event or condition.

Appeal by defendants from opinion and award entered by the North Carolina Industrial Commission on 28 April 2005. Heard in the Court of Appeals 8 March 2006.

Cobourn & Saleeby, L.L.P., by Sean C. Cobourn, for plaintiff-appellee.

Rudisill, White & Kaplan, P.L.L.C., by Garth H. White and Bradley H. Smith, for defendant-appellants.

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HUDSON, Judge.

In May 2002, plaintiff, the widow of deceased employee Walter Wooten (“the decedent”), filed a claim with the North Carolina Industrial Commission alleging that her husband died in a traffic accident that occurred while he was working as a truck driver for defendant-employer. On 27 April 2004, Deputy Commissioner Philip A. Baddour, III, entered an opinion and award denying plaintiff’s claim on the ground that decedent’s death was not an injury by accident which arose out of his employment. On 28 April 2005, the Full Commission reversed and awarded plaintiff workers’ compensation benefits. Defendants appeal. We affirm.

The facts as found by the Commission show that decedent Walter Wooten was employed as a truck driver with defendant-employer. On 9 May 2002 at approximately 10:45 p.m., decedent was driving a tractor-trailer on Interstate 81 in Augusta County, Virginia, at an estimated speed of 65 m.p.h., when his truck ran off the left side of the road, struck the guardrail, and came to rest in the median. No other vehicles were involved in the accident. Two unknown passersby called 911; one reported that it appeared that the truck struck debris in the road and ran off the highway, and the other reported that her husband checked the driver, who was unconscious, but still breathing. Virginia State Police were dispatched and emergency rescue workers pronounced decedent dead at the scene of the accident.

Following the accident, inspection of the left side of decedent’s vehicle revealed two missing tires, which most likely came off as a result of damage to the tire rims when the vehicle hit the guard rail. At the time of his death, decedent was 51 years old with a prior history of heart conditions, including one prior heart attack. Dr. William Massello, an assistant medical examiner, performed an autopsy on decedent which revealed arteriosclerotic heart disease, or a hardening and narrowing of the arteries. He found severe hardening of the arteries that supply blood to the heart and testified that “they were so narrow that they were almost completely shut.” In his first deposition, Dr. Massello testified that decedent’s heart disease triggered an arrhythmia, causing decedent to experience a sudden heart attack, and that he believed that the immediate cause of decedent’s death was arteriosclerotic heart disease. When asked whether the stress and physical exertion caused by losing control of his truck could have triggered decedent’s arrhythmia, Dr. Massello stated: “If a person were physically or mentally stressed because of that and his blood pressure went up and the adrenaline came out and . . . physical

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exertion took place, those would be things that would precipitate an arrhythmia in this man with this kind of heart disease.” However, Dr. Massello stated that he could not say whether the arrhythmia occurred while decedent was driving or after he stopped.

In Dr. Massello’s first deposition, the deputy commissioner had ruled that the 911 reports were inadmissible hearsay. However, the Full Commission subsequently determined that the reports were admissible and allowed a second deposition of Dr. Massello. In the second deposition, Dr. Massello again stated that he believed that decedent died as a result of an arrhythmia caused by arteriosclerotic heart disease. Regarding the 911 reports, Dr. Massello testified that he did not know whether defendant had the accident because of a heart attack or whether he had a heart attack because of the accident.

[1] Defendants first argue that the Commission erred in finding that plaintiff is entitled to the presumption under *Pickrell v. Motor Convoy, Inc.*, 322 N.C. 363, 368 S.E.2d 582 (1988), that decedent died from a compensable cause. In order for plaintiff to recover workers’ compensation benefits for the death of the decedent, she must prove that he died from an injury by accident arising out of and in the course of his employment. N.C. Gen. Stat. § 97-2(6) (2001). Where the circumstances concerning the causal connection between decedent’s work and his death are unknown, there is a “presumption that death was work-related, and therefore compensable, whether the medical reason for death is known or unknown,” known as the “*Pickrell* presumption.” *Pickrell*, 322 N.C. at 370, 368 S.E.2d at 586. Here, the Commission made the following relevant findings of fact:

4. . . . The 911 dispatch report indicates that an unknown 911 caller reported that decedent’s tractor trailer “appeared to have struck tire debris in [the] road and ran off [the] roadway.” The record is unclear why decedent’s vehicle lost control.

* * *

6. On May 10, 2002, an autopsy was performed on decedent by Dr. William Massello, the Assistant Chief Medical Examiner for the Virginia Office of the Chief Medical Examiner in western Virginia. Dr. Massello found that at the time of decedent’s death, he was suffering from arteriosclerotic heart disease, or a hardening and narrowing of the arteries that supply blood to the heart Dr. Massello further testified that decedent’s heart disease triggered an arrhythmia, causing decedent to experience a

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sudden heart attack. Finally, Dr. Massello testified to a reasonable degree of medical certainty that the immediate cause of decedent's death was arteriosclerotic heart disease.

7. In his first deposition Dr. Massello was asked whether the stress and physical exertion caused by the truck losing two tires, striking the guardrail and going into the median could have triggered decedent's arrhythmia. Dr. Massello stated: "If a person were physically or mentally stressed because of that and his blood pressure went up and the adrenaline came out and . . . physical exertion took place, those would be things that would precipitate an arrhythmia in this man with this kind of heart disease. . . ." Upon further questioning whether the arrhythmia took place while decedent was driving the truck or after he stopped driving the truck, Dr. Massello stated that there was no way that he could say one way or the other.

8. During the second deposition, Dr. Massello again stated to a reasonable degree of medical certainty that decedent's death was a result of an arrhythmia caused by arteriosclerotic heart disease. Regarding the information contained in the 911 reports, Dr. Massello stated that he did not know whether decedent allegedly struck debris because there was a heart attack in progress or whether decedent struck debris because he could not avoid it. Dr. Massello further stated decedent "could have had the accident because of a heart attack or he could have had the heart attack because of the accident." Dr. Massello also indicated that most people who have heart attacks while driving manage to steer the vehicle off the road, even if they lose consciousness before the car stops.

The scope of this Court's review of an Industrial Commission decision is limited "to reviewing whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000) (citing *Adams v. AVX Corp.*, 349 N.C. 676, 509 S.E.2d 411 (1998)). Here, although defendants assigned this error to several findings of fact, they do not make this argument in their brief. Thus, we deem these assignments of error abandoned, N.C. R. App. P. 28(b)(6) (2005), and treat the unchallenged findings of fact as conclusive on appeal. *First Union Nat'l Bank v. Bob Dunn Ford, Inc.*, 118 N.C. App. 444, 446, 455 S.E.2d 453, 454 (1995). Accordingly, the

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question before us is whether the findings support the following challenged conclusions:

4. [T]he greater weight of the evidence indicates that the circumstances regarding the work-relatedness of decedent's death are unknown and that the death occurred as a result of an injury by accident sustained in the course of decedent's employment. It is uncontested that plaintiff was within the course of his employment and was engaged in his employer's business at the time of his death. The fact that the immediate medical cause of decedent's death is known does not indicate that the *Pickrell* presumption does not apply. *Pickrell v. Motor Convoy, Inc., supra*.

5. Decedent was involved in a motor vehicle accident while in the course and scope of his employment with defendant-employer. As a result of the accident, decedent suffered a cardiac arrhythmia and died. The only element at issue is whether decedent's injury by accident arose out of the employment. The evidence fails to show whether decedent had a heart attack that caused the motor vehicle accident or whether the circumstances of the accident caused decedent's heart arrhythmia. Therefore, defendants have failed to meet their burden of showing that plaintiff's arrhythmia occurred prior to and caused plaintiff's injury by accident. Defendants have not successfully rebutted the presumption by coming forward with sufficient, credible evidence that death occurred as a result of a non-compensable cause. *Pickrell v. Motor Convoy, Inc, supra; Melton v. City of Rocky Mount, supra*. Plaintiff is entitled to the *Pickrell* presumption that decedent's cause of death was an injury by accident arising out of the employment. *Id.*

We conclude that the Commission's findings of fact support these conclusions of law and that the Commission correctly applied the *Pickrell* presumption here. Defendants contend that the Commission erred because the presumption of compensability applies "only where there is no evidence that decedent died other than by a compensable cause." *Gilbert v. Entenmann's, Inc.*, 113 N.C. App. 619, 623, 440 S.E.2d 115, 118 (1994). However, in *Gilbert*, the Court concluded that plaintiff was not entitled to the *Pickrell* presumption because decedent died from a subarachnoid hemorrhage, which is not a compensable cause. In contrast, "an injury caused by a heart attack may be compensable if the heart attack is due to an accident, such as when the heart attack is due to *unusual or extraordinary exertion* or extreme conditions." *Cody v. Snider Lumber Co.*, 328

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N.C. 67, 71, 399 S.E.2d 104, 106 (1991) (italics in original, internal citations and quotations omitted). Furthermore, we note that there was no evidence here that decedent died by other than a compensable cause—as the Commission concluded, “[t]he evidence fails to show whether decedent had a heart attack that caused the motor vehicle accident or whether the circumstances of the accident caused decedent’s heart arrhythmia.”

[2] Defendants also contend that if plaintiff is entitled to the *Pickrell* presumption, then they successfully rebutted it. In order to rebut the presumption, “the defendant has the burden of producing credible evidence that the death was not accidental or did not arise out of employment.” *Bason v. Kraft Food Service, Inc.*, 140 N.C. App. 124, 128, 535 S.E.2d 606, 609 (2000). In *Bason*, decedent was found dead in his delivery truck, which was parked behind a building where he had been scheduled to make a delivery and an autopsy revealed the cause of death to be a cardiac arrhythmia caused by heart disease. *Id.* “Defendant, however, presented evidence and the Full Commission found as fact that ‘there was nothing unusual about the route, the hours, or the amount or type of deliveries required of . . . Decedent’ on the day of his death.” *Id.* (ellipses in original). The Court held that the Commission correctly concluded that defendant rebutted the *Pickrell* presumption. *Id.* Here, it is undisputed that decedent was involved in an accident, and we conclude that the Commission correctly concluded that defendants did not rebut the presumption of compensability. We overrule this assignment of error.

[3] Defendants also argue that the Commission erred in admitting the 911 dispatch report into evidence because it is inadmissible hearsay. The Commission admitted a 911 dispatch report which contains statements of unknown callers. The rules of evidence do not strictly apply in worker’s compensation cases, *Haponski v. Constructor’s Inc.*, 87 N.C. App. 95, 97, 360 S.E.2d 109, 110 (1987), but even if they did, the Commission did not err in exercising its discretion. Rule 805 provides that, “[h]earsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.” N.C. Gen. Stat. § 8C-1, Rule 805 (2001). The Commission determined that the 911 calls were admissible in their entirety pursuant to the hearsay exceptions of Rule 803(1), (2), (6) and (8). N.C. Gen. Stat. § 8C-1 (2001). In their brief, defendants concede that the dispatch reports were admissible under Rule 803(6), “Records of Regularly Conducted Activity,” and Rule 803(8), “Public Records and

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Reports.” But defendants contend that the statements of the unknown callers were not properly admitted pursuant to Rule 803(1) or (2). We disagree. Rule 803(1), “Present Sense Impression,” allows for admission of “[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.” N.C. Gen. Stat. § 8C-1. Defendants contend that there is no evidence that the statements were made “while the declarant was perceiving the event or condition, or immediately thereafter.” However, we conclude that 911 calls reporting that “the [tractor trailer] appeared to have struck tire debris in road and ran off roadway” and that “[caller’s] husband checked the driver and advised he was not moving but he was breathing,” qualify as present sense impressions. Even if the callers did not observe the accident happen, they observed the aftermath and then reported this “event or condition.” Because we conclude that the calls were admissible pursuant to Rule 803(1), we need not determine whether they qualify as excited utterances under Rule 803(2). We overrule this assignment of error.

Affirmed.

Judges HUNTER and BRYANT concur.

IN THE MATTER OF THE WILL OF HECTOR CORNELIUS McFAYDEN

No. COA04-1585

(Filed 1 August 2006)

1. Appeal and Error— notice of appeal—untimely

The failure to timely file a notice of appeal meant that a portion of an appeal (by the propounder of a will) was not properly before the Court of Appeals.

2. Appeal and Error— presentation of issues—failure to cite authority—argument not properly before appellate court

An argument by the caveator of a will was not properly before the Court of Appeals where no authority was cited.

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3. Wills— caveat—trifurcated proceeding—not an abuse of discretion

The trial court did not abuse its discretion by trifurcating a caveat proceeding involving multiple wills (1995 and 2002), and it was not manifestly unreasonable to try the 1995 will first. Submission to the jury of the 1995 will referring to the last will and testament of the deceased was not an error.

4. Wills— caveat—missing will—evidence that destruction not by testator—sufficiency

The caveators in a case with multiple wills presented a genuine issue of fact that should have gone to the jury. Viewing the evidence in the light most favorable to the caveators, they presented evidence that the loss or destruction of the subsequent will was not due to action by the testator.

Appeal by Caveators, Simon A. Burney and wife, Mary J. Burney and Mary Elizabeth Sherill, aligned with Caveators, from an order and judgments entered 28 May 2004 by Judge Gregory A. Weeks in Cumberland County Superior Court. Appeal by Propounder of the Last Will and Testament, Mickey Jackson, from an order entered 25 March 2004 by Judge Knox V. Jenkins, Jr. Appeals Heard in the Court of Appeals 18 August 2005.

Anderson, Johnson, Lawrence, Butler & Bock, L.L.P., by Steven C. Lawrence for Caveators-appellants.

McCoy, Weaver, Wiggins & Cleveland, PLLC, by Jim Wade Goodman for Intervenor-appellees.

Ward and Smith, P.A., by George K. Freeman, Jr. and Alexander C. Dale for Propounder-appellee.

JACKSON, Judge.

Simon A. Burney and his wife, Mary J. Burney (“caveators”), appeal from the trial court’s judgments entered 28 May 2004 that ordered trifurcation of the jury trial of the caveat proceeding and granted directed verdict in favor of Mickey Jackson (“propounder”).

On 8 August 2003, Hector Cornelius McFayden (“testator”) died of natural causes at the age of seventy-six. Caveators are testator’s neighbors and propounder is testator’s cousin. Mary Sherrill (“alignor”) is testator’s sister and aligns with caveators. Patricia Hall

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Nunalee and June Hall Ransbotham (“intervenor”) are testator’s cousins and argue for affirmation of the trial court’s directed verdict.

Two wills are contested here: one, executed on 30 January 1995 (“1995 will”) devises all of testator’s property to propounder; and the other executed on 15 February 2002 (“2002 will”) devises all of testator’s property to caveators. Propounder admitted the original 1995 will to probate. The evidence shows that only a copy of the 2002 will could be found.

Caveators initiated the present action to set aside testator’s 1995 will. In the caveat, caveators contend that the 1995 will is not testator’s last will and testament, and that testator duly executed his last will and testament on 15 February 2002 in the law offices of MacRae, Perry, Williford, MacRae & Hollers, L.L.P. Caveators argue that the drafting attorney instructed testator to place his original 2002 will in a safe deposit box and to destroy the 1995 will. Upon testator’s death and after a diligent search, the original 2002 will could not be found. Caveators filed an application for Probate of Lost Will on 19 March 2004.

[1] Propounder answered the caveat and filed motions to dismiss the caveat proceeding pursuant to N.C. R. Civ. P. 12(b)(1), 12(b)(6), and 12(c). Propounder argued that caveators lacked standing to file the caveat. On 25 March 2004, the trial court denied propounder’s motions, and propounder did not file his notice of appeal until 30 June 2004. Accordingly, propounder’s appeal of the trial court’s denial of his motion to dismiss is not properly before this Court. *See* N.C. R. App. P., Rule 3(c)(1) (2006) (in civil actions, a party must file and serve a notice of appeal within thirty days after entry of judgment).

On 12 April 2004, propounder filed a motion to trifurcate the caveat proceeding for separate trials. The trial court granted propounder’s motion, and ordered that the jury trial be presented in three phases as follows:

Phase I: Is the paper-writing, dated January 30, 1995, the Last Will of Hector Cornelius McFayden?

Phase II: Did Hector Cornelius McFayden destroy the original of the paper-writing, dated February 15, 2002?

Phase III: Issue One: Is the paper-writing, dated February 15, 2002, the Last Will of Hector Cornelius McFayden? Issue Two: Did Hector Cornelius McFayden lack sufficient mental capacity to

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make and execute a Will at the time the paper-writing, dated February 15, 2002, was executed? Issue Three: Was the execution of the paper-writing, dated February 15, 2002, procured by undue influence?

The trial court conducted Phase I of the caveat proceeding on 12 April 2004, during which the jury found that the 1995 will was testator's last will and testament. During Phase II, at the conclusion of caveators' evidence, propounder moved for directed verdict on the grounds that caveators failed to present sufficient evidence to go to the jury on Phase II. The trial court granted propounder's motion, and caveators moved the trial court to stop the trial, release the jury, and certify its directed verdict on the issue in Phase II for immediate appeal to this Court. On 28 May 2004, the Honorable Gregory A. Weeks entered an order that caveators did not present sufficient evidence on the issue of whether testator destroyed the original 2002 will with the intention of revoking it, and that testator revoked the 2002 will by destroying the original 2002 will with the intention of revoking it. Caveators appealed from the trial court's judgments.

On appeal, caveators present three issues: (1) whether the trial court erred in granting propounder's motion to trifurcate; (2) whether the trial court erred in granting propounder's directed verdict; and (3) whether the trial court erred by not allowing testimony regarding testator's mental capacity.

[2] The scope of review on appeal is confined to a consideration of those exceptions set out and made the basis of assignments of error in the record on appeal. N.C. R. App. P., Rule 10 (2006). Exceptions in the record not set out in appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned. N.C. R. App. P., Rule 28 (2006). Caveators failed to cite authority supporting their third argument. For this reason, caveators' third argument is not properly before us.

[3] The first issue is whether the trial court erred in granting propounder's motion to trifurcate and sever the issues as presented to the jury.

The trial court trifurcated the proceedings into separate phases. In the first phase, the jury decided that the first will, executed in 1995, was a valid will. Subsequently, the later will, executed in 2002 was tried before the same jury in the second phase of the trial.

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Pursuant to the provisions of Rule 42(b) of the North Carolina Rules of Civil Procedure, it was with the trial court's discretion to trifurcate the proceedings. N.C. Gen. Stat. § 1A-1, N.C. R. Civ. P. 42(b) (2005). This decision is reviewed under an abuse of discretion standard. *Roberts v. Young*, 120 N.C. App. 720, 725, 464 S.E.2d 78, 82 (1995). In this case, it is clear that the issues concerning the validity of the 1995 will and the revocation of the 2002 will were separate, distinct and compartmentalized. Therefore, the trial court did not abuse its discretion in severing these trials.

The decision to try the issues pertaining to the 1995 will prior to the 2002 will also was within the sound discretion of the trial court. An abuse of discretion occurs only when the trial court's ruling is "manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision." *Briley v. Farabow*, 348 N.C. 537, 547, 501 S.E.2d 649, 656 (1998). In this case, the trial court eventually would have to decide the validity of both the 1995 and the 2002 wills. The resolution of the validity of one will would not be determinative of the validity of the other. This being the case, it was not manifestly unreasonable to try the 1995 will first.

The submission of the issue to the jury as to the 1995 will referring to the last will and testament of the deceased was not error. The only issue to be decided by the jury was the validity of the 1995 will. Nothing else was submitted to the jury during the first phase of the trial. Had the jury subsequently found that the 2002 will was a valid will, then that determination would have operated as a matter of law to revoke the 1995 will, rendering the jury verdict in the first phase of the trial moot.¹ Accordingly, we hold that the trial court did not abuse its discretion, and this assignment of error is overruled.

[4] The second issue on appeal is whether the trial court erred in granting propounder's directed verdict because caveators failed to present sufficient evidence to rebut the presumption of revocation of testator's 2002 will.

"A motion for directed verdict under N.C.G.S. § 1A-1, Rule 50 [(2005)], presents the question whether as a matter of law the evidence is sufficient to entitle the nonmovant to have a jury decide the issue." *In re Will of Jarvis*, 334 N.C. 140, 143, 430 S.E.2d 922, 923 (1993). In ruling on such a motion the trial court must consider the

1. The purported 2002 will contains the following language, "I do hereby revoke all former wills made by me and do hereby make, publish and declare this to be my Last Will and Testament."

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evidence in the light most favorable to the nonmovant, resolving all conflicts in the evidence in their favor and giving them the benefit of all favorable inferences that reasonably may be deduced from the evidence. *Id.* “If the evidence is sufficient to support each element of the nonmovant’s case, the motion for directed verdict should be denied.” *Id.* “The credibility of the testimony is [a question] for the jury, not the court, and a genuine issue of fact must be tried by a jury unless this right is waived.” *Id.*

Pursuant to North Carolina General Statutes, Section 31-5.1 (2005),

[a] written will, or any part thereof, may be revoked only (1) [b]y a subsequent written will or codicil or other revocatory writing executed in the manner provided herein for the execution of written wills, or (2) [b]y being burnt, torn, canceled, obliterated, or destroyed, with the intent and for the purpose of revoking it, by the testator himself or by another person in the presence and by his direction.

N.C. Gen. Stat. § 31-5.1 (2005). In North Carolina, “[i]t is well established that when a will last seen in the testator’s possession cannot be found at death a rebuttable presumption arises that the will was revoked[.]” *In re Will of Jolly*, 89 N.C. App. 576, 577, 366 S.E.2d 600, 601 (1988). In order to revoke a will by destroying it, the destructive act must be done with the intent to revoke the will. *Id.* (citing *In re Will of Wall*, 223 N.C. 591, 27 S.E.2d 728 (1943)). “The presumption, however, that the testator destroyed the paper with the intent to revoke it as his will is not one of law but of fact, and may be rebutted by evidence of facts and circumstances showing that its loss or destruction was not or could not have been due to the act of the testator or that of any other person by his direction and consent.” *In re Wall*, 223 N.C. at 593, 27 S.E.2d at 730. “[A]s soon as the circumstances attendant upon the disappearance of the paper are made to appear, the presumption loses its potency and the issue becomes one for the jury.” *In re Wall*, 223 N.C. at 595-96, 27 S.E.2d at 731. Thus, it is critical to determine whether caveators presented any competent evidence either that testator did not destroy the will or did not intend to revoke it.

Here, caveators offered four witnesses regarding the 2002 will to rebut the presumption that testator revoked the 2002 will and that testator did not intend to revoke the 2002 will. First, James C. McRae, Jr. (“McRae”), testator’s attorney, testified that he gave the original

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and a copy of the 2002 will to testator in an envelope on the day testator executed the 2002 will. McRae testified that testator never mentioned any subsequent desire to change his will. Second, Mary Sherrill Winks (“Winks”), testator’s niece, testified that propounder had access to testator’s house after testator’s death. Third, Glenn Lane (“Lane”), testator’s friend, testified that testator told him that he had made a new will in 2002, and that the 2002 will “would be a big surprise.” Finally, propounder testified that he had gone to testator’s house on 12 August 2003 with McRae to find the original 2002 will. Propounder testified that on the day after testator went to the hospital, propounder obtained keys to testator’s home from Lane, applied his own lock to the home, and went through the house to secure the firearms, although he denied going to testator’s home to look for papers. In contrast, Lane testified that propounder had told him that he needed to get some papers from the home, and was not able to find the papers in the brown envelope. Furthermore, Lane testified that propounder stated that he would need to have his wife return to testator’s house to locate the brown envelope. Lane stated that he saw propounder coming out of testator’s house at around 7:00 a.m. the morning after he obtained testator’s house keys. There also is evidence that someone moved testator’s 1995 will after his death.

This evidence is sufficient to establish facts and circumstances that show testator did not intend to lose or destroy the 2002 will. In viewing the evidence in the light most favorable to caveators, caveators presented evidence of facts and circumstances that the loss or destruction of the 2002 will was not or could not have been due to the act of the testator or that of any other person by his direction and consent. The four witnesses’ testimony provided circumstances attendant upon the disappearance of the 2002 will, and their testimony presented facts and circumstances sufficient to allow the issue to become one for the jury. Thus, caveators presented a genuine issue of fact to be presented to the jury. Accordingly, we affirm in part and reverse and remand in part.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

Judges HUDSON and STEELMAN concur.

GANNETT PACIFIC CORP. v. CITY OF ASHEVILLE

[178 N.C. App. 711 (2006)]

GANNETT PACIFIC CORPORATION d/B/A ASHEVILLE CITIZEN-TIMES PUBLISHING COMPANY, AN HAWAII CORPORATION, AND CHESAPEAKE TELEVISION, INC. T/D/B/A WLOS-TV, A MARYLAND CORPORATION, PLAINTIFFS-APPELLANTS v. CITY OF ASHEVILLE AND COUNTY OF BUNCOMBE, DEFENDANTS-APPELLEES

No. COA05-1304

(Filed 1 August 2006)

Open Meetings— mediation between city and county—one representative of each—not an official meeting

A mediation between the City of Asheville and Buncombe County was not an official meeting within the Open Meetings law because it was attended by only one representative from each entity rather than a majority. Furthermore, the mediation was not held to evade the spirit or purpose of the Open Meetings Law. N.C.G.S. § 143-318.10(d).

Appeal by plaintiffs from order entered 29 June 2005 by Judge James U. Downs in Superior Court, Buncombe County. Heard in the Court of Appeals 11 May 2006.

Kelly & Rowe, P.A., by James Gary Rowe, for plaintiffs-appellants.

Robert W. Oast, Jr. for defendant-appellee City of Asheville.

Westall Gray Connolly and Davis, by Joseph A. Connolly, for defendant-appellee County of Buncombe.

McGEE, Judge.

Asheville Citizen-Times Publishing Company and WLOS-TV (collectively plaintiffs), appeal the trial court's 29 June 2005 order denying declaratory and injunctive relief in plaintiffs' action against the City of Asheville (the City) and Buncombe County (the County) (collectively defendants). Plaintiffs alleged defendants violated North Carolina's Open Meetings Law.

For some time prior to plaintiffs' filing of the present action, defendants were involved in negotiations concerning the termination of the Regional Water Authority Agreement (the agreement) then in existence between defendants. The agreement pertained to the future supply of water and other services within the City and the County. The City announced on 21 April 2005 that it would hold a special meeting for the purpose of participating in mediation with the County

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regarding termination of the agreement. The announcement stated in part:

It is anticipated that City Council will go into closed session for a substantial part of that meeting in order to consult with an attorney employed by the City about matters with respect to which the attorney client privilege between the City and its attorney must be preserved, including possible litigation, and to give instructions to the attorney concerning the handling of the mediation, pursuant to N.C. Gen. Stat. sec. 143-318.11(a)(3).

Beginning at approximately 8:00 a.m. on 26 April 2005, a majority of the members of the City Council and all of the members of the County's Board of Commissioners (Board of Commissioners) met in separate rooms at the Asheville Renaissance Hotel. Each governmental body voted to close its session in order to consult with its respective attorneys about the forthcoming mediation. Throughout the day, and until approximately 12:00 midnight, the City and the County sent one representative, along with one or more of its attorneys, to meet in mediation with Professor John Stephens (Professor Stephens), a mediator from the Institute of Government at The University of North Carolina at Chapel Hill. While the two representatives and the attorneys met in mediation, the City Council and the Board of Commissioners either stood in recess or discussed no official business. No member of the City Council was present during the Board of Commissioners' meeting, nor was any member of the Board of Commissioners present during the City Council's meeting. The two representatives and the attorneys reported back to their respective bodies. Each body then met separately in a closed meeting to discuss the handling of the mediation. Thereafter, the two representatives and the attorneys returned to the mediation. The mediation, like the City's and the County's meetings in separate rooms, was closed to the public.

The plaintiffs were not allowed into the two separate closed meetings or into the closed mediation at any time. Plaintiffs hand delivered a letter to defendants at approximately 12:15 p.m. on 26 April 2005 demanding that defendants cease the closed meetings and the closed mediation, as defendants were in violation of North Carolina's Open Meetings Law. Defendants refused to terminate the closed meetings or the closed mediation. Plaintiffs filed a complaint on 26 April 2005 seeking declaratory judgment and injunctive relief, including a temporary restraining order and preliminary injunction.

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Plaintiffs' requests for a temporary restraining order and a preliminary injunction were denied by the trial court in two separate orders. In an order filed 28 April 2005, the trial court denied plaintiffs' request for a temporary restraining order, finding that the mediation and the meetings had concluded, and therefore no emergency required the issuance of a temporary restraining order. In an order filed 4 May 2005, the trial court denied plaintiffs' request for a preliminary injunction, concluding that defendants did not violate the Open Meetings Law and that plaintiffs were not likely to succeed on the merits of their claim. A hearing was held on the merits of plaintiffs' claims for injunctive relief and declaratory judgment on 16 May 2005. In an order filed 29 June 2005, the trial court made specific findings of fact and concluded:

(1) The mediation process attended by and participated in by the defendants on April 26, 2005, was not an official meeting by either body and open to the public as defined by N.C.G.S. 143-318.10(d).

(2) The format used by the defendants and the procedure followed during the entire mediation process by closing their respective sessions to discuss their positions and legal options were permitted in N.C.G.S. 143-318.11(a)(3).

(3) The conduct complained of by the plaintiffs against the defendants herein did not violate the North Carolina open meetings law.

The trial court thereby denied plaintiffs' request for declaratory judgment and injunctive relief. Plaintiffs appeal.

"It is well settled in this jurisdiction that when the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." *Shear v. Stevens Bldg. Co.*, 107 N.C. App. 154, 160, 418 S.E.2d 841, 845 (1992). If supported by competent evidence, the trial court's findings of fact are conclusive on appeal. *Finch v. Wachovia Bank & Tr. Co.*, 156 N.C. App. 343, 347, 577 S.E.2d 306, 308-09 (2003). "Conclusions of law drawn by the trial court from its findings of fact are reviewable *de novo* on appeal." *Food Town Stores v. City of Salisbury*, 300 N.C. 21, 26, 265 S.E.2d 123, 127 (1980). In the present case, plaintiffs do not dispute there was competent evidence to support the trial court's findings of fact. Rather, plaintiffs argue the trial court's three conclusions of law were not proper based on those findings.

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It is the public policy of our State that “hearings, deliberations, and actions of [public] bodies be conducted openly.” N.C. Gen. Stat. § 143-318.9 (2005). Accordingly, as a general rule, “each official meeting of a public body shall be open to the public, and any person is entitled to attend such a meeting.” N.C. Gen. Stat. § 143-318.10(a) (2005). Plaintiffs contend that the mediation engaged in by defendants constituted an official meeting as defined by statute and thus should have been open to the public.

An “official meeting” is defined by N.C. Gen. Stat. § 143-318.10(d) (2005) as

a meeting, assembly, or gathering together at any time or place . . . of a majority of the members of a public body for the purpose of conducting hearings, participating in deliberations, or voting upon or otherwise transacting the public business within the jurisdiction, real or apparent, of the public body. However, a social meeting or other informal assembly or gathering together of the members of a public body does not constitute an official meeting unless called or held to evade the spirit and purposes of this Article.

A “public body” is defined by N.C. Gen. Stat. § 143-318.10(b) (2005) as any elected or appointed authority, board, commission, committee, council, or other body of the State, or one or more counties, cities, school administrative units, constituent institutions of The University of North Carolina, or other political subdivisions or public corporations in the State that (i) is composed of two or more members and (ii) exercises or is authorized to exercise a legislative, policy-making, quasi-judicial, administrative, or advisory function.

The City Council and the Board of Commissioners were clearly both public bodies as defined by N.C. Gen. Stat. § 143-318.10(b). Any “official meeting” of the City Council or Board of Commissioners, then, must be open to the public, subject to certain exceptions. *See* N.C.G.S. § 143-318.10(a).

The exception at issue in the present case is the attorney-client exception codified at N.C. Gen. Stat. § 143-318.11(a)(3) (2005). The exception provides that a public body may close an official meeting and exclude the public

[t]o consult with an attorney employed or retained by the public body in order to preserve the attorney-client privilege between the attorney and the public body, which privilege is hereby

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acknowledged. . . . The public body may consider and give instructions to an attorney concerning the handling or settlement of a claim, judicial action, mediation, arbitration, or administrative procedure.

N.C. Gen. Stat. § 143-318.11(a)(3) (2005). In *Multimedia Pub'g of N.C., Inc. v. Henderson Cty.*, 145 N.C. App. 365, 550 S.E.2d 846 (2001), our Court addressed the attorney-client privilege exception and recognized the competing policy interests inherent in that statutory exception.

While the courts strongly support openness in government, public participation, and the free exchange of ideas, it must be noted that in some instances the right to public access must yield in order to protect other important societal interest. The degree of openness is a matter of public policy that must be settled by legislators in their capacity as elected representatives of the people.

Multimedia Pub'g at 374, 550 S.E.2d at 852. Our General Assembly has addressed the “degree of openness” afforded public bodies by enacting certain statutory exceptions to the Open Meetings Law, including N.C.G.S. § 143-318.11(a)(3), the attorney-client exception. Plaintiffs assign error to the trial court’s three conclusions, including its conclusion number two that defendants’ procedure of “closing their respective sessions to discuss their positions and legal options [was] permitted in N.C.G.S. 143-318.11(a)(3).” However, in their brief, plaintiffs concede that the separate meetings of the City Council and the Board of Commissioners were official meetings properly closed to the public pursuant to the attorney-client exception. Accordingly, plaintiffs have abandoned this portion of their assignment of error. See N.C.R. App. P. 28(b)(6). Plaintiffs bring forward their assignment of error to the trial court’s conclusions one and three: that the mediation was not an official meeting mandated to be open to the public and that defendants did not violate North Carolina’s Open Meetings Law.

Under N.C.G.S. § 143-318.10(d), the definition of an official meeting has three essential elements: (1) a meeting, assembly, or gathering together, (2) of a majority of the members, (3) of a public body. By the plain language of the statute, in order to be an official meeting, a majority of the members of the public body must be present. In the present case, at no time did more than one member of the City Council or the Board of Commissioners participate in the mediation. Thus, by statutory definition, the mediation was not an official meeting mandated to be open to the public.

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Plaintiffs urge our Court to rely on the second sentence of N.C.G.S. § 143-318.10(d), which provides: “However, a social meeting or other informal assembly or gathering together of the members of a public body does not constitute an official meeting unless called or held to evade the spirit and purposes of this Article.” Plaintiffs focus on the second sentence of N.C.G.S. § 143-318.10(d) and argue that the mediation was “called or held to evade the spirit and purposes of [the statute]” and therefore should be considered an official meeting. We disagree with this argument.

First, we disagree with plaintiffs that defendants structured the mediation to evade the spirit and purposes of the Open Meetings Law. The structure and function of the meetings and the mediation do not evidence such an intent. The function of the mediation was to negotiate terms of the agreement. As defendants stated at oral argument, and plaintiffs did not contest, such terms could be accepted only by a majority vote of the members of the City Council and the Board of Commissioners. A majority vote could not have been held until after the two representatives returned from mediation to their respective bodies meeting in separate rooms. As discussed above, although the meetings in the separate rooms were official meetings under N.C.G.S. § 143-318.10(d), those separate meetings fell squarely within the attorney-client exception.

Moreover, reading the second sentence of N.C.G.S. § 143-318.10(d) in its entirety, it is clear that this provision does not apply to the present case. First, the mediation was not a “social meeting or other informal assembly or gathering together.” Rather, the mediation was a carefully structured meeting, organized pursuant to advice from Professor Stephens, who also conducted the mediation. Second, nothing in the language of the second sentence of N.C.G.S. § 143-318.10(d) negates the requirement that “a majority of the members of a public body” must be present to constitute an official meeting. N.C.G.S. § 143-318.10(d). At any given time, only one member representing each defendant attended the mediation. Accordingly, under the plain language of the statute, the mediation did not constitute an official meeting.

In conclusion, we hold that the mediation, attended by only one representative from each defendant, was not an official meeting as defined by N.C.G.S. § 143-318.10(d), in that there was no gathering together of a majority of the members of the City Council or of the Board of Commissioners. Further, the mediation, which was not a

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social meeting or other informal assembly or gathering together, was not called or held to evade the spirit or purposes of the Open Meetings Law. Accordingly, we uphold the trial court's conclusions of law and affirm its 29 June 2005 order.

Affirmed.

Judges ELMORE and STEELMAN concur.

STATE OF NORTH CAROLINA v. DEDRIC PAXTON CRUMP, DEFENDANT

No. COA05-902

(Filed 1 August 2006)

1. Constitutional Law— double jeopardy—possession of firearm by felon—basis for second conviction—habitual felon sentence

Defendant was not subjected to multiple punishments in violation of double jeopardy by the State's use of his 1998 conviction for possession of a firearm by a felon to support his current conviction of possession of a firearm by a felon and his sentence as an habitual felon.

2. Constitutional Law— double jeopardy—firearms possession by felon—two offenses—no violation

Defendant was not subjected to double jeopardy where he was convicted of a cocaine offense in 1991, possession of a firearm by a felon in 1998, and possession of a firearm by a felon again in 2003. Defendant was convicted and punished in 2003 only for the latest offense and did not receive multiple punishments for the 1991 conviction.

Appeal by defendant from judgment entered 12 October 2004 by Judge A. Moses Massey in Forsyth County Superior Court. Heard in the Court of Appeals 22 March 2006.

Attorney General Roy Cooper, by Assistant Attorney General David L. Elliott, for the State.

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

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GEER, Judge.

Defendant Dedric Paxton Crump appeals his conviction for possession of a firearm by a felon. Defendant argues that the indictments charging him with this offense and as attaining the status of a habitual felon unconstitutionally subjected him to double jeopardy by “double-counting” a prior controlled substances conviction and a prior conviction for possession of a firearm by a felon. Defendant’s arguments confuse “double-counting” with double jeopardy. Defendant has not shown that he has been re-prosecuted or re-punished for his prior offenses, but, rather, has merely shown that some of his prior convictions factored into his current conviction and sentence in accord with North Carolina’s recidivist statutes. Consequently, defendant has failed to show a violation of the Double Jeopardy Clause.

Facts

The State’s evidence at trial tended to show the following facts. In the early morning hours of 30 May 2003, Officer James Deeney of the Winston-Salem Police Department observed a white Ford Contour sedan weave into the opposing traffic lane for about half a block. The officer ran a history of the license plate and discovered that it actually belonged to a Chevrolet pickup truck.

Officer Deeney pulled up behind the Contour and initiated a traffic stop by turning on his lights and sounding his siren. The Contour, however, continued driving and ultimately turned down two roads before coming to a stop in defendant’s driveway. As defendant exited from the driver’s seat, Officer Deeney observed that two other passengers remained in the car. After the officer determined that defendant’s license had been permanently suspended, he arrested defendant and placed him in the rear of the patrol car. When the officer returned to the Contour, he noticed a handgun in the grass about a foot away from the front passenger door.

At the police station, defendant told police that he had been outside a bar with his younger brother and his brother’s friend, “Mossey.” Mossey told defendant that he could not get into the bar because he had a gun and asked defendant if he would hide it for him. Defendant agreed, took the gun, and began driving home. When defendant was stopped by Officer Deeney, he asked his passengers to throw the gun out of the car window.

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On 21 July 2003, defendant was indicted for possession of a firearm by a felon. According to the indictment, defendant, at the time of his 2003 arrest, was a felon because of a 1998 conviction for possession of a firearm by a felon. On 20 October 2003, defendant was also indicted for having achieved habitual felon status. For the three predicate felonies, the indictment alleged convictions for possession of cocaine in 1991, felony larceny in 1997, and possession of a firearm by a felon in 1998.

At trial, Precious Bailey testified on defendant's behalf. She explained that she and her sister were the passengers Officer Deeney observed in the Contour on 30 May 2003. Ms. Bailey stated that the two women had been waiting in the car outside of a bar while defendant made a phone call. Before defendant returned, Mossey got into the rear seat next to Ms. Bailey and placed the gun underneath the driver's seat. After they drove away from the bar, Ms. Bailey told defendant there was a gun in the car, and he responded "okay." When they pulled into the driveway, and the patrol car pulled in behind them, defendant reached under his seat and handed the gun to Ms. Bailey's sister, who was seated in the front passenger seat, and told her to throw the gun out of the window.

On 12 October 2004, a jury found defendant guilty of possession of a firearm by a felon. Defendant thereafter pled guilty to achieving habitual felon status and was sentenced to a term of 93 to 121 months in prison. Defendant timely appealed to this Court.

I

[1] We first address defendant's argument that his habitual felon indictment subjected him to double jeopardy because "it resulted in the State's use of [his 1998 conviction for possession of a firearm by a felon] for two purposes"—namely, to support defendant's current conviction for possession of a firearm by a felon and to support defendant's sentencing as a habitual felon. The Double Jeopardy Clause of the Fifth Amendment states that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V. Although the North Carolina Constitution contains no express provision prohibiting double jeopardy, it is regarded as an "integral part" of our Constitution's Law of the Land Clause, N.C. Const. art. I, § 19. *State v. Ballard*, 280 N.C. 479, 482, 186 S.E.2d 372, 373 (1972).

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The United States Supreme Court has explained that the Double Jeopardy Clause “serves the function of preventing both successive punishment and successive prosecution, and that the Constitution was designed as much to prevent the criminal from being twice punished for the same offence [sic] as from being twice tried for it.” *Witte v. United States*, 515 U.S. 389, 395-96, 132 L. Ed. 2d 351, 361, 115 S. Ct. 2199, 2204 (1995) (internal citations and quotation marks omitted). Accordingly, our Supreme Court has recently explained that “[t]he Clause protects against three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense.” *State v. Tirado*, 358 N.C. 551, 578, 599 S.E.2d 515, 534 (2004), *cert. denied sub nom. Queen v. North Carolina*, 544 U.S. 909, 161 L. Ed. 2d 285, 125 S. Ct. 1600 (2005).

In this case, defendant does not specify which of these three double jeopardy abuses he is alleging the State committed. We can be certain that it is not the first; there is no acquittal at issue. Moreover, defendant has not been “re-prosecuted” for his 1998 possession of a firearm by a felon conviction—the prosecution below related only to his possession of a firearm on 30 May 2003. *See Missouri v. Hunter*, 459 U.S. 359, 365, 74 L. Ed. 2d 535, 542, 103 S. Ct. 673, 678 (1983) (“Because respondent has been subjected to only one trial, it is not contended that his right to be free from multiple trials for the same offense has been violated.”). Thus, to the extent defendant has been subjected to double jeopardy, it must be under the third variation: multiple punishments for the same offense.

Consequently, defendant’s only potential double jeopardy argument is that, by utilizing his 1998 conviction for possession of a firearm by a felon as both (1) the underlying felony for his current possession of a firearm prosecution and (2) one of the underlying felonies for his habitual felon indictment, he has been punished multiple times for his 1998 conviction for possession of a firearm by a felon. This Court has, however, already rejected this argument. *See State v. Glasco*, 160 N.C. App. 150, 160, 585 S.E.2d 257, 264 (“[E]lements used to establish an underlying conviction may also be used to establish a defendant’s status as a habitual felon.”), *disc. review denied*, 357 N.C. 580, 589 S.E.2d 356 (2003).

It is well-settled that a sentence flowing from habitual felon status is not another punishment for a prior offense—*i.e.*, the 1998 possession of a firearm by a felon conviction—but, rather, an enhanced

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sentence for the present underlying felony, *i.e.*, the current possession of a firearm by a felon. *See, e.g., State v. Patton*, 119 N.C. App. 229, 231, 458 S.E.2d 230, 232 (1995) (“Being an habitual felon . . . subjects the individual subsequently convicted of a crime to increased punishment *for that crime.*” (emphasis added)), *rev’d on other grounds*, 342 N.C. 633, 466 S.E.2d 708 (1996); *State v. Penland*, 89 N.C. App. 350, 351, 365 S.E.2d 721, 722 (1988) (“Upon a conviction as an habitual felon, the court must sentence the defendant *for the underlying felony* as a Class C felon.” (emphasis added)). *See also State v. Todd*, 313 N.C. 110, 117, 326 S.E.2d 249, 253 (1985) (“We begin by rejecting outright the suggestion that our legislature is constitutionally prohibited from enhancing punishment for habitual offenders as violations of constitutional strictures dealing with double jeopardy . . .”).

Indeed, the United States Supreme Court adopted this very rationale over 100 years ago in *Moore v. Missouri*, 159 U.S. 673, 40 L. Ed. 301, 16 S. Ct. 179 (1895), while explicitly rejecting a double jeopardy challenge to recidivist sentencing. The Court held that:

The reason for holding that the accused is not again punished for the first offense is . . . that the punishment is for the last offense committed, and it is rendered more severe in consequence of the situation into which the party had previously brought himself; . . . that the statute imposes a higher punishment for the same offense upon one who proves, by a second or third conviction, that the former punishment has been inefficacious in doing the work of reform for which it was designed; . . . that the punishment for the second is increased, because by his persistence in the perpetration of crime, he has evinced a depravity which merits a greater punishment, and needs to be restrained by severer penalties than if it were his first offense; and . . . that it is just that an old offender should be punished more severely for a second offense—that repetition of the offense aggravates guilt.

Id. at 677, 40 L. Ed. at 303, 16 S. Ct. at 181 (internal quotation marks omitted). *See also Spencer v. Texas*, 385 U.S. 554, 560, 17 L. Ed. 2d 606, 611, 87 S. Ct. 648, 651 (1967) (noting that recidivism statutes “have been sustained in this Court on several occasions against contentions that they violate constitutional strictures dealing with double jeopardy”).

In the present case, as a consequence of defendant’s 1998 conviction for possession of a firearm by a felon, it was unlawful for

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defendant “to purchase, own, possess, or have in his custody, care, or control any firearm or any weapon of mass death and destruction as defined in G.S. 14-288.8(c).” N.C. Gen. Stat. § 14-415.1(a) (2005). By possessing a firearm on 30 May 2003, defendant committed a fresh violation of this statute, and his punishment for that new crime cannot reasonably be said to re-punish the 1998 offense. Rather, it only punishes him for this new violation. Accordingly, the mere reliance on the 1998 conviction to establish that defendant was a recidivist for sentencing purposes does not implicate double jeopardy concerns. We, therefore, reject defendant’s argument that he has been subjected to double jeopardy with respect to his 1998 possession of a firearm by a felon conviction.

II

[2] We next turn to defendant’s argument that his indictment for possession of a firearm by a felon subjected him to double jeopardy “because it resulted in double-counting of . . . his conviction in 1991 . . . for possession with intent to manufacture, sell, and deliver cocaine.” Defendant contends that his 1991 drug conviction has been impermissibly double-counted because it (1) was the underlying felony for his 1998 possession of a firearm by a felon conviction, and (2) was used “derivatively” as the underlying felony for his current possession of a firearm by a felon conviction, because the 1998 possession of a firearm by a felon conviction was used as the underlying felony for his current possession of a firearm by a felon conviction.

As was the case with defendant’s 1998 firearm conviction, defendant was neither acquitted of nor prosecuted a second time for his 1991 drug conviction, and, consequently, defendant must show he has received multiple punishments for the 1991 conviction in order to establish a double jeopardy violation. *Tirado*, 358 N.C. at 578, 599 S.E.2d at 534. In 1991, defendant was convicted of and punished for his drug offense. One of the consequences of that conviction was that he was barred from ever possessing a firearm under N.C. Gen. Stat. § 14-415.1(a). When, in 1998, he possessed a firearm in violation of that statute, he was again convicted and punished—not a second time for the 1991 drug conviction, but for the first time for this new offense under § 14-415.1(a). Defendant was, of course, still barred from thereafter possessing a firearm. Consequently, when defendant, in 2003, again unlawfully possessed a firearm, he was convicted and punished only for this new offense. Defendant has, therefore, failed to show that he has received multiple punishments for the 1991 conviction.

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In short, defendant's arguments on appeal assert a legal theory that does not exist. The "double-counting" alleged by defendant in his arguments fails to implicate "double jeopardy" as defendant has not been re-prosecuted or re-punished for either his 1998 or 1991 convictions. Accordingly, defendant's assignments of error are overruled.

No error.

Judges MCGEE and CALABRIA concur.

STATE OF NORTH CAROLINA v. DARIAN JAQUAN HARRIS, DEFENDANT

No. COA05-1031

(Filed 1 August 2006)

1. Drugs—positive urine test—corroborating evidence required—insufficient evidence of marijuana possession

A positive urine test, without more, does not satisfy the intent or knowledge requirement inherent in the statutory definition of possession. Here, the State presented no corroborating evidence of marijuana possession.

2. Drugs—cocaine—positive urine test—corroborating evidence

There was sufficient evidence to support a conviction for the possession of cocaine where a positive urine test gave rise to the inference that defendant used cocaine and testimony from a witness who saw defendant snort cocaine provided corroborating evidence.

Appeal by defendant from judgment entered 21 April 2005 by Judge Kenneth F. Crow in the Superior Court in Craven County. Heard in the Court of Appeals 8 March 2006.

Attorney General Roy Cooper, by Assistant Attorney General Karen Ousley Boyer, for the State.

Thomas R. Sallenger, for defendant-appellant.

HUDSON, Judge.

In April 2005, the Craven County grand jury indicted defendant for the offenses of assault with a deadly weapon with the intent to kill

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inflicting serious injury, assault inflicting serious bodily injury, sale and delivery of cocaine, possession of cocaine, and possession of marijuana. At trial, a jury convicted defendant of possession of cocaine and possession of marijuana, but acquitted him of the remaining charges. On 21 April 2005, the court sentenced defendant as a habitual felon to 132 to 168 months for the cocaine possession and to a concurrent 20-day sentence for the marijuana possession. Defendant appeals. As discussed below, we find no error in part, reverse in part, and remand for entry of judgment.

The evidence tends to show that on Friday night, 20 August 2005, Ms. Renetta Bryant drank beer and liquor and smoked marijuana with her husband. Early the next morning, Bryant arrived at a friend's house, where she saw defendant, Darian Harris, sitting in a chair in the front room. Bryant testified that she "saw [defendant] snort cocaine up his nose," and that she bought a crack rock from him for \$20.00, which she then smoked. Bryant testified that she fell asleep and later woke up and went to the bathroom and that when she returned to the front room, defendant poured alcohol on her and used his cigarette lighter to set her on fire. Hours later, EMS transported Bryant to the hospital, where she was treated for second and third degree burns and transferred to a burn center for follow-up.

On 24 August 2004, defendant's probation officer took a urine sample from defendant at the Craven County Detention Center to determine if he had used drugs in violation of his probation. The North Carolina Department of Corrections Substance Abuse and Intervention Program analyzed the urine sample, which tested positive for marijuana and cocaine. The lab conducted its test twice to confirm the presence of marijuana and cocaine in defendant's urine. At trial, Dr. Robert McClelland, an expert in general pharmacology, testified that cocaine can be detected in the body for approximately 27 to 96 hours after use and that marijuana can be detected in the body for "a fairly long period" of 40 to 45 days.

Defendant argues that the trial court erred in not granting his motion to dismiss for insufficiency of the evidence. "[T]he question for the trial court is whether there is substantial evidence of (1) each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of the offense." *State v. Scott*, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002). In reviewing the trial court's ruling, we must evaluate the evidence in the light most favorable to the State and resolve all contradictions in

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favor of the State. *State v. Malloy*, 309 N.C. 176, 179, 305 S.E.2d 718, 720 (1983). The ultimate question is “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). 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.” *Molloy*, 309 N.C. at 179, 305 S.E.2d at 720 (internal citation omitted). “This is true even though the suspicion aroused by the evidence is strong.” *Id.* (internal citation omitted).

[1] We address defendant’s argument regarding the sufficiency of the evidence on his marijuana conviction first. North Carolina Courts have not previously addressed whether a positive urine test for controlled substances, standing alone, supports a conviction for possession. Defendant was convicted of possession of less than one-half ounce of marijuana. N.C. Gen. Stat. 90-95(a)(3) & (d)(4) (2004). “An accused has possession of a controlled substance within the meaning of the law when he has both the power and intent to control its disposition or use.” *State v. Matias*, 143 N.C. App. 445, 448, 550 S.E.2d 1, 3 (2001). “Necessarily, power and intent to control the controlled substance can exist only when one is aware of its presence.” *Id.*

We note that although we are not bound by cases from other jurisdictions, the majority of courts that have confronted this issue have held that a positive drug test alone cannot support a conviction for possession.¹ Because we have no authority either way in North Carolina, we cite to many of these cases. *United States v. Reichenbach*, 29 M.J. 128, 138 (C.M.A. 1989) (discovery of drug in person’s blood insufficient to establish guilt beyond a reasonable doubt, because insufficient proof of knowledgeable possession); *State v. Throssen*, 809 P.2d 941, 943 (Alaska Ct. App. 1991) (positive drug test could not sustain conviction for cocaine possession because defendant ceased having control of it once it entered his body); *People v. Spann*, 232 Cal. Rptr. 31, 33-335 (Cal. Ct. App. 1986) (crimes of “use”

1. Both federal and state case law dealing with positive drug tests as circumstantial evidence in support of probation revocations have noted that a lower standard of proof is required in those hearings, and therefore have found evidence of positive drug tests sufficient to support a probation revocation. See *United States v. Blackston*, 940 F.2d 877, 891 (3rd Cir. 1991); *Brown v. State*, 760 S.W.2d 748, 749 (Tex. App. 1988).

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and “possession” should not be merged); *State v. Vorm*, 570 N.E.2d 109, 111 (Ind. Ct. App. 1991) (positive drug test alone fails to prove defendant knowingly and voluntarily possessed cocaine); *State v. Flinchpaugh*, 659 P.2d 208, 211 (Kan. 1983) (once drug is in a person’s blood, he no longer controls it, and positive drug test alone is insufficient to establish knowledge because it could have been injected involuntarily or by trick); *State v. Lewis*, 394 N.W.2d 212, 217 (Minn. Ct. App. 1986) (“evidence of a controlled substance in a person’s urine specimen does not establish possession . . . absent probative corroborating evidence of actual physical possession”); *In re R.L.H.*, 116 P.3d 791, 795-96 (Mont. 2005) (presence of drug in body insufficient evidence that such drug was knowingly and voluntarily ingested); *State v. McCoy*, 864 P.2d 307, 313 (N.M. 1993) (positive drug test alone insufficient to prove knowledge and intent to possess controlled substance); *Jackson v. State*, 833 S.W.2d 220, 223 (Tex. App. 1992) (“[t]he results of a test for drugs in bodily fluids does not satisfy the elements of the offense of possession of cocaine”); *State v. Sorenson*, 758 P.2d 466, 468 (Utah Ct. App. 1988) (“the mere presence of alcohol in the bloodstream does not constitute possession”); *State v. Griffin*, 584 N.W.2d 127, 131 (Wis. Ct. App. 1998) (“mere presence of drugs in a person’s system is insufficient to prove that the drugs are knowingly possessed by the person or that the drugs are within the person’s control”). *But see Green v. State*, 398 S.E.2d 360, 362 (Ga. 1990) (positive urinalysis and testimony of certified urinalysis field technician sufficient to find defendant guilty of possession of cocaine); *State v. Schroeder*, 674 N.W.2d 827, 831 (S.D. 2004) (positive urinalysis sufficient to support possession conviction because statutory definition of controlled substance includes metabolites of substances).

Viewing the evidence here in the light most favorable to the State, we conclude that it is reasonable to infer from the positive urine screen that defendant must have ingested the substance. However, we hold that a positive urine test, without more, does not satisfy the intent or the knowledge requirement inherent in our statutory definition of possession. As the New Mexico Court noted,

it is quite possible that a defendant may have involuntarily ingested the drugs either through coercion, deception, or second-hand smoke. Accordingly, without some corroborating proof of knowledge and intent, the cases have uniformly held that a positive drug test alone does not prove a defendant’s knowledge of the drug or intent to possess it Moreover, we believe the

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State's argument ["that knowledge and intent can be properly inferred from the positive drug test"] impermissibly shifts the burden of proof to Defendants. In our view, it would be difficult if not impossible for a defendant to present credible evidence that he or she ingested drugs unknowingly.

McCoy, 864 P.2d at 312-13. The Montana Court similarly stated that, "without more than proof that a person had a dangerous drug in their system, there is no evidence to establish that such drug was knowingly and voluntarily ingested." *R.L.H.*, 116 P.3d at 795. Here, the State presented no evidence regarding the marijuana charge other than the positive urine test. Here, the State presented no corroborating evidence that defendant had "the power and intent to control [the marijuana's] disposition or use" or that he was "aware of its presence." See *Matias*, 143 N.C. App. at 448, 550 S.E.2d at 3. Thus, we conclude that there was insufficient evidence that defendant possessed marijuana within the meaning of our Controlled Substances Act and we reverse the conviction.

[2] In contrast, we conclude that there was sufficient evidence to support defendant's conviction for possession of cocaine. Here, the positive urine screen gives rise to the inference that defendant ingested cocaine, and Ms. Bryant's testimony that she saw defendant snort cocaine provides corroborating evidence that defendant exercised the power and intent to control the substance's disposition or use, and that he was aware of its presence.

No error in part; reversed in part and remanded for entry of judgment.

Judges HUNTER and BRYANT concur.

IN THE MATTER OF: A.K.

No. COA04-986-2

(Filed 1 August 2006)

Child Abuse and Neglect— standard of proof—prior orders involving sibling—insufficiency

Allegations in a petition alleging child abuse, neglect or dependency shall be proven by clear and convincing evidence. The trial court here could not conclude that the child would be at

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substantial risk of neglect in the custody of the parents because it considered only prior orders concerning a sibling, and the only order concerning the sibling that contained findings by the clear and convincing standard of proof was from a hearing many months earlier.

Appeal by respondent father from order entered 17 January 2004 by Judge Gary S. Cash in Buncombe County District Court. Originally heard in the Court of Appeals 26 January 2005, and now on remand from the Supreme Court of North Carolina, opinion filed 5 May 2006, reversing this Court's opinion filed 15 February 2005.

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

Richard Croutharmel, for respondent-appellant father.

Elizabeth Spradlin, for respondent-mother.

Michael Tousey, for Guardian ad Litem.

LEVINSON, Judge.

Respondent (father) appeals from an order adjudging his child A.K. neglected. We reverse.

The pertinent facts may be summarized as follows: C.A.K., the older sibling of A.K., was born on 11 January 2002. Less than four weeks later, on 4 February 2002, C.A.K. was taken to the hospital and diagnosed with an infection. After having a seizure, subsequent evaluation revealed that C.A.K. had suffered as many as 16 bone fractures. According to Dr. Dejournett, an emergency room physician, the fractures looked " 'fresh', and were less than 7 to 10 days old." In Dr. Dejournett's opinion, such injuries required some type of major force. C.A.K. was also tested for a metabolic bone deficiency called osteogenesis imperfecta (OI), which could suggest an alternative cause of C.A.K.'s condition. Dr. J. Edward Spence, Director of the Clinical Genetics Center, and Dr. Cynthia Brown suspected abuse. Dr. Ellen Boyd believed that OI possibly explained the fractures.

As a result of a hearing held at the end of July 2002, the trial court concluded in a 4 September 2002 order that C.A.K. was a neglected juvenile and found by clear and convincing evidence that the parents of C.A.K. denied that either of them intentionally harmed C.A.K. The trial court also found that father "has at various times stated that

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these injuries could have been caused by the hospital staff, people visiting in their home, their dog, or that the child had [a bone deficiency,] OI.” Accordingly, the trial court concluded that “it appears that at least some of the physical injuries sustained by the minor child are a result of inappropriate force applied to the child’s body by her caretaker(s) or while in their care.” C.A.K.’s case was reviewed by the district court numerous times thereafter. In conducting a review on 23 October 2002, the trial court found that the parents of C.A.K. “continued to deny any responsibility for the injuries sustained by the minor child. . . .” Again, in a 16 December 2002 review, the trial court found that “[t]he respondent parents deny any responsibility for the injuries sustained by the minor child. . . .” Based on all the court orders concerning C.A.K., it is evident that the parents’ failure to recognize that C.A.K.’s injuries were not the result of OI or some other condition was central to the trial court’s conclusion that C.A.K. would be at risk of injury should the juvenile be returned to the parents’ care. The record also reveals that the parents were actively involved in the juvenile cases concerning C.A.K. and A.K., and were cooperating with social workers and reunification requirements established by the court.

The subject juvenile, A.K., was born on 10 May 2003. On 14 May 2003, the Buncombe County Department of Social Services (DSS) filed a petition alleging that A.K. was neglected. As a result, A.K. was placed in nonsecure custody. When the petition came on for hearing in November 2003, DSS argued that A.K. should be adjudged neglected based upon C.A.K.’s prior adjudication of neglect pursuant to N.C. Gen. Stat. § 7B-101(15) (2005). According to DSS, A.K. was at substantial risk of injury because of the parents’ continuing failure to recognize the true genesis of C.A.K.’s injuries. The trial court took judicial notice of the prior court orders in the matter involving C.A.K., including the adjudication of neglect for C.A.K., and received no additional evidence.

In its order concluding A.K. was a neglected juvenile, the trial court relied upon the prior adjudication of C.A.K. as a neglected juvenile and the review orders concerning C.A.K. discussed above. In its order, the trial court noted that A.K. was an infant. As part of its disposition, the court ordered that A.K. remain with DSS pending the parents’ compliance with numerous conditions.

From this adjudication and disposition order, father appeals. Father contends that the trial court’s conclusion that A.K. is a

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neglected juvenile must be reversed because the trial court, by relying solely on the prior court orders concerning C.A.K., could not conclude that A.K. was at a substantial risk of injury. As part of his argument, father contends that the most recent evidence and findings of fact concerning his failure to acknowledge the cause of C.A.K.'s injuries occurred long before the neglect hearing concerning A.K. This argument has merit.

The district court has subject matter jurisdiction under the Juvenile Code to adjudicate children as abused, neglected and dependent and to enter the appropriate disposition. *In re Van Kooten*, 126 N.C. App. 764, 768, 487 S.E.2d 160, 162 (1997). "The allegations in a petition alleging abuse, neglect, or dependency shall be proved by clear and convincing evidence." N.C. Gen. Stat. § 7B-805 (2005). "Clear and convincing evidence is greater than the preponderance of the evidence standard required in most civil cases." *In re Smith*, 146 N.C. App. 302, 304, 552 S.E.2d 184, 186 (2001). It amounts to "evidence which should fully convince." *Id.* (internal quotation marks omitted). "A proper review of a trial court's finding of . . . neglect entails a determination of (1) whether the findings of fact are supported by 'clear and convincing evidence.'" *In re Pittman*, 149 N.C. App. 756, 763-64, 561 S.E.2d 560, 566 (2002). "The doctrine of collateral estoppel precludes the relitigation of an issue when the issue has previously been litigated and judicially determined." *State ex rel. Tucker v. Frinzi*, 344 N.C. 411, 414 474 S.E.2d 127, 128 (1996).

Our General Assembly has defined a neglected juvenile as:

A juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare; or who has been placed for care or adoption in violation of law. In determining whether a juvenile is a neglected juvenile, it is relevant whether that juvenile lives in a home where another juvenile has died as a result of suspected abuse or neglect or lives in a home where another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home.

N.C. Gen. Stat. § 7B-101(15) (2005).

In interpreting G.S. § 7B-101(15), we have held that a prior adjudication of neglect is a relevant factor in a current adjudication of neglect:

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It is clear from section 7A-517(21) [now G.S. § 7B-101(15)] that evidence of abuse of another child in the home is relevant in determining whether a child is a neglected juvenile. However, it is also clear that the statute does not mandate the result requested by DSS. . . . Rather, the statute affords the trial judge some discretion in determining the weight to be given such evidence. We believe the trial court in the case at hand complied with the statute and considered the evidence as a relevant factor.

. . .

In Re Nicholson and Ford, 114 N.C. App. 91, 94, 440 S.E.2d 852, 854 (1994).

In the instant case, the record reveals that the trial court relied upon all prior orders concerning C.A.K. in entering its adjudication of A.K. as a neglected juvenile. Of these orders, only the adjudication order of C.A.K. as a neglected juvenile included findings of fact that were established by clear and convincing evidence. All subsequent custody review and permanency planning orders for C.A.K.—orders that stated the parents continued to deny culpability or recognize the true cause of C.A.K.'s injuries—included findings of fact that were not established by clear and convincing evidence. Thus, the most recent findings related to the parents' failure to acknowledge the cause of C.A.K.'s injuries that the trial court could properly rely on by collateral estoppel (the ones from the order adjudging C.A.K. a neglected juvenile) were based on a hearing date nine (9) months before the date A.K. was removed from the home and as many as fifteen (15) months before the petition alleging A.K. was a neglected juvenile came on for hearing. Thus, the trial court could not, because of the expiration of these months, find that A.K. was at "substantial risk of neglect" because of father's failure to acknowledge the cause of C.A.K.'s injuries.

Even assuming *arguendo* that the trial court could rely on every finding in all orders concerning C.A.K., including the ones that included findings that were not found by clear and convincing evidence, the date of the last hearing concerning C.A.K. occurred 5 February 2003, three (3) months before the petition alleging A.K. was a neglected juvenile was even filed, and as many as nine (9) months before the petition concerning A.K. came on for hearing. There was no evidence introduced related to the parents' progress or, more particularly, whether one or both of the parents continued to deny the true cause of C.A.K.'s injuries. This was, again, central to the trial

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court's finding that A.K. was at "substantial risk of neglect." Thus, even if the trial court could rely on every finding by collateral estoppel in every order concerning C.A.K., the expiration of time precluded the trial court, on the facts of this case, from finding that A.K. was at substantial risk of neglect.

Consequently, where the trial court did not accept any formal evidence in addition to its consideration of the prior court orders concerning C.A.K., and the only order concerning C.A.K. that contained findings by the clear and convincing standard of proof was from a hearing occurring many months earlier, the trial court could not, on this record, conclude that "the minor child would be at substantial risk of neglect if placed in the custody of the . . . parents at this time."

Reversed.

Judges McCULLOUGH and ELMORE concur.

STATE OF NORTH CAROLINA v. TINA LYNN LOCKLEAR, DEFENDANT

No. COA05-509

(Filed 1 August 2006)

1. Child Abuse and Neglect— bodily injury versus physical injury—sentence not supported by instructions

It was error to sentence defendant for felonious child abuse inflicting serious bodily injury where the jury was only instructed on the lesser offense of felony child abuse inflicting serious physical injury. N.C.G.S. §§ 14-318.4(a), (a3).

2. Child Abuse or Neglect— subject matter jurisdiction—allegation that defendant a parent or caregiver

The trial court failed to gain subject matter jurisdiction, and a conviction for felonious child abuse was vacated, where the indictment did not allege the essential element that defendant was a parent or other person providing care or supervision to a child.

3. Child Abuse and Neglect— child abuse—flawed indictment—lesser offense of misdemeanor assault

A flawed indictment and verdict for felonious child abuse supported the lesser offense of misdemeanor assault.

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Appeal by Defendant from judgment entered 27 September 2004 by Judge Gary L. Locklear in Superior Court, Robeson County. Heard in the Court of Appeals 10 January 2006.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Laura E. Crumpler, for the State.

Paul F. Herzog for defendant-appellant.

WYNN, Judge.

An essential element of felonious child abuse is that injury be inflicted by “[a] parent or any other person providing care to or supervision of a child less than 16 years of age[.]”¹ Defendant argues that since the indictment failed to include this element, her conviction of felony child abuse must be vacated. Because the indictment and jury verdict only support the entry of judgment for the crime of misdemeanor assault, we must vacate Defendant’s conviction for felony child abuse and remand for re-sentencing.

On 1 October 2001, the grand jury of Robeson County indicted Defendant Tina Lynn Locklear for felonious child abuse pursuant to section 14-318.4(a) of the North Carolina General Statutes. The indictment alleged that Ms. Locklear

unlawfully, willfully and feloniously did, intentionally inflict serious bodily injury, blunt force trauma, on [the victim], who was 2 years old and thus under 16 years of age, all against the form of the statute in such case made and provided and against the peace and dignity of the State.

Nowhere did the indictment allege that Ms. Locklear was “[a] parent or any other person providing care to or supervision of a child[.]” N.C. Gen. Stat. §§ 14-318.4(a), (a3) (2005).

Following presentation of the evidence, the trial court instructed the jury regarding felonious child abuse as follows:

For you to find the defendant guilty of this offense, the State must prove three things beyond a reasonable doubt:

First, that the defendant was the parent of the child;

Second, that, at the time, the child had not reached her sixteenth birthday;

1. N.C. Gen. Stat. §§ 14-318.4(a), (a3) (2005).

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Third, that the defendant intentionally assaulted the child which proximately resulted in serious physical injury to the child.

...

Regarding the definition of a serious injury: A “serious physical injury” is such physical injury as causes great pain and suffering.

The trial court repeated the above-stated instructions for felonious child abuse inflicting “serious *physical* injury” three times. At no point did the trial court instruct the jury regarding “serious *bodily* injury” as alleged in the indictment.

Upon consideration of the evidence, the jury found Ms. Locklear guilty of “Felony Child Abuse-Serious Injury.” From this conviction, Ms. Locklear appeals contending it was error to sentence her for felonious child abuse inflicting serious *bodily* injury, a Class C felony, where the jury was only instructed on the lesser offense of felony child abuse inflicting serious *physical* injury, a Class E felony; and, the indictment failed to allege that she was either a parent or caretaker of the child, an essential element of the crime of felonious child abuse. We must agree.

I.

[1] Two separate crimes of felonious child abuse under North Carolina law are relevant to this appeal—(1) felonious child abuse inflicting serious *bodily* injury and (2) felonious child abuse inflicting serious *physical* injury.

Felonious child abuse inflicting serious *bodily* injury is defined by section 14-318.4(a3), which states:

A parent or any other person providing care to or supervision of a child less than 16 years of age who intentionally inflicts any serious bodily injury to the child or who intentionally commits an assault upon the child which results in any serious bodily injury to the child, or which results in permanent or protracted loss or impairment of any mental or emotional function of the child, is guilty of a Class C 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.

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N.C. Gen. Stat. § 14-318.4(a3).

The separate crime of felonious child abuse inflicting serious *physical* injury is defined under section 14-318.4(a), which states:

A parent or any other person providing care to or supervision of a child less than 16 years of age who intentionally inflicts any serious physical injury upon or to the child or who intentionally commits an assault upon the child which results in any serious physical injury to the child is guilty of a Class E felony, except as otherwise provided in subsection (a3) of this section.

N.C. Gen. Stat. § 14-318.4(a). Felonious child abuse inflicting serious *physical* injury is defined as “injuries that cause great pain and suffering.” *State v. Phillips*, 328 N.C. 1, 20, 399 S.E.2d 293, 303, *cert. denied*, 501 U.S. 1208, 115 L. Ed. 2d 977 (1991).

Felonious child abuse inflicting serious *physical* injury is punishable as a Class E felony, whereas felonious child abuse inflicting serious *bodily* injury is a more serious crime punishable as a Class C felony. *See* N.C. Gen. Stat. §§ 14-318.4(a), (a3).

Here, the indictment charged Ms. Locklear with “inflicting serious *bodily* injury” whereas the record shows that the trial court instructed the jury regarding “serious physical injury”, a lesser crime. Because the trial court failed to instruct the jury regarding “serious bodily injury” as alleged in the indictment, it was error to sentence Ms. Locklear for felonious child abuse inflicting serious *bodily* injury, a Class C felony, where the jury was only instructed on the lesser offense of felony child abuse inflicting serious *physical* injury, a Class E felony.

II.

[2] Nonetheless, “where the indictment does sufficiently allege a lesser-included offense, we may remand for sentencing and entry of judgment thereupon.” *State v. Bullock*, 154 N.C. App. 234, 245, 574 S.E.2d 17, 24 (2002). But we cannot remand this matter for re-sentencing on felony child abuse inflicting serious *physical* injury because the indictment in this case failed to allege an essential element required for proof of that crime—that injury be inflicted by “[a] parent or any other person providing care to or supervision of a child less than 16 years of age[.]”² N.C. Gen. Stat. § 14-318.4(a); *Phillips*,

2. This element is also required for proof of the crime of felonious child abuse inflicting serious bodily injury. N.C. Gen. Stat. § 14-318.4(a3).

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328 N.C. at 20, 399 S.E.2d at 302 (defining felony child abuse as “the intentional infliction of serious injuries by a caretaker to a child” (emphasis added)); see also *State v. Carrilo*, 149 N.C. App. 543, 549, 562 S.E.2d 47, 51 (2002) (noting that “the evil that the legislature intended to suppress by the felony child abuse statute is clearly the intentional infliction of serious injury upon a child who is dependent upon another for his or her care or supervision”); *State v. Qualls*, 130 N.C. App. 1, 8, 502 S.E.2d 31, 36 (1998) (stating that, “All that is required to indict a defendant for felonious child abuse is an allegation that the defendant was the parent or guardian of the victim, a child under the age of 16, and that the defendant intentionally inflicted any serious injury upon the child.”), *aff’d per curiam*, 350 N.C. 56, 510 S.E.2d 376 (1999).

“An indictment is insufficient if it fails to allege the essential elements of the crime charged as required by Article I, Section 22 of the North Carolina Constitution and our legislature in N.C.G.S. § 15-144.” *Bullock*, 154 N.C. App. at 244, 574 S.E.2d at 23. “When an indictment has failed to allege the essential elements of the crime charged, it has failed to give the trial court subject matter jurisdiction over the matter, and the reviewing court must arrest judgment.” *Id.* Failure of a criminal pleading to charge the essential elements of the alleged offense is an error of law which may be corrected upon appellate review even where the defendant fails to object at the trial level. *State v. Sturdivant*, 304 N.C. 293, 308, 283 S.E.2d 719, 729 (1981); see also *State v. Wilson*, 128 N.C. App. 688, 497 S.E.2d 416 (1998) (noting that a challenge to the sufficiency of an indictment may be made for the first time on appeal).

Here, the indictment failed to allege Ms. Locklear was “[a] parent or any other person providing care to or supervision of a child,” which is an essential element of the crime of felonious child abuse. See N.C. Gen. Stat. §§ 14-318.4(a), (a3) (injury must be inflicted by “[a] parent or any other person providing care to or supervision of a child less than 16 years of age”); *Phillips*, 328 N.C. at 20, 399 S.E.2d at 302. As such, the trial court failed to gain subject matter jurisdiction over the matter, and we must therefore vacate Ms. Locklear’s conviction of felonious child abuse. *Bullock*, 154 N.C. App. at 244, 574 S.E.2d at 23.

III.

[3] Although the indictment fails to allege the crime of felonious child abuse, it does sufficiently allege the lesser-included offense of

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misdemeanor assault on a child under section 14-33(c) of the North Carolina General Statutes which states, in pertinent part as follows:

Unless the conduct is covered under some other provision of law providing greater punishment, any person who commits any assault, assault and battery, or affray is guilty of a Class A1 misdemeanor if, in the course of the assault, assault and battery, or affray, he or she:

(1) Inflicts serious injury upon another person . . .

(3) Assaults a child under the age of 12 years; . . .

N.C. Gen. Stat. § 14-33(c) (2005).

Here, the indictment charged Ms. Locklear with felonious child abuse inflicting serious injury upon a child, and the trial court instructed the jury regarding felonious child abuse inflicting serious physical injury. In doing so, the trial court instructed the jury that to find Ms. Locklear guilty of felonious child abuse, it had to find beyond a reasonable doubt that Ms. Locklear intentionally assaulted the child, resulting in serious physical injury to the child. The jury found Ms. Locklear guilty of felonious child abuse inflicting serious injury. As such, the jury necessarily found that Ms. Locklear assaulted the child, resulting in serious injury to the child. Thus, the indictment and jury verdict support the entry of judgment for the crime of Class A1 misdemeanor assault.

In sum, we vacate the judgment of the trial court and remand Ms. Locklear's case for re-sentencing on the crime of Class A1 misdemeanor assault.

Vacated and remanded for re-sentencing.

Judges HUNTER and JACKSON concur.

ALLSTATE INS. CO. v. STILWELL

[176 N.C. App. 738 (2006)]

ALLSTATE INSURANCE COMPANY, PLAINTIFF v. ELIZABETH CHANEY STILWELL, ADMINISTRATRIX OF THE ESTATE OF DENNIS RAY STILWELL, JR., DECEASED; GMAC INSURANCE MANAGEMENT CORPORATION; DENNYSE RAYANNE NICOLE STILWELL, A MINOR, DEFENDANT

No. COA05-1393

(Filed 1 August 2006)

Insurance— UIM—number of policies—multiple numbers for one policy

The trial court in a declaratory judgment action properly granted summary judgment for plaintiff Allstate in a UIM action in which the question was the number of insurance policies issued by Allstate insuring five vehicles. Allstate consistently and without contradiction maintained both before and after the accident in question that it had issued but a single policy, with the use of two policy numbers being a concession to computer limitations.

Appeal by defendant from order entered 28 June 2005 by Judge Robert C. Ervin in the Superior Court in Caldwell County. Heard in the Court of Appeals 11 May 2006.

Morris, York, Williams, Surlis & Barringer, L.L.P., by John P. Barringer and Keith B. Nichols, for plaintiff-appellee.

Byrd, Byrd, Ervin, Whisnant & McMahan, P.A., by Robert K. Denton and Lawrence D. McMahan, Jr., for defendant-appellant.

HUDSON, Judge.

On 8 October 2004, plaintiff Allstate Insurance Company (“Allstate”) asked the court to declare its obligations regarding insurance policies issued to a driver whose negligence caused the death of Dennis Ray Stilwell, Jr. (“decedent”), the spouse of defendant Elizabeth Chaney Stilwell (“defendant”). Each party moved for summary judgment, and on 21 June 2005, the trial court granted summary judgment to Allstate. Defendant appeals. As discussed below, we affirm.

Defendant’s spouse died on 22 September 2003 as the result of the negligent operation of a car driven by Joshua Chad Moses. Moses was covered by two liability policies issued by GMAC Insurance, each with liability limits of \$30,000 per person. Defendant reached a set-

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tlement with GMAC for \$60,000, exhausting both liability policies, but reserving her right to recover additional damages under any applicable underinsured motorist (“UIM”) coverage. At the time of his death, decedent was the son of Dennis and Frankie Stilwell (“the Stilwells”), a resident of their household, and thus, an insured family member under any UIM coverage provided to the Stilwells. The Stilwells had automobile insurance coverage provided by plaintiff. Defendant made a claim for additional damages from plaintiff, contending that Allstate had issued two policies to the Stilwells, each of which included UIM coverage. Allstate countered that only one policy had been issued to the Stilwells with UIM coverage limited to \$50,000, less than the amount defendant recovered from the exhausted liability policies. The present declaratory judgment action ensued.

Defendant argues that the trial court erred granting summary judgment to Allstate based on the ruling that the Stilwells had only a single insurance policy with Allstate. We do not agree.

At the time of decedent’s death, he was covered by Allstate policy 130072640, issued to the Stilwells, which covered two of their vehicles. Policy 130072640 provided UIM coverage in the amount of \$50,000. Because of Allstate’s computer system limitations and the fact that the Stilwell family owned and insured more than four vehicles, Allstate issued a second policy reference number (13017390), referred to as a multiple record policy (“MRP”) number, which covered three additional vehicles. The sworn affidavit of Allstate employee Carol Edens states that policy 130072640 and MRP 13017390 comprised only one automobile insurance policy. Uncontroverted evidence indicates that all policy premiums paid for the Stilwells’ five vehicles were billed under policy 130072640 in a single bill. The invoice for policy 130170370 states that UIM coverage for bodily injury is “charged on policy 130072640,” and shows no balance due; the invoice for policy 130072640 shows a charge of \$25 for such coverage. In addition, Edens’ affidavit indicated that the premiums paid only entitled the Stilwells to UIM coverage in the amount of \$50,000 per person. Further, Allstate submitted numerous letters sent to the Stilwells, six before decedent’s death and one after, explaining that they had only a single policy with Allstate. These letters explained:

Because you have more than four vehicles to protect, you have two sets of policy Declarations with two policy numbers. In effect, you have one policy with two policy numbers.

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Defendant objected to the admission of this evidence, contending that it constituted merely the affiant's legal conclusions. Our review of the affidavit reveals that it contains nothing more than uncontroverted factual assertions about Allstate's billing practices and internal procedures, which the trial court properly considered. In addition, defendant cites *Ridenhour v. Life Ins. Co. of Virginia*, 46 N.C. App. 765, 769, 266 S.E.2d 372, 374 (1980), for the proposition that an insurance agent's interpretation of the terms of an insurance policy is not admissible to contradict the written policy. Here, we conclude that nothing in the affidavits contradicts the terms of the written policy, as the declaration contains no language indicating that the Stilwells had two policies with Allstate.

In *Iodice v. Jones*, plaintiffs sought "declaratory judgment on the issue of whether they had purchased one or two underinsured motorist (UIM) policies from GEICO [their automobile insurance company]." 135 N.C. App. 740, 741, 522 S.E.2d 593, 593 (1999). In *Iodice*, GEICO had informed the plaintiffs that only three vehicles could be covered under a single policy and that, in order to cover their fourth vehicle GEICO "would need to issue a second policy." *Id.* at 742, 522 S.E.2d at 594. In addition, GEICO sent plaintiffs separate billings with different renewal dates for each policy. *Id.* Most importantly, "GEICO submitted affidavits, in response to Plaintiffs' request for the production of documents, plainly stating that separate policies of insurance were 'issued.'" *Id.* at 745, 522 S.E.2d at 596. Although GEICO submitted an affidavit from an underwriting manager stating the second policy was only a extension and not a separate policy, this Court concluded that this contradictory evidence revealed "nothing more than an ambiguity with respect to the question of whether there is one policy or two policies[.]" *Id.*

Here, in contrast, the undisputed facts reveal that Allstate has consistently and without contradiction maintained that it issued the Stilwells only a single policy. Unlike the insurance company in *Iodice*, Allstate here has never stated that it issued two separate policies to the Stilwells; to the contrary it has repeatedly explained, both before and after decedent's death, that the Stilwells had but a single policy and that the use of two policy numbers was merely a concession to computer limitations. On these facts, the trial court properly granted summary judgment to plaintiff.

Affirmed.

Judges McCULLOUGH and TYSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 1 AUGUST 2006

B&L SURVEYS v. CLINE No. 05-1436	Davidson (05CVD656)	Reversed and remanded
BOONE v. MOORE No. 05-1321	Halifax (02CVS657)	Dismissed
BURNETTE v. CITY OF GOLDSBORO No. 05-1277	Wayne (04CVS1383)	Affirmed
ELLIS v. INTERNATIONAL HARVESTER CO. No. 04-1114	Buncombe (02CVS5019)	Affirmed
FICKEL v. FICKEL No. 05-1062	Buncombe (03CVD4357)	Affirmed
HILL v. HILL No. 05-1459	Robeson (02CVD4598)	Affirmed
IN RE ADOPTION OF LMJS No. 05-1103	Wake (04SP2345)	Dismissed
IN RE A.M.A. No. 05-1472	Polk (02J18)	Reversed and remanded
IN RE D.M.B., K.S.B., Z.N.B. No. 05-1139	Cabarrus (03J182) (03J183) (03J184)	Affirmed
IN RE D.N.U.B. & D.T.B. No. 05-1375	Guilford (03J8) (03J9)	Affirmed
LANE v. BEALLS, INC. No. 05-578	Indus. Comm. (I.C. #220208)	Affirmed in part; remanded in part
LINKENHOGER v. RENAISSANCE CONSTR. CO. No. 05-1117	Dare (04CVS45)	Affirmed
LOCKE v. GLENN No. 05-1555	Randolph (04CVS1483)	Affirmed
MALONE v. DEAN No. 05-1426	Franklin (04CVS1048)	Affirmed
MARLOWE v. MARLOWE No. 05-1338	Buncombe (04CVD3773)	Affirmed

McGEE v. McGEE (SHARPE) No. 05-1290	Rutherford (00CVD686)	Affirmed in part, reversed and remanded in part
PEGG v. DOE No. 05-1490	Orange (04CVS891)	Vacated and remanded
STATE v. BERGHELLO No. 05-944	Catawba (04CRS52374)	No error
STATE v. BIGGS No. 05-1448	Washington (95CRS2086)	No prejudicial error
STATE v. BRYANT No. 02-1706-2	Forsyth (01CRS60165) (02CRS1454) (01CRS60165) (02CRS1454)	No error
STATE v. DAVIS No. 05-1056	Forsyth (03CRS53434)	No error
STATE v. FRAZIER No. 05-800	Mecklenburg (03CRS200251) (03CRS205719)	No error
STATE v. GRIFFIN No. 05-807	Forsyth (03CRS56036) (03CRS56364)	No error
STATE v. HESS No. 05-1366	Cumberland (02CRS61458) (02CRS61506) (02CRS61542) (02CRS61568)	No error
STATE v. JOYNER No. 05-1124	Durham (03CRS54523) (03CRS54524) (03CRS54525)	No error
STATE v. KIRBY No. 05-1179	Caldwell (04CRS1187)	No error
STATE v. OWENS No. 05-1275	Henderson (04CRS57653)	No error
STATE v. POKE No. 05-1003	Guilford (04CRS24266) (04CRS35283)	No error
STATE v. SHUFORD No. 05-1381	Iredell (04CRS54434)	No error
STATE v. THORNE No. 05-1327	Edgecombe (03CRS53759)	No error

STATE v. ZAMORA No. 05-1576	Haywood (05CRS50085)	No error
TAYLOR v. TOWN OF RIVER BEND No. 05-841	Craven (04CVS2193)	Affirmed
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ADMINISTRATIVE LAW

Appeal from school board—issue of fact—whole record review—The trial court correctly engaged in whole record review where a board of education's motivation for not renewing a teacher's contract was manifestly a question of fact. **Davis v. Macon Cty. Bd. of Educ.**, 646.

Employment Security Commission findings—no exception—no trial court authority to consider—The superior court had no authority to determine that Employment Security Commission findings were not supported by the evidence and then make its own findings where petitioner had not excepted to the ESC findings. The trial court compounded its error by relying on a decision by an appeals referee in favor of a co-worker; by statute, that decision was not admissible or binding. **Woodle v. Onslow Cty. ABC Bd.**, 372.

Judicial review of agency decision—petition sufficient to challenge findings of fact—The superior court did not err by concluding that the petition for judicial review was sufficient to challenge the Employment Security Commission's (ESC) findings of fact, because: (1) the petition stated petitioner was challenging the ESC's findings of fact on the grounds that they were not supported with competent record evidence and were inconsistent with applicable law; and (2) given the facts and circumstances of the instant case, the petition was sufficient to permit judicial review. **Binney v. Banner Therapy Prods.**, 417.

Wrecker services—safety exception—not preempted by federal law—The trial court did not err by granting summary judgment for defendants in an action challenging the Highway Patrol's regulation of private wrecker services. The General Assembly delegated to the Department of Crime Control and Public Safety and the Highway Patrol the authority to make regulations governing inclusion in the Patrol's Wrecker Rotation List. Those regulations are not preempted by federal law because they fall within the safety regulation exception of 49 U.S.C. § 14501(c)(2)(A). **Ramey v. Easley**, 197.

AIDING AND ABETTING

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APPEAL AND ERROR

Absence of record references—assignments of error and brief—no prejudice—importance of issue—Plaintiffs' appeal was not dismissed in a case alleging racial discrimination, despite their failure to provide adequate transcript or record references in their assignments of error and brief in violation of the Rules of Appellate Procedure, where the assignments of error were specific enough that defendants were not substantially prejudiced. **Hammonds v. Lumbee River Elec. Membership Corp.**, 1.

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to file a new motion for appropriate relief in the superior court, because this motion did not amend the previous motion nor was it timely filed. **State v. Brigman, 78.**

Appealability—appointment or denial of receiver—The appointment or denial of a receiver is a matter of discretion under current jurisprudence, to be reviewed under statutes dealing with interlocutory appeals, which allow an immediate appeal for the loss of substantial rights. **Barnes v. Kochhar, 489.**

Appealability—denial of appointment of receiver—substantial rights—The denial of plaintiffs' motion for appointment of a receiver was immediately appealable. Plaintiffs' right to preservation of assets and corporate opportunities of the company founded by plaintiff Barnes and defendant Wanda Kochhar (Precision) was substantially affected by the denial of a receiver. The failure to appoint a receiver for questions involving the management of a related company (Outcomes) to which Kochhar allegedly transferred Precision's corporate opportunities did not involve a substantial right since plaintiffs are not shareholders of Outcomes. **Barnes v. Kochhar, 489.**

Appealability—denial of summary judgment—Although caveator contends the trial court erred in a contested will case by denying his motion for summary judgment with respect to the judgment probating the will, the trial court's denial of summary judgment cannot constitute reversible error when the issues in this case were decided following a trial on the merits. **In re Will of Yelverton, 267.**

Appealability—discovery orders—privilege against self-incrimination—physician-patient privilege—Interlocutory discovery orders affected a substantial right and were immediately appealable by defendant where defendant asserted his Fifth Amendment privilege against self-incrimination and the physician-patient privilege as reasons for not producing documents and responding to plaintiff's discovery request in an action arising out of an automobile accident. **Roadway Express, Inc. v. Hayes, 165.**

Appealability—interlocutory order—oral certification—reviewed for loss of substantial right—An interlocutory order was reviewed for the loss of a substantial right where the trial court orally certified its ruling as immediately appealable but the record contains no written certification order. **Rauch v. Urgent Care Pharm., Inc., 510.**

Appealability—interlocutory order—summary judgment—substantial right—title to disputed property—Although plaintiff prospective purchasers' appeal from the denial of their motion for summary judgment and grant of summary judgment in favor of defendant purchaser is an appeal from an interlocutory order based on the fact that defendant vendor elected not to participate in this appeal and the trial court did not certify the appeal under N.C.G.S. § 1A-1, Rule 54(b), interlocutory orders concerning title may be immediately appealed as vital preliminary issues involving substantial rights adversely affected. Also, defendant vendor stipulated that title to the disputed property rests in either plaintiffs or defendant purchaser and its liability, if any, cannot be determined until a final decision is entered on appeal. **Watson v. Millers Creek Lumber Co., 552.**

Appealability—lack of personal jurisdiction—lack of subject matter jurisdiction—The trial court's dismissal of plaintiff's claims based on a lack of

APPEAL AND ERROR—Continued

personal jurisdiction was immediately appealable. However, the dismissal of plaintiff's alter ego claim based on lack of subject matter jurisdiction was not immediately appealable, and her request to treat her appeal as a petition for certiorari was denied because the request did not comply with N.C. Appellate Rule 21. **Rauch v. Urgent Care Pharm., Inc.**, 510.

Appealability—same factual issues, different legal issues—no substantial right—Plaintiff did not show that she would lose a substantial right without an immediate appeal based on inconsistent verdicts where there would be a correspondence between the factual issues but not the legal issues. **Rauch v. Urgent Care Pharm., Inc.**, 510.

Assignment of error—conclusion—error not properly assigned to underlying finding—The appellate court did not consider an assignment of error that concerned only the validity of a medical non-compete agreement notwithstanding an AMA ethics provision where plaintiffs did not properly assign error to underlying finding concerning that provision. **Calhoun v. WHA Med. Clinic, PLLC**, 585.

Assignments of error—failure to cite record pages—An appeal was heard despite the failure to cite record pages corresponding with each assignment of error where the appellate court was able to determine the issues in the case. **Davis v. Macon Cty. Bd. of Educ.**, 646.

Assignments of error—insufficiency—Assignments of error were deemed abandoned where defendant merely recited the standards of review and stated that he chose not to elaborate other than to state the argument and cite authorities for the court's review. **State v. Taylor**, 395.

Assignments of error—overbroad—An overbroad assignment of error did not preserve for appellate review the contention that a finding concerning a medical non-compete clause and AMA ethics was “contrary to law.” **Calhoun v. WHA Med. Clinic, PLLC**, 585.

Broadside assignments of error—public interest issues—Appellate Rule 2—An appeal from an order involving a group home in a subdivision with contrary restrictive covenants was heard under Appellate Rule 2 despite broadside assignments of error because the case presented public interest issues. **Hedingham Cmty. Ass'n v. GLH Builders, Inc.**, 635.

Law of the case—preservation of issue by objection at trial—The Court of Appeals would not review the admission of hearsay testimony from a social worker in a child neglect case where the issue had already been ruled upon in a prior appeal. The failure to assign as error the question of whether there was ineffective assistance of counsel in not objecting to this evidence at trial meant that the question was not properly before the Court of Appeals. **In re T.S., III & S.M.**, 110.

Mootness—prior record level—Although defendant contends the trial court erred in a multiple obtaining property by false pretenses, multiple forgery, and multiple uttering case by calculating defendant's prior record level, this argument is dismissed as moot because the case has already been remanded for resentencing, and the trial court is required to calculate defendant's prior record level upon resentencing. **State v. King**, 122.

APPEAL AND ERROR—Continued

Motion for appropriate relief—recantation of witness's testimony—Defendant's motion for appropriate relief must be remanded based upon the alleged recantation of the testimony of defendant's wife, because the Court of Appeals cannot determine the veracity of the witness's testimony, nor can it discern whether there is a reasonable possibility that a different result would have been reached at trial had the witness's testimony at trial been different or non-existent. **State v. Brigman, 78.**

Notice of appeal—untimely—The failure to timely file a notice of appeal meant that a portion of an appeal (by the propounder of a will) was not properly before the Court of Appeals. **In re Will of McFayden, 704.**

Preservation of issues—argument not supported by authority—deemed abandoned—An argument not supported by authority was not properly before the Court of Appeals. **Bombardier Capital, Inc. v. Lake Hickory Watercraft, Inc., 535.**

Preservation of issues—assignment of error—argument not included—An argument not listed in the assignment of error was not addressed. **Davis v. Macon Cty. Bd. of Educ., 646.**

Preservation of issues—brief—issue not adequately argued—abandoned—An argument was deemed abandoned where it was stated in the heading but not adequately argued. **In re T.S., III & S.M., 110.**

Preservation of issues—contention not argued—abandoned—Plaintiffs abandoned by not arguing an assignment of error that testimony of the purpose of a clause in a medical non-compete agreement was irrelevant. **Calhoun v. WHA Med. Clinic, PLLC, 585.**

Preservation of issues—costs—premature argument—Although defendants contend the trial court erred by awarding plaintiff costs in this action, this argument is premature because the trial court has not yet entered a specific order providing the nature or amount of costs awarded to plaintiff. **Duke Energy Corp. v. Malcolm, 62.**

Preservation of issues—evidence previously admitted without objection—The benefit of an objection is lost if the evidence has previously been admitted without objection. Defendant here failed to preserve his objection for appellate review where he did not object when the prior written statements were offered or admitted, but did object when the State sought to publish the statements to the jury. The court properly gave a limiting instruction. **State v. Taylor, 395.**

Preservation of issues—failure to cite authority—Although defendants contend the trial court erred by granting injunctive relief that was inconsistent with the consent judgment, this assignment of error is dismissed because defendant's argument is not supported by relevant authority as required by N.C. R. App. P. 28(b)(6). **Duke Energy Corp. v. Malcolm, 62.**

Preservation of issues—failure to cite authority—Caveator's appeal in a contested will case from the trial court's 17 December 2004 ruling that caveator could not retain possession of the testator's real property pending appeal of the caveat proceeding is dismissed, because caveator failed to cite any statutes, case

APPEAL AND ERROR—Continued

law, or other authority in support of his arguments as to why the order was erroneous as required by N.C. R. App. P. 28(b)(6). **In re Will of Yelverton, 267.**

Preservation of issues—failure to cite authority—argument not properly before appellate court—An argument by the caveator of a will was not properly before the Court of Appeals where no authority was cited. **In re Will of McFayden, 704.**

Preservation of issues—failure to object—Defendant's contention that the trial court erred by admitting certain photographs was heard on appeal despite his failure to object at trial (a motion in limine is not sufficient) where he relied on the amended Evidence Rule 103(a) in effect at the time of trial, which has recently been held to be inconsistent with Appellate Rule 10(b)(1). Refusing to review defendant's appeal would be a manifest injustice because he relied on a procedural statute presumed constitutional at the time of trial. **State v. Brown, 189.**

Preservation of issues—failure to renew motion for directed verdict—issue not preserved—Plaintiff's failure to renew its motion for a directed verdict at the close of all the evidence meant that it did not preserve for appellate review the denials of its motions for a directed verdict and for a motion for a new trial or a judgment n.o.v. **City of Charlotte v. Hurlahe, 144.**

Preservation of issues—issue not raised at trial—An issue not raised at trial or assigned as error was not preserved for appellate review. **City of Charlotte v. Hurlahe, 144.**

Preservation of issues—motion for directed verdict—motion for judgment notwithstanding verdict—waiver—Although caveator contends the trial court erred in a contested will case by denying his motion for a directed verdict at the close of propounder's evidence and motion for judgment notwithstanding the verdict (JNOV), caveator's arguments were not properly preserved because: (1) although caveator moved for directed verdict at the close of propounder's evidence, he did not renew his motion at the close of all the evidence and thus waived his directed verdict motion; and (2) caveator's waiver of the motion for a directed verdict also precludes a review of his motion for JNOV. **In re Will of Yelverton, 267.**

Preservation of issues—motion in limine—renewal of objection—Defendant's contention that the trial court erred by denying his motion in limine was reviewed on appeal, despite his failure to renew his objections at trial. N.C.G.S. § 8C-1, Rule 103 was then presumed constitutional, and the trial court assured defendant that he did not need to renew his objections. **State v. Grant, 565.**

Preservation of issues—no argument in brief—Assignments of error concerning findings that a parent lacked the ability or willingness to establish a safe home were deemed abandoned where her brief contained no arguments challenging the findings. **In re L.A.B., 295.**

Preservation of issues—psychologist-patient privilege—failure to object on basis of privilege—waiver—Although respondent mother contends the trial court violated her psychologist-patient privilege in a child neglect case by considering evidence in the form of a letter and testimony of a psychologist, she failed to preserve this question for appellate review, because: (1) although respondent

APPEAL AND ERROR—Continued

objected to various statements that the psychologist made during the hearing and to admission of the letter from the psychologist to respondent mother's social worker, she did not object on the basis of privilege but instead based on hearsay and expert qualifications; (2) respondent's failure to object to the psychologist's testimony on the basis of privilege amounted to a waiver of her right to claim the psychologist-client privilege on appeal; (3) the psychologist-patient privilege does not operate to exclude evidence regarding the abuse or neglect of a child; and (4) N.C.G.S. § 8-53.3 permits the trial judge to compel disclosure of otherwise privileged information if in his or her opinion disclosure is necessary to a proper administration of justice. **In re K.D.**, 322.

Relevancy—standard of review—A trial court's rulings on relevancy are not discretionary and are not reviewed on appeal for abuse of discretion, but they are given great deference. **State v. Grant**, 565.

Termination of parental rights—only one ground considered—Arguments on appeal regarding further grounds for terminating parental rights were not reached after it was concluded that one statutory ground existed. **In re L.A.B.**, 295.

ARBITRATION AND MEDIATION

Prejudgment interest left open in award—later calculation by judge—The trial court did not err by adding prejudgment interest to an arbitration award where the arbitrator had expressly left the amount of prejudgment interest open. Both the arbitration agreement as understood by the parties and the award contemplated prejudgment interest; the judge's mathematical calculation of the interest award did not amount to a modification of the award. **Lovin v. Byrd**, 381.

ATTORNEYS

Attorney fees—non-compete agreement—findings not sufficient—An award of attorney fees under N.C.G.S. § 6-21.2 in a declaratory judgment action determining that a covenant not to compete and a liquidated damages provision in plaintiff doctors' contract of employment were enforceable is remanded for appropriate factual findings where the trial court made no findings as to whether the employment contract is a "printed or written instrument, signed or otherwise executed by the obligor, which evidences on its face a legally enforceable obligation to pay money" or whether the contract relates to commercial transactions within the meaning of the statute. **Calhoun v. WHA Med. Clinic, PLLC**, 585.

Malpractice—disbarment—denial of motion for new trial—abuse of discretion standard—The State Bar Disciplinary Hearing Commission did not abuse its discretion by denying defendant attorney's motion for a new trial even though one of the DHC panel members failed to recuse herself on her own motion after learning that an attorney from the Attorney General's office, where she also worked, had prepared an affidavit for one of the prosecuting witnesses, and after hearing evidence concerning the Attorney General's investigation of a convicted felon who worked on postconviction cases with defendant, because nothing in the record indicated that the panel member was unable to render a fair

ATTORNEYS—Continued

and impartial decision on defendant's interactions with his clients. **N.C. State Bar v. Leonard, 432.**

Malpractice—embezzlement of client funds—The trial court did not err by concluding the State Bar Disciplinary Hearing Commission's (DHC) findings of fact were competent to support its conclusions that defendant attorney violated the Rules of Professional Conduct based on mismanagement of a client's settlement money in defendant's trust account. **N.C. State Bar v. Leonard, 432.**

Malpractice—incompetent representation of a client—sharing legal fees with a nonlawyer—failing to properly supervise—willfully mismanaging client funds—The trial court did not err by concluding the State Bar Disciplinary Hearing Commission's (DHC) findings of fact were competent to support its conclusions that defendant attorney violated the Rules of Professional Conduct based on incompetent representation of a client in a domestic relations case, sharing legal fees with a nonlawyer, failing to properly supervise a nonlawyer, and willfully mismanaging client funds entrusted to him in a fiduciary capacity. **N.C. State Bar v. Leonard, 432.**

Malpractice—sanctions—disbarment—The State Bar Disciplinary Hearing Commission (DHC) did not err by disbarring defendant attorney based on violations of multiple Rules of Professional Conduct. **N.C. State Bar v. Leonard, 432.**

BURGLARY AND UNLAWFUL BREAKING OR ENTERING

Entry beyond public area—initial consent void ab initio—An entry with the owner's consent cannot be punished, even if it is with felonious intent, but subsequent conduct can render the consent void ab initio. The trial court here correctly denied motions to dismiss charges of felonious breaking or entering and felonious larceny where defendant entered a law firm which had a reception area open to the public, went beyond that area to commit a theft, and lied to a member of the firm about his reason for being there. **State v. Brooks, 211.**

CHILD ABUSE AND NEGLECT

Bodily injury versus physical injury—sentence not supported by instructions—It was error to sentence defendant for felonious child abuse inflicting serious bodily injury where the jury was only instructed on the lesser offense of felony child abuse inflicting serious physical injury. **State v. Locklear, 732.**

Child abuse—flawed indictment—lesser offense of misdemeanor assault—A flawed indictment and verdict for felonious child abuse supported the lesser offense of misdemeanor assault. **State v. Locklear, 732.**

Delay in issuing order—not prejudicial—The assertion that the trial court's delay in issuing its order in a child neglect and abuse case kept the mother away from the children without just cause and was very hard for the mother did not establish prejudice. The mother could have requested a review hearing and sought custody if she had complied with conditions such as remaining drug free. Moreover, the interests of the child are paramount. **In re T.S., III & S.M., 110.**

CHILD ABUSE AND NEGLECT—Continued

Dependency—sufficiency of evidence—alternative child care arrangement—The trial court erred in a child abuse case by adjudicating the minor child as dependent, and the case is remanded for further findings as to whether the mother lacks an appropriate alternative child care arrangement for the child, where the mother had voluntarily placed the child with an aunt. **In re K.D.**, 322.

Neglect—sufficiency of evidence—The trial court did not err by adjudicating a minor child as neglected, because: (1) although respondent mother assigned error to the adjudication order's first finding of fact, her brief failed to contain any argument challenging the first finding of fact which is thus deemed abandoned under N.C. R. App. P. 28(a); (2) as for the remaining assignments of error in the adjudication order, a single assignment of error generally challenging the sufficiency of evidence to support numerous findings of fact is broadside and ineffective; and (3) respondent's struggles with her parenting skills, domestic violence, and anger management, as well as her unstable housing situation, have the potential to significantly impact her ability to provide proper care, supervision, or discipline for the minor child. **In re K.D.**, 322.

Permanency planning order—not final—appeal interlocutory—A permanency planning order for a neglected and dependent juvenile directing DSS to pursue adoption after the death of the mother was not a final order as set forth in N.C.G.S. § 7B-1001, and the father's appeal was dismissed as interlocutory. **In re A.R.G.**, 205.

Remand—findings—supported by evidence—There was no merit in a child neglect case to an objection to certain findings on remand that were not in the original order. The challenged findings were supported by clear and convincing evidence of domestic violence, illegal drug activity, illegal firearms possession, and repeated and violent angry outbursts in the presence of the children. **In re T.S.**, III & S.M., 110.

Standard of proof—prior orders involving sibling—insufficiency—Allegations in a petition alleging child abuse, neglect or dependency shall be proven by clear and convincing evidence. The trial court here could not conclude that the child would be at substantial risk of neglect in the custody of the parents because it considered only prior orders concerning a sibling, and the only order concerning the sibling that contained findings by the clear and convincing standard of proof was from a hearing many months earlier. **In re A.K.**, 727.

Subject matter jurisdiction—allegation that defendant a parent or caregiver—The trial court failed to gain subject matter jurisdiction, and a conviction for felonious child abuse was vacated, where the indictment did not allege the essential element that defendant was a parent or other person providing care or supervision to a child. **State v. Locklear**, 732.

CITIES AND TOWNS

Discontinuance of special allowance for retirement from county's police force—absence of preaudit certificate—The trial court did not err in a breach of contract case by granting summary judgment in favor of defendant county in an action for breach of contract for its failure to continue paying plaintiff a special allowance based on her retirement from the county's police force, because: (1) an agreement with a county requiring the payment of money is not enforce-

CITIES AND TOWNS—Continued

able in the absence of the preaudit certificate mandated by N.C.G.S. § 159-28(a); (2) the agreement in this case that is the subject of this appeal is for the payment of money, and thus, *Lee v. Wake County*, 165 N.C. App. 154 (2004), is inapplicable; and (3) the pertinent memorandum is not enforceable under principles of estoppel since to permit a party to use estoppel to render a county contractually bound despite the absence of the certificate would effectively negate N.C.G.S. § 159-28(a). **Finger v. Gaston Cty.**, 367.

CIVIL PROCEDURE

Nonjury trial—motion to dismiss—Rule 41(b)—It is well settled that in actions tried without a jury a motion to dismiss is under N.C.G.S. § 1A-1, Rule 41(b), not Rule 50(a), and the “directed verdict” in this case was reviewed on appeal as a dismissal. The distinction is significant because the judge under N.C.G.S. § 1A-1, Rule 41(b) does not consider the evidence in the light most favorable to plaintiffs, but considers and weighs all the competent evidence, including the credibility of testimony and reasonable inferences, and may find the facts against the plaintiffs even though they have made a prima facie case. **Hammonds v. Lumbee River Elec. Membership Corp.**, 1.

CIVIL RIGHTS

Racial discrimination—electric co-op board—evidence not sufficient—Plaintiffs did not make an evidentiary showing of intentional racial discrimination in the election of electric co-op board members sufficient to survive a motion to dismiss. **Hammonds v. Lumbee River Elec. Membership Corp.**, 1.

COLLATERAL ESTOPPEL AND RES JUDICATA

Res judicata—sewer usage—federal action and subsequent state action—Defendant’s claims regarding sewer usage are precluded by the doctrine of res judicata, because: (1) the issue of whether the City Code is applicable to and/or enforceable against defendant has already been litigated in a federal court action and thus constitutes a final decision; (2) a party may not file suit seeking relief for a wrong under one legal theory and then after that theory fails, seek relief for the same wrong under a different legal theory in a second legal proceeding; and (3) defendant failed to provide any explanation why it could not in the exercise of reasonable diligence have pursued this theory in the federal court action. **City of Lumberton v. U.S. Cold Storage, Inc.**, 305.

CONFESSIONS AND INCRIMINATING STATEMENTS

Knowing waiver of rights—borderline IQ—Spanish only speaker—The trial court’s unchallenged findings of fact support its conclusion of a knowing waiver of rights by a defendant with borderline or low average intellectual function who spoke only Spanish. **State v. Ortez**, 236.

Miranda warnings—flawed translation to Spanish—The Spanish translations of Miranda warnings used here contained grammatical errors, but reasonably informed defendant of his rights. **State v. Ortez**, 236.

Miranda warnings—Vietnamese translation—The trial court’s conclusion that a Vietnamese defendant’s waiver of his Miranda rights was knowing and vol-

CONFESSIONS AND INCRIMINATING STATEMENTS—Continued

untary was supported by the findings, to which he did not assign error. Although defendant finds fault with the use of a police officer to translate rather than a certified interpreter, there was no evidence that the officer was deceitful or acted improperly; furthermore, the officer was raised in Vietnam and could communicate clearly with defendant. **State v. Nguyen, 447.**

Motion to suppress—interrogation—custody—The trial court did not err in a felony fleeing to elude arrest case by denying defendant's motion to suppress his confession, because: (1) defendant failed to preserve the issue for appellate review by impermissibly presenting a different theory on appeal than argued at trial; (2) even if the issue were properly preserved, undisputed evidence in the record established that defendant initiated the confession and his confession was not made in response to any questioning by an officer; and (3) although defendant was in custody when he confessed, Miranda protection is only triggered by a measure of compulsion above and beyond that inherent in custody itself. **State v. Smith, 134.**

CONSTITUTIONAL LAW

Cruel and unusual punishment—life sentence for sixteen-year-old—The argument that a life sentence without parole for a sixteen-year-old defendant was cruel and unusual was not raised at trial and was not preserved. Even so, defendant did not show that his sentence violated his constitutional rights. **State v. Taylor, 395.**

Double jeopardy—possession of firearm by felon—basis for second conviction—habitual felon sentence—Defendant was not subjected to multiple punishments in violation of double jeopardy by the State's use of his 1998 conviction for possession of a firearm by a felon to support his current conviction of possession of a firearm by a felon and his sentence as an habitual felon. **State v. Crump, 717.**

Double jeopardy—possession of firearm by felon—two offenses—no violation—Defendant was not subjected to double jeopardy where he was convicted of a cocaine offense in 1991, possession of a firearm by a felon in 1998, and possession of a firearm by a felon again in 2003. Defendant was convicted and punished in 2003 only for the latest offense and did not receive multiple punishments for the 1991 conviction. **State v. Crump, 717.**

Effective assistance of counsel—supporting opening argument—There was no merit to defendant's argument that he was denied the effective assistance of counsel in that his attorney did not support his opening argument with evidence that he was voluntarily intoxicated. Defense counsel provided testimony that defendant drank beer and liquor, took Ecstasy, and was otherwise intoxicated on the night of the crime; there was other evidence that defendant had a prior conviction for possession of cocaine; and the trial court instructed the jury on the defense of voluntary intoxication. **State v. Laney, 337.**

Right to have consulate contacted on arrest—not raised at trial—not ineffective assistance of counsel—Defendant's claim of inadequate representation failed because he did not show how the act not performed (contacting his consulate) would have changed the outcome of the case. **State v. Nguyen, 447.**

CONSTITUTIONAL LAW—Continued

Right to unanimous jury verdict—The trial court did not err or commit plain error in a multiple first-degree sex offense and multiple taking indecent liberties with a minor case by failing to require the jury to be unanimous as to the actus reus for each charge, because: (1) the risk of a nonunanimous verdict does not arise even if the jury considered a greater number of incidents than charged in the indictments because, while one juror might have found some incidents of misconduct and another juror might have found different incidents of misconduct, the jury as a whole found that improper sexual conduct occurred; and (2) the jury was instructed on all issues including unanimity and separate verdict sheets were submitted to the jury for each charge. **State v. Brigman, 78.**

Right to unanimous verdict—generic testimony—Defendant's right to a unanimous verdict was not violated by the trial court's submission to the jury of eleven counts of first-degree rape of a child under thirteen based on the victim's testimony that she was raped by defendant at least twice a week for ten months, because: (1) there was no indication that there was any confusion on the part of the jury on its duty to render a unanimous verdict based on the six factors enumerated by our Supreme Court; (2) although the victim gave specific testimony concerning only the first act of sexual intercourse, generic testimony can in fact support a conviction of a defendant and the number of convictions based upon generic testimony is not limited to one; and (3) there was no possibility that some jurors believed some of the rapes took place and some believed that they did not. **State v. Bullock, 460.**

CONTRACTS

Condition precedent—stock sale with indemnity clause—no condition in contract language—There was no genuine issue of material fact concerning the failure of a condition precedent in a stock sale contract with an indemnity clause. The plain language of the contract does not require a condition to occur before the contract is valid. **Bombardier Capital, Inc. v. Lake Hickory Watercraft, Inc., 535.**

Indemnification—waiver—There were no genuine issues of material fact concerning a waiver by a former stockholder (Marchese) of the right to seek indemnification from the stockholder who had bought him out. A waiver is an intentional relinquishment or abandonment of a known right or privilege; neither the record nor the parties here indicate that Marchese expressly waived his right to indemnification, nor did he do so impliedly. **Bombardier Capital, Inc. v. Lake Hickory Watercraft, Inc., 535.**

CORPORATIONS

Necessary parties—res judicata—piercing the corporate veil—alternative remedies—The trial court erred by dismissing plaintiff's complaint seeking to hold the individual defendants liable for an earlier judgment rendered in plaintiffs' favor against a corporation for a refund of a deposit for the purchase of a manufactured home from the corporation because: (1) defendants, the sole shareholders, directors, and officers of the corporation, were not necessary parties to the first action under N.C.G.S. § 1A-1, Rule 19 when there was no basis at the time of the prior action to attempt to pierce the corporate veil and name the individuals as defendants; and (2) res judicata does not bar the present suit when

CORPORATIONS—Continued

the prior action sought recovery of a deposit and the present action seeks to pierce the corporate veil and determine whether defendants should be held liable for the corporate debt based on their alleged actions of selling off corporate assets for personal gain after the successful conclusion of plaintiffs' prior suit. **Blair v. Robinson, 357.**

COSTS

Alimony—attorney fees—The findings of fact in an alimony action were sufficient for the award of attorney fees. **Squires v. Squires, 251.**

Alimony—attorney fees—The unchallenged findings were sufficient to support an award of attorney fees in an alimony case. There was no abuse of discretion in the amount awarded. **Rhew v. Felton, 475.**

Attorney fees—civil contempt—child custody—The trial court did not err by denying plaintiff father's motion for attorney fees under N.C.G.S. § 50A-312 in a case where defendant mother filed a motion in the cause to enforce a North Carolina court order including a request that plaintiff father be held in civil contempt for his plans to violate the parties' child custody provisions, because defendant mother did not seek the expedited enforcement of a child custody determination, seek to register an out-of-state order, or otherwise utilize the remedies set forth in Part 3 of the Uniform Child Custody Jurisdiction and Enforcement Act. **Creighton v. Lazell-Frankel, 227.**

Attorney fees—guaranty assumption in stock purchase agreement—indemnity—The trial court did not abuse its discretion in awarding attorney fees pursuant to N.C.G.S. § 6-21.2 of less than fifteen percent of the indemnity for breach of an assumption of a guaranty of payment in a stock purchase agreement where the agreement contained a provision for the payment of attorney fees and the amount of attorney fees awarded was supported by attorney testimony, affidavits and billing statements. **Bombardier Capital, Inc. v. Lake Hickory Watercraft, Inc., 535.**

Expert witness fees—negligence action—The trial court did not abuse its discretion in a medical malpractice case by denying defendants' motion to tax expert witness fees against plaintiffs after a jury verdict was returned in favor of defendants. **Smith v. Cregan, 519.**

CRIMES, OTHER

Safecracking—locked desk not a safe—A "safe" or "vault" must be something more substantial than a common locked desk compartment for a conviction under the safecracking statute, N.C.G.S. § 14-89.1. Defendant's motion to dismiss should have been granted. **State v. Goodson, 557.**

CRIMINAL LAW

Felonious escape from county jail—motion to dismiss—sufficiency of evidence—The trial court did not err by denying defendant's motion to dismiss the charge of felonious escape from a county jail even though the incident occurred while defendant was being transported back to Central Prison (after being transported to a county jail from Central Prison for a court appearance), because the

CRIMINAL LAW—Continued

deputy testified that he placed defendant in the county jail both before and after defendant's hearing, thus making the deputy an officer of such jail within the meaning of N.C.G.S. § 14-256. **State v. Farrar, 231.**

Felony fleeing to elude arrest—motion to dismiss—sufficiency of evidence—aggravating factors—The trial court did not err by denying defendant's motion to dismiss the charge of felony fleeing to elude arrest under N.C.G.S. § 20-141.5(b), because: (1) an officer testified that defendant sped at least in excess of sixty miles per hour in speed-zone areas of thirty-five and forty-five miles per hour, thus providing sufficient evidence that defendant drove more than fifteen miles per hour over the speed limit as required for a charge under N.C.G.S. § 20-141.5(b); and (2) an officer provided sufficient testimony to show that defendant's actions satisfied the definition of reckless driving including that it was a rainy day, defendant was involved in a high-speed chase and came close to hitting an oil tanker at speeds in excess of sixty miles per hour, and defendant crossed double yellow lines. **State v. Smith, 134.**

Instructions—prior acts of violence—limited to intended purpose—Questions in a first-degree murder prosecution about reports of domestic violence were within the scope of cross-examination of plaintiff's expert about his testimony regarding defendant's ability to form the intent to kill. An instruction limiting the testimony to its purpose was proper. **State v. Nguyen, 447.**

Judge's discussion with attorneys—case reopened—judicial neutrality—The trial court did not depart from its neutral role in a prosecution for failing to register as a sex offender when it conducted a discussion with the attorneys away from the jury about whether the State had to produce evidence of defendant's release date (due to the effective date of the statute), which the State had not done and was opposed to doing, and then allowed the State to reopen its case to introduce that missing evidence. **State v. Wise, 154.**

Motion for continuance—failure to provide affidavit—The trial court did not abuse its discretion in a felony fleeing to elude arrest case by denying defendant's motion for a continuance, because: (1) defendant failed to provide with his motion an affidavit citing any reasons for a continuance beyond defense counsel's general statement that he needed time to process the information; (2) defendant failed to show how the additional time would have helped him to better prepare had the continuance been granted; (3) attempts to suggest reasons supporting the motion in a brief on appeal are insufficient to overcome the failure to provide these reasons to the trial court in an affidavit or otherwise; and (4) defendant failed to demonstrate that he was materially prejudiced as a result of the denial of his motion to continue, and the overwhelming evidence of his guilt negates any inference that he suffered material prejudice. **State v. Smith, 134.**

Motion for mistrial—jailhouse statement produced during trial—The trial court did not abuse its discretion by denying defendant's motion for a mistrial after a prisoner came forward during the trial to report a jailhouse conversation with defendant. There was no argument that the State violated discovery procedures, only that the statement contradicted defense counsel's opening statement. While the prisoner's statement was materially adverse to defendant's case, it did not cause substantial and irreparable prejudice. **State v. Ortez, 236.**

CRIMINAL LAW—Continued

Prosecutor's closing argument—defendant vile, amoral, wicked, and evil—The trial court did not err in a multiple first-degree rape of a child under thirteen case by failing to intervene ex mero motu to limit certain remarks made by the State during its closing argument referring to defendant as vile, amoral, wicked, and evil. **State v. Bullock, 460.**

Prosecutor's closing argument—spousal abuse—statements repeated by expert—A prosecutor's closing argument about evidence of a first-degree murder defendant's abuse of his wife (the victim) were not grossly improper. The remarks referred to statements repeated by defendant's expert and properly admitted as impeachment of his conclusions, and the fact that the court had refused to allow the people who gave those statements to testify without stating reasons did not necessarily indicate that the evidence was prejudicial. **State v. Nguyen, 447.**

Right to have consulate contacted on arrest—not raised at trial—not ineffective assistance of counsel—A first-degree murder defendant's claim that the State violated his right to have his consulate contacted upon his arrest was not reached because defendant did not raise the claim at trial. **State v. Nguyen, 447.**

State allowed to reopen case—no abuse of discretion—The trial court did not abuse its discretion by allowing the State in a prosecution for failing to register as a sex offender to reopen its case and present evidence of defendant's release date from prison after the parties had rested but before the case was given to the jury. **State v. Wise, 154.**

DAMAGES AND REMEDIES

Personal injury instructions—loss of use—reference to “plaintiffs”—conceded and contested body parts—The trial court did not err by instructing the jury that damages for personal injury include compensation for partial loss of use of certain of “plaintiff's” body parts and by including a contested brain injury in the listed body parts along with conceded orthopedic injuries. **Hammel v. USF Dugan, Inc., 344.**

DEEDS

Restrictive covenants—group home—public policy—Plaintiff's attempt to enforce its restrictive covenants to prohibit use of a house as a family care home for girls with emotional or mental disabilities who are not dangerous to others was void as against public policy under N.C.G.S. § 168-23. **Hedingham Cmty. Ass'n v. GLH Builders, Inc., 635.**

DISCOVERY

Admissions—interrogatories—medications at time of automobile accident—The trial court erred by ordering defendant to respond to plaintiff's second request for admissions and interrogatories relating to factual information on medications he may have been under the influence of at the time of an automobile accident, because defendant is entitled to assert his Fifth Amendment privilege to protect himself from self-incrimination in relation to prescription drugs

DISCOVERY—Continued

defendant may have been under the influence of at the time of the accident. However, if the trial court determines such responses are essential to evaluate the application of the sudden emergency doctrine, the trial court must hold that defendant's choice to invoke his rights not to respond to the request for admissions and interrogatories precludes his assertion of the sudden emergency defense to plaintiff's allegations. **Roadway Express, Inc. v. Hayes, 165.**

Criminal—statutory only—interviewing prosecution witnesses—not included in statute—A detective was not required to submit to an interview with defense counsel against his wishes before trial. Pretrial discovery is statutory rather than a constitutional or common law right, and the General Assembly has not included the right to interview the State's witnesses in a criminal trial in the discovery statute. **State v. Taylor, 395.**

Documents—review of records submitted under seal—The trial court did not err in a multiple first-degree sex offense and multiple taking indecent liberties with a minor case by failing to require the State to provide certain documents to defendant prior to trial, because upon careful review of the records submitted under seal, the Court of Appeals did not find any exculpatory evidence that would entitle defendant to a new trial. **State v. Brigman, 78.**

Medical records—physician-patient privilege—The trial court did not abuse its discretion in an action arising out of an automobile accident by ordering the production of defendant's medical records in the interest of justice, because: (1) the results of a blood test are not protected under the Fifth Amendment when the results of the test are neither testimonial nor communicative; and (2) defendant's medical records are not protected by the physician-patient privilege since the trial court reviewed the medical records to determine their relevance to the matter and limited the scope of production, plaintiff contends defendant's physical or mental condition contributed to the accident, and defendant asserted the sudden emergency doctrine as an affirmative defense to plaintiff's claims. **Roadway Express, Inc. v. Hayes, 165.**

Motion for additional independent medical examination—peremptory trial—The trial court did not err in a negligence case arising out of a collision between a vehicle and a truck by denying defendant's motions for additional independent medical examination of plaintiff and for continuance of the trial. **Hammel v. USF Dugan, Inc., 344.**

Privileged material—work-product doctrine—The trial court did not abuse its discretion in a breach of contract, misrepresentation, breach of the duty of good faith and fair dealing, and breach of fiduciary duty case by compelling Zurich defendants' production of alleged privileged material, because: (1) defendants could have, but chose not to, produce the Group B documents for an in camera inspection as evidenced by their submission of Group A documents for in camera inspection; (2) no attorney-client privilege is at issue regarding the Group A documents; and (3) the trial court's determination that defendants retained the work-product privilege from 20 December 2001 and forward was reasonable, and the work-product doctrine covers documents respecting claim reserve data from 20 December 2001 forward. **Wachovia Bank v. Clean River Corp., 528.**

SBI agent on methamphetamine production—not listed as expert—Defendant was granted a new trial on charges of possessing precursor chemicals

DISCOVERY—Continued

where an SBI agent purportedly testified as a lay witness, but in fact was more qualified than the jury and testified as an expert witness, even though the State had not listed any experts in its response to defendant's discovery request. **State v. Blankenship, 351.**

School records of witness—reviewed in camera—not discoverable—The school records of a tenth grader (an accomplice to first-degree kidnapping and murder) who testified in defendant's trial pursuant to a plea agreement were reviewed in camera on appeal and held to contain no information favorable and material to defendant's guilt and punishment, nor any evidence adversely affecting the witness's credibility. Therefore, the trial court properly denied defendant's motion to be allowed to review those records for impeachment purposes. **State v. Taylor, 395.**

DIVORCE

Alimony—attorney fees—The findings of fact in an alimony action were sufficient for the award of attorney fees. **Squires v. Squires, 251.**

Alimony—attorney fees—The unchallenged findings were sufficient to support an award of attorney fees in an alimony case. There was no abuse of discretion in the amount awarded. **Rhew v. Felton, 475.**

Alimony—contempt—A finding of contempt for not paying a lump sum alimony award was vacated where the award itself was vacated. **Rhew v. Felton, 475.**

Alimony—findings—The trial court made sufficient findings in an alimony order about defendant's age, past health concerns, and gross and after-tax income as required by N.C.G.S. § 50-16.3A(b). **Squires v. Squires, 251.**

Alimony—findings about duration—An alimony order was remanded for further findings concerning the reason for the duration of alimony payments. Findings that plaintiff had no income after thirty-eight years of marriage were not sufficient. **Squires v. Squires, 251.**

Alimony—judicial notice of equitable distribution order—The trial court did not err by failing to take judicial notice of an equitable distribution order before entering its alimony order on remand. N.C.G.S. § 50-20(f) has no application because there was no existing alimony order to modify until after the effective date of the order issued on remand. **Rhew v. Felton, 475.**

Alimony—monthly income of real estate developer—evidence supporting findings—The evidence supported findings in an alimony order about defendant's continued monthly income. Defendant, a real estate developer, had income plus a complex and constant turnover of properties; although he alleged that some assets were included twice, the evidence supports the court's findings. **Squires v. Squires, 251.**

Alimony—order not binding on heirs—A finding that an alimony order would be binding on defendant's heirs was erroneous and without effect, as such a term is barred by N.C.G.S. § 50-16.9(b). **Squires v. Squires, 251.**

Alimony—remand—delay—new evidence—The delay between an initial alimony award and a rehearing after remand was not controlled by *Wall v. Wall*,

DIVORCE—Continued

140 N.C. App. 303, (which held that a delay was not de minimis and required new evidence). This case involved alimony rather than equitable distribution, and the delay here resulted from an appeal and remand. **Rhew v. Felton, 475.**

Alimony—remand—original evidence—changed circumstances meanwhile—The trial court did not abuse its discretion in determining alimony on remand based solely on evidence from the original 1998 hearing. However, the trial court on remand will redetermine the amount of the award and plaintiff's ability to pay if it finds a substantial change of circumstances. **Rhew v. Felton, 475.**

Alimony—remand—reliance on original findings—changed circumstances in intervening period—The trial court was within its discretion in relying on the original evidence on remand of an alimony case where the remand was for insufficient findings, with the evidence being held sufficient. However, the trial court exceeded its mandate on remand by awarding a lump sum for the interval without considering evidence of possible changes in circumstances during that time. **Rhew v. Felton, 475.**

Alimony—retirement account execution—The trial court in an alimony action did not err by denying plaintiff's motion to exempt his retirement account from execution. N.C.G.S. § 1C-1601(e)(9) clearly provides that the exemption for retirement accounts does not apply to claims for alimony. The question of whether the account was exempt from execution pursuant to 29 U.S.C. § 1056(d)(1) (2005) was premature, as the statute involves assignments, which has not happened here. **Rhew v. Felton, 475.**

Alimony—supporting spouse—evidence and findings—sufficient—The evidence and findings in an alimony case supported the trial court's determination that plaintiff is a supporting spouse and defendant a dependent spouse. **Rhew v. Felton, 475.**

Alimony—tax rate—findings—A finding in an alimony order about defendant's tax rate was supported by the evidence. **Squires v. Squires, 251.**

Equitable distribution—ability to earn—finding supported by tax returns—The trial court did not err by finding that defendant had the ability to earn large sums where his tax returns and financial statement supported that finding. **Squires v. Squires, 251.**

Equitable distribution—assets existing at separation but not at trial—proceeds from liquidation—findings—The trial court did not err in a divorce and equitable distribution action by finding that defendant had received the proceeds from the sale of several assets and distributions. Although defendant asserted that these assets no longer existed at the time of trial and had gone to preserve defendant's company and support the parties, the assets existed at the date of separation and the proceeds were used to pay for spending and loans incurred by defendant after the separation. **Squires v. Squires, 251.**

Equitable distribution—assets liquidated and found to be distributed—postseparation conversion of those assets—distribution factor—The trial court did not err in an equitable distribution action by finding that proceeds from the sale of an asset and the liquidation of an IRA were distributed to defendant and then considering defendant's postseparation conversion of those assets as a distributional factor. **Squires v. Squires, 251.**

DIVORCE—Continued

Equitable distribution—company controlled by defendant—payment of debts—There was no abuse of discretion in an equitable distribution action in requiring defendant to pay the debt and tax liability which accrued to a company during the time after separation in which he had sole control of the company. **Squires v. Squires, 251.**

Equitable distribution—decreased value of company—defendant's role—Findings in a divorce and equitable distribution action that a decrease in the value of defendant's real estate development business was attributable to the actions of defendant were not erroneous. Although defendant's son had become president of the company and defendant limited his role, other findings indicate that defendant continued to play an important role in the company. **Squires v. Squires, 251.**

Equitable distribution—distribution of assets—business and automobile—There was no error in a divorce and equitable distribution action where defendant contended that the court found the distribution of an asset to be divisible, but in fact the finding determined that the asset was defendant's separate property. Furthermore, the court properly classified a car leased by defendant but driven by plaintiff as marital and distributed it to plaintiff at the value agreed to by both parties (\$0). **Squires v. Squires, 251.**

Equitable distribution—distribution of stock—capital gains—The trial court did not err in a divorce and equitable distribution action by distributing stock to plaintiff without taking into account defendant's capital gains liability. Defendant's accountant testified that defendant would have no tax after consideration of other losses. **Squires v. Squires, 251.**

Equitable distribution—distributional factor—eligibility for social security benefits—The trial court did not err in an equitable distribution action by finding as a distributional factor that defendant will be entitled to receive social security benefits and that plaintiff will not. Plaintiff produced defendant's W-2 statement, showing social security withholding, and neither party produced evidence that plaintiff was entitled to social security benefits. **Squires v. Squires, 251.**

Equitable distribution—distributional factors—findings—The trial court in an equitable distribution action made the required findings about distributional factors. **Squires v. Squires, 251.**

Equitable distribution—distributive award—findings—sufficiency of assets—A distributive award in an equitable distribution action was remanded for additional findings on whether defendant had sufficient liquid assets to pay the award. **Squires v. Squires, 251.**

Equitable distribution—marital debts—found but not listed—The trial court erred in a divorce and equitable distribution action by finding certain debts to be marital but not listing them in Table A. Although remand was for other reasons, correction was ordered. **Squires v. Squires, 251.**

Equitable distribution—marital home—debts and tax payments—The trial court did not err in its findings concerning the marital home in a divorce and equitable distribution action. Defendant failed to present any evidence of principal reduction, the payments made were ordered as part of defendant's support of his

DIVORCE—Continued

dependent spouse, and defendant did not introduce evidence to support the contention that he should have had a credit for paying plaintiff's tax liability, which was a lien on the marital home. **Squires v. Squires, 251.**

Equitable distribution—past and future tax losses—testimony from accountants—not speculative—Findings in a divorce and equitable distribution action concerning defendant's net operating loss deductions for future and past tax years, and for capital gains eliminated using the loss carrybacks, were supported by testimony from defendant's accountants and were not speculative. **Squires v. Squires, 251.**

Equitable distribution—real estate development company—appraisal—An appraisal of defendant's real estate company was properly admitted in an equitable distribution action. **Squires v. Squires, 251.**

Equitable distribution—valuation of country club membership—opinion of plaintiff—The trial court did not err in a divorce and equitable distribution action in valuing a country club membership. The subjective opinions of the owner of property as to its value are admissible and competent. **Squires v. Squires, 251.**

Equitable distribution—wife's inheritance—use to purchase husband's business—The trial court did not err in an equitable distribution action by finding that the wife's inheritance was used for the acquisition of the husband's business. **Squires v. Squires, 251.**

Postseparation support findings—incorporation of financial standing affidavit—Postseparation support involves a relatively brief examination of the parties' needs and assets and the court may base its award on a verified pleading, affidavit, or other competent evidence. The trial court here made an appropriate finding supported by the evidence by incorporating by reference defendant's financial standing affidavit. **Squires v. Squires, 251.**

Postseparation support findings—incorporation of tax return—A trial court order for postseparation support was supported by a finding that incorporated by reference defendant's income numbers from his tax return. **Squires v. Squires, 251.**

DRUGS

Cocaine—positive urine test—corroborating evidence—There was sufficient evidence to support a conviction for the possession of cocaine where a positive urine test gave rise to the inference that defendant used cocaine and testimony from a witness who saw defendant snort cocaine provided corroborating evidence. **State v. Harris, 723.**

Instruction—witness with immunity or quasi-immunity—The trial court did not abuse its discretion in a trafficking in cocaine by possession, transportation, and sale case by failing to instruct the jury regarding a police informant's testimony according to the pattern jury instruction for testimony of a witness with immunity or quasi-immunity, because: (1) although the requested instruction was correct in law, it was not supported by the evidence when no evidence was presented at trial that the informant testified under an agreement for a charge reduction or an agreement for a sentencing concession; (2) the trial court's

DRUGS—Continued

instruction that the jury should review the informant's testimony with care and caution substantively reflected the concept defendant wished to convey to the jury; and (3) defendant had the opportunity to cross-examine the informant about any alleged agreement and to argue to the jury regarding the impact of any alleged agreement upon the informant's credibility. **State v. Mewborn, 281.**

Positive urine test—corroborating evidence required—insufficient evidence of marijuana possession—A positive urine test, without more, does not satisfy the intent or knowledge requirement inherent in the statutory definition of possession. Here, the State presented no corroborating evidence of marijuana possession. **State v. Harris, 723.**

EASEMENTS

Consent judgment—landowners' placement of trees and structures—dominant tenant's removal right—Easement rights contained in a consent judgment entered by plaintiff electric power company and defendant landowners' predecessors in interest gave the power company the right to have trees and structures placed by the landowners in the right-of-way removed where the consent judgment granted the power company the right to clear the right-of-way and to keep it clear of any and all structures and trees, notwithstanding the consent judgment also stated that the predecessors in interest reserved all other rights not inconsistent with the easement rights granted to the power company, since the reserved rights are restricted by the enumerated rights granted to the dominant tenant in the consent judgment. **Duke Energy Corp. v. Malcolm, 62.**

Public prescriptive easement—lack of standing—The trial court did not err in a declaratory judgment action seeking to quiet title in a public access easement by granting plaintiffs' motion to dismiss intervenors' claim for a public prescriptive easement based on their lack of standing, because: (1) one's use of a purported prescriptive easement must be for a period of at least twenty years, and none of the intervenors testified that they used the purported easement for a period of more than a few years; (2) although plaintiffs did have record notice of an easement granting a public access easement over their property, this easement ceased to exist once the town passed the ordinance prohibiting sand paths over the beach dunes and plaintiffs began constructing an improvement on their property; (3) there is other beach access available to the public in the same general area as the purported easement; and (4) intervenors have not alleged, nor have they established, that they suffered any special injury that differed from that suffered by the public generally. **Koenig v. Town of Kure Beach, 500.**

EMINENT DOMAIN

Condemnation—future use of land—airport parking—Future uses of the land are admissible in a condemnation action if the owner has taken steps to adapt the land prior to the taking. Testimony in a condemnation of land near an airport concerning the value of property as a valet parking business was admissible where it was undisputed that the property was largely covered by paved and gravel parking areas, defendant had used the property for parking cars, plaintiff used the property for airport parking after it was condemned, and an expert appraiser testified that the property was "ready to go" as a valet parking business. **City of Charlotte v. Hurlahe, 144.**

EMINENT DOMAIN—Continued

Land near airport—evidence of possible use as parking lot—The was no prejudice in a condemnation action involving land near an airport from the admission of evidence that the owner would have used the land as a valet parking lot. Testimony about the possible uses of property is relevant to its highest and best use, the parties agree that airport parking is the highest and best use here, the city operated a parking lot on the property after the taking, and the city did not argue that the admission was prejudicial. **City of Charlotte v. Hurlahe, 144.**

Lost profits—predicted rental income—Lost profits are not recoverable in a taking under eminent domain, but rental income is admissible on the question of fair market value. The trial court here did not err by admitting testimony from experts concerning their use of predicted rental income in determining the fair market value of property when used for a valet parking business near an airport. A cautionary instruction clarified any jury confusion on the issue. **City of Charlotte v. Hurlahe, 144.**

EMPLOYER AND EMPLOYEE

Hotel manager—manual labor—no overtime—A manager in a hotel house-keeping services department who did manual labor when she was short-staffed nevertheless was primarily a manager, and the trial court correctly granted summary judgment against her in her action for overtime wages under the Fair Labor Standards Act. **King v. Windsor Capital Grp., Inc., 669.**

Medical non-compete agreements—no violation of public policy per se—Non-compete agreements in physicians' employment contracts are not per se against public policy. **Calhoun v. WHA Med. Clinic, PLLC, 585.**

Non-compete agreements—consideration—offer of employment in merged company—Offers of new employment served as consideration for non-compete agreements where a medical practice became part of a new entity. **Calhoun v. WHA Med. Clinic, PLLC, 585.**

Non-compete agreements—reasonableness a matter of law—The reasonableness of agreements not to compete is a matter of law, and the trial court did not err by dismissing the jury in a declaratory judgment action to determine the validity of medical non-compete agreements. **Calhoun v. WHA Med. Clinic, PLLC, 585.**

EVIDENCE

Autopsy photographs—illustrations of victim's wounds—There was no abuse of discretion in admitting autopsy photographs of a murder victim where a forensic pathologist testified that each photograph depicted a distinct aspect of the victim's wounds and would provide the jury with a helpful illustration of the wounds. **State v. Taylor, 395.**

Character—victim's propensity for violence—self-defense—neutral witness—The trial court erred in a second-degree murder case by excluding a witness's testimony concerning the victim's propensity for violence, including the victim's prior violent behavior at a car dealership where he damaged property, because the evidence was relevant and admissible to show whether defendant's apprehension of death and bodily harm was reasonable. **State v. Everett, 44.**

EVIDENCE—Continued

Cross-examination—prior crimes or bad acts—prior convictions—status as drug dealer—The trial court did not err in a trafficking in cocaine by possession, transportation, and sale case by allowing the State to cross-examine defendant about his prior convictions and his status as a drug dealer, because: (1) by defendant's own admission, N.C.G.S. § 8C-1, Rule 608 is inapplicable to the contested questioning about defendant's status as a drug dealer since it was neither a reference to a specific act nor probative of defendant's truthfulness; and (2) the evidence was admissible to correct inaccuracies or misleading statements in defendant's testimony. **State v. Mewborn, 281.**

Cross-examination—prior crimes or bad acts of witness—sexual misconduct—plain error analysis—The trial court did not commit plain error in a trafficking in cocaine by possession, transportation, and sale case by allowing the State to cross-examine a defense witness about an alleged incident of sexual misconduct under N.C.G.S. § 8C-1, Rule 608(b), because, given the insignificance of the witness's testimony, any harm to the witness's credibility caused by the cross-examination was also insignificant and did not have a probable impact on the jury's decision. **State v. Mewborn, 281.**

Dead Man's Statute—sentimental interest—facts based on independent knowledge—The trial court did not err in a contested will case by allowing propounder and his mother to testify during trial about statements made to them by the testatrix, because: (1) the Dead Man's Statute did not bar propounder's mother from testifying merely based on the fact that she was aligned with propounder since her son was above the age of majority, and caveator failed to identify any legal or pecuniary interest of the mother other than a mere sentimental interest; (2) it is questionable whether propounder's assertion that his grandmother told him what was in an envelope, without any testimony as to what the testator actually said, violated N.C.G.S. § 8C-1, Rule 601(c); and (3) assuming arguendo that propounder's testimony was inadmissible, caveator failed to demonstrate that any resulting error was prejudicial. **In re Will of Yelverton, 267.**

Defendant's conduct on probation—hearsay—door opened by defendant—Defendant opened the door in a first-degree murder prosecution to hearsay testimony about his conduct during probation. The trial court did not err by admitting the evidence. **State v. Grant, 565.**

Defendant's statements to clinical social worker—admission for rebuttal—Testimony that a first-degree murder defendant had told a social worker (who did not fully believe him) that he had been involved in drive-by shootings was relevant to show that he could be manipulative. The testimony was elicited to rebut the social worker's testimony that defendant was impulsive. **State v. Grant, 565.**

DNA evidence—common plan scheme or plan to sexually abuse victim—The trial court did not err in a multiple first-degree rape of a child under thirteen case by admitting DNA evidence establishing a 99.99 percent probability that defendant was in fact the father of the victim's child even though the victim conceived the child after she left Wake County and thus after each of the incidents for which defendant was convicted in the instant case because evidence that defendant engaged in other sexual acts with the victim is admissible to show that he had a common scheme or plan to sexually abuse the victim. **State v. Bullock, 460.**

EVIDENCE—Continued

Expert testimony—lost future earning capacity—The trial court did not err in a negligence case arising out of a collision between a vehicle and a truck by admitting allegedly inadmissible hearsay evidence regarding plaintiff's lost future earning capacity as a truck driver, because, an expert's testimony of the facts that are the basis for his opinion is not hearsay when it is not offered for the truth of the matter; and earning capacity is not determined solely on the present or past earnings of a plaintiff, and plaintiff was entitled to present evidence of his earning capacity as well as of his actual past earnings. **Hammel v. USF Dugan, Inc., 344.**

Expert testimony—sexual abuse—credibility—posttraumatic stress disorder—plain error analysis—Although the trial court erred in a multiple first-degree sex offense and multiple taking indecent liberties with a minor case by admitting certain statements made by two expert witnesses including that the children suffered sexual abuse by defendant, concerning Child 3's credibility, and regarding the children's symptoms of posttraumatic stress disorder, it did not amount to plain error because it cannot be concluded that there was a reasonable possibility that a different result would have been reached by the jury when the evidence against defendant was overwhelming. **State v. Brigman, 78.**

Hearsay—character—victim's propensity for violence—state of mind exception—victim's plan or intent to engage in future act—The trial court erred in a second-degree murder case by excluding defendant's testimony regarding an incident between the victim and defendant's former subordinate employee to show the victim's violent nature because defendant's testimony that her employee told her that the victim threatened to shoot up his house should have been admitted as further evidence of the victim's violent character to show defendant's fear of the victim was reasonable, and the statement was not offered for the truth of the matter asserted, but instead to show that defendant's apprehension of death and bodily harm was reasonable. **State v. Everett, 44.**

Hearsay—exception—plan for future act—murder victim's statement—A murder victim's statement of his plans for the night on which he was killed was admissible pursuant to the hearsay exception in N.C.G.S. § 8C-1, Rule 803(3), as a then-existing plan to engage in a future act. **State v. Taylor, 395.**

Hearsay—nontestimonial—residual hearsay exception—The trial court did not abuse its discretion in a multiple first-degree sex offense and multiple taking indecent liberties with a minor case by admitting the children's hearsay statements to their foster parents and to medical personnel, because: (1) defendant concedes that the statements made to the children's foster parents were not testimonial, and therefore, did not violate the Confrontation Clause; (2) the children's statements to their foster parents were admissible under the residual hearsay exception; and (3) Child 3's statements to a doctor (that defendant put his hand in the child's bottom, that it hurt, and that defendant touched the two other children in the same way) were not testimonial and defendant's right to confrontation was not violated when it cannot be concluded that a reasonable child under three years of age would know or should know that his statements might later be used at trial. **State v. Brigman, 78.**

Hearsay—Sex Offender Registration documents—records of regularly conducted activity—A Sex Offender Registration Worksheet and Notice of Pending Registration were records of regularly conducted activity under N.C.G.S.

EVIDENCE—Continued

§ 8C-1, Rule 803(6) and were properly admitted in a prosecution for failing to register as a sex offender. Although police reports are specifically excluded under Rule 803(8), the inadmissibility of evidence under one hearsay exception does not necessarily preclude admission under another exception. **State v. Wise, 154.**

Hearsay—statement against interest—A hearsay statement from an indecent liberties defendant to the mother of the child that he would “be guilty” in court was admissible under N.C.G.S. § 8C-1, Rule 801(d)(A) as a statement against interest. **State v. Laney, 337.**

Hearsay—statement offered to show effect on defendant—not offered for truth of the matter—A statement repeated in a prosecution for aiding and abetting a first-degree murder was not hearsay because it was not offered for the truth of the matter, but to show the effect it had on defendant regardless of its truth. **State v. Glynn, 689.**

Offer of proof—court not required to receive personally—No binding authority was found which would require a trial court to personally take an offer of proof, and there was no prejudice in this case from the court’s failure to personally take plaintiff’s offer of proof where the trial court allowed plaintiff to introduce excluded evidence into the record. **Rhew v. Felton, 475.**

Order concerning notary—failure to lay proper foundation—The trial court did not err in a contested will case by excluding evidence of an order from the North Carolina Secretary of State regarding propounder’s notary witness and testimony from caveator relating to this order, because: (1) caveator failed to lay a proper foundation for the evidence’s admission; (2) caveator made no showing that he has personal nonhearsay knowledge such that he could testify that the pertinent order refers to his mother’s will; and (3) nothing on the fact of the order indicated that the Secretary of State’s order has anything at all to do with this case, and caveator’s offer of proof does not establish that he could offer admissible testimony supplying the necessary connection. **In re Will of Yelverton, 267.**

Other crimes or bad acts—admissible to show preparation and planning—The trial court did not err in a trial for statutory sexual offense with a person thirteen years old by admitting nude photographs which defendant had shown to the victim. The photographs demonstrated defendant’s preparation and planning, a permissible purpose other than showing defendant’s character. **State v. Brown, 189.**

Other crimes or bad acts—common plan or scheme—absence of mistake—The trial court did not abuse its discretion in a multiple obtaining property by false pretenses, multiple forgery, and multiple uttering case by admitting evidence found in a vehicle purchased by defendant which included a power of attorney defendant obtained naming her as attorney in fact and a third person as the principal, and personal papers and identification cards belonging to two other persons, and evidence of defendant’s purchase of a vehicle with the power of attorney naming the victim as the principal, because: (1) the State offered the evidence to show common plan or scheme and absence of mistake; (2) the evidence tended to rebut defendant’s contention that the victim initialed the power of attorney used to withdraw funds from the victim’s bank account, and showed defendant engaged in a plan or scheme to obtain and use illegitimate powers of

EVIDENCE—Continued

attorney to illegally withdraw funds from individuals' bank accounts including that of the victim; and (3) and the incidents were 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. **State v. King, 122.**

Other crimes or bad acts—drug dealing and robbing drug dealers—relevancy to premeditation and deliberation—Evidence that defendant robbed drug dealers and hit a drug dealer during a robbery was relevant in a first-degree murder prosecution to refute defendant's contention that the shooting was without premeditation and deliberation. Evidence that defendant bought and used drugs was relevant to explain his robberies of drug dealers. **State v. Grant, 565.**

Other crimes or bad acts—failure to intervene ex mero motu—remoteness in time—common scheme or plan—The trial court did not err in a multiple first-degree rape of a child under thirteen case by admitting evidence of other bad acts under N.C.G.S. § 8C-1, Rule 404(b) including sexual acts with defendant's older daughter (the victim's half sister) and by failing to intervene ex mero motu when the State argued this evidence, because: (1) when the facts surrounding a prior act are sufficiently similar to those in a case at bar, it may be proper to admit the prior act evidence even if over ten years have passed (although the elapsed time in this case was actually around nine years); and (2) in light of the similarity of the incidents and in light of the unnatural character of a father raping his own preteen daughters, the evidence was properly admitted to show a common scheme or plan. **State v. Bullock, 460.**

Other crimes or bad acts—inducing another to commit fraud—purchases of weapons—relevancy to story of crime—Evidence that a first-degree murder defendant induced another to fraudulently fill out a pawn shop form so that he could buy a gun was relevant to how defendant acquired the murder weapon. Evidence that defendant illegally purchased another weapon was relevant to how defendant acquired that weapon, the possession of which was the motive for the shooting. **State v. Grant, 565.**

Other crimes or bad acts—missing curfew—relevancy—Evidence that a first-degree murder defendant had missed his probation curfew was part of the chain of circumstances leading to the shooting. **State v. Grant, 565.**

Other crimes or bad acts—possession of assault rifle—Testimony about defendant's possession of a modified assault rifle was relevant in a prosecution for a murder committed with a shotgun. The evidence explained why defendant was in the field where the shooting occurred, why defendant used a shotgun instead of the rifle, and defendant's motive for the shooting. Disposal of the assault rifle showed a consciousness of guilt, and testimony about modifications to the rifle corroborated other testimony. **State v. Grant, 565.**

Other crimes or bad acts—possession of pistol—A pistol that was not connected in any way to a shooting with a shotgun was not relevant in the subsequent first-degree murder prosecution and should not have been admitted. However, there was no prejudice because there was overwhelming evidence of defendant's guilt. **State v. Grant, 565.**

Other prior crimes or bad acts—shooting of dog—The trial court erred in a second-degree murder case by admitting evidence that defendant once shot a

EVIDENCE—Continued

dog, because: (1) whether defendant was knowledgeable about firearms or had experience shooting them does not make it more or less probable that she shot her husband in self-defense; (2) defendant admitted that she shot the victim with a pistol; and (3) if the State seeks to establish relevance on remand, the evidence is equally relevant to show the victim also shot and killed the dog. **State v. Everett, 44.**

Pathologist's opinion—time required for death—An expert forensic pathologist's testimony about the time a victim's death from his wounds would have required had he not drowned was within the witness's area of expertise and was relevant and appropriate to show the number and severity of the wounds. **State v. Taylor, 395.**

Testimony that cellular phone images existed—no details—no prejudice—There was no prejudice in a prosecution for first-degree murder and other crimes in admitting testimony that defendant had a cellular telephone with stored photos. No evidence was presented about the contents of the images (guns), the jury did not see the images, and presuming the telephone was improperly seized, defendant failed to show that a different result would likely have been reached if that evidence had been excluded. **State v. Taylor, 395.**

Transcript of text messages—authentication—confrontation issue not preserved—The trial court did not abuse its discretion by admitting into evidence transcripts of text messages. There was testimony sufficient to authenticate the exhibits; moreover, defendant both failed to cite on appeal any authority to support the argument that his right to confront witnesses was denied and did not object at trial on constitutional grounds. **State v. Taylor, 395.**

Unavailable witness—denial of motion for continuance—abuse of discretion standard—The trial court did not abuse its discretion in a contested will case by denying caveator's motion for a continuance made at the close of propounder's evidence after propounder's notary witness had informed him at the last minute that she was unavailable to testify, because: (1) caveator's motion for a continuance was made in the middle of trial after the case had been set peremptorily ahead of time based on propounder being stationed overseas; (2) caveator knew he could not compel the witness to testify by service of a subpoena due to her relocation to Maryland, and he made no attempt to secure her testimony through a deposition *de bene esse*; and (3) a hardship would have resulted from a continuance in addition to caveator's failure to exhaust reasonable methods of securing the witness's testimony. **In re Will of Yelverton, 267.**

Uncharged crimes and bad acts—not unduly prejudicial—The probative value of uncharged crimes and bad acts was not substantially outweighed by the danger of unfair prejudice in a first-degree murder prosecution where premeditation and deliberation were contested issues at trial. **State v. Grant, 565.**

Videotapes not authenticated—activity admitted by defendant—admission not prejudicial—There was no prejudicial error in the admission of videotapes that may not have been properly authenticated where defendant admitted the activity shown on the tapes. **State v. Brooks, 211.**

FALSE PRETENSES

Aiding and abetting—private work by government employee—There was sufficient evidence to deny defendant's motion to dismiss the charge of aiding and abetting obtaining property by false pretenses based on a county worker performing a household repair for defendant, a county commissioner, on county time. Defendant's own statement and a prior bad act provided evidence from which intent and knowledge could be inferred. **State v. Sink, 217.**

FORGERY

Motion to dismiss—sufficiency of evidence—The trial court erred by denying defendant's motion to dismiss on all but the first three forgery charges named in the indictment and the accompanying uttering charges, and defendant's ten convictions for forgery and ten convictions for uttering in docket numbers 04 CRS 55303, 04 CRS 55304, 04 CRS 55306, and 04 CRS 55307 are reversed, because: (1) signing as the agent of another without authority does not constitute forgery; and (2) all but the first three withdrawal slips from 04 CRS 555302 that defendant presented to the bank bore defendant's own signature and did not include the victim's name or purported signature. **State v. King, 122.**

Sufficiency of indictments—The trial court did not err by concluding the thirteen forgery indictments were not fatally defective, because: (1) the indictments set forth all of the elements of the offense; (2) the indictments do not have to state the manner in which defendant forged the withdrawal form; (3) the indictments informed defendant of the date and time of each offense, the amount of money involved, and where the offense occurred; and (4) the indictments gave defendant notice of the charge against her and enabled the court to know what judgment to pronounce in case of conviction. **State v. King, 122.**

GUARANTY

Default by company after stockholder buyout—mitigation of damages—There were no issues of material fact concerning the failure of one of the three initial stockholders and guarantors of a business to mitigate his damages after the business defaulted and payment was sought from the guarantors. **Bombardier Capital, Inc. v. Lake Hickory Watercraft, Inc., 535.**

HIGHWAYS AND STREETS

Closing public road—directed verdict—more than a scintilla of evidence—The trial court did not err by denying appellant's motion for directed verdict in an action seeking to close Ocean Hill I roads to the general public because a petitioner's testimony that closing Ocean Hill I roads would deprive her of a safe route to the beach was not only more than a scintilla of evidence supporting appellees' assertion that closing these roads is contrary to the public interest, but also is conflicting testimony favorable to appellees precluding the granting of appellant's motion for directed verdict. **Ocean Hill Joint Venture v. Currituck Cty. Bd. of Comm'rs, 182.**

Closing public road—instructions—burden of proof—questions of public interest—The trial court did not submit an incorrect burden of proof to the jury in an action seeking to close Ocean Hill I roads to the general public and did not improperly empower the jury to determine a question of law, because: (1) the

HIGHWAYS AND STREETS—Continued

Court of Appeals has already held that the burden of proof was correctly placed on appellant; (2) appellant never objected to the submitted jury instruction in the final pretrial conference order, and appellant submitted the exact question to the jury in their requested jury instruction; and (3) our Supreme Court has ratified the ability of juries to deliberate upon questions of public interest. **Ocean Hill Joint Venture v. Currituck Cty. Bd. of Comm'rs, 182.**

Closing public road—statutorily mandated de novo hearing—burden of proof—The trial court did not err by placing the burden on appellant to illustrate the board of county commissioners correctly determined that closing the roads in Ocean Hill I to the general public was not contrary to the public interest, because: (1) the burden of proof was initially placed on appellant who sought to change the status of Ocean Hill I roads from public to private; and (2) pursuant to a statutorily mandated de novo hearing, the burden of proof remained with appellant. **Ocean Hill Joint Venture v. Currituck Cty. Bd. of Comm'rs, 182.**

HOMICIDE

Aiding and abetting first degree murder—no variance between indictment and trial—There was no fatal variance between the allegations in the indictment and the evidence at trial in a first-degree murder prosecution. The State is not required to declare any specific theory for first degree murder prior to trial; the State's evidence here, regardless of the theory, supports the indictment. **State v. Glynn, 689.**

First-degree murder—aiding and abetting—short form indictment—A short form indictment properly apprised defendant of the charge of first-degree murder based on aiding and abetting. Short form indictments have been held again and again to be sufficient to charge first degree murder on the basis of any theory set forth in N.C.G.S. § 14-17, and a defendant must be prepared to defend any and all legal theories supported by the facts when the facts are sufficiently pled. A bill of particulars may be requested to supplement the facts in the indictment, but this defendant did not do so. **State v. Glynn, 689.**

First-degree murder—short-form indictment—constitutional—The short-form indictment for first-degree murder is constitutional. **State v. Grant, 565.**

IMMUNITY

Governmental—school principal at dance—student removed from window—Supervising a school dance was a governmental function for the principal, who was acting in his capacity as public official when he removed plaintiff Webb from a cafeteria window. Governmental immunity bars personal liability by the principal for negligence and the trial court did not err in granting his motion for judgment on the pleadings. **Webb v. Nicholson, 362.**

INDECENT LIBERTIES

Two incidents of touching in one night—one act—Two incidents of touching in one night should have resulted in one indecent liberties conviction, not two,

INDECENT LIBERTIES—Continued

and defendant's motion to dismiss one of the cases should have been granted. The sole act was the touching, there was no temporal gap between the two incidents, and the two incidents combined for the purpose of arousing defendant's sexual desire. **State v. Laney, 337.**

INJUNCTIONS

Permission required before placing objects within right-of-way—The trial court erred by enjoining defendants from placing other structures, trees, fire hazards and other objects of any nature within the right-of-way without plaintiff's permission insofar as the judgment requires defendants to obtain plaintiff's permission before placing objects within the right-of-way. **Duke Energy Corp. v. Malcolm, 62.**

INSURANCE

Business automobile policy—underinsured motorist coverage—The trial court erred by granting summary judgment in favor of defendant corporations based on its determination that a business automobile insurance policy issued by plaintiff insurance company to defendants provided underinsured motorist (UIM) coverage to defendant individual, and the trial court is directed to enter summary judgment in favor of plaintiff, because: (1) the policy provided coverage only for vehicles actually owned by either of the corporations, and the person seeking coverage under the UIM policy was not occupying a covered automobile which is a vehicle owned by the named insured at the time of the injury; (2) when viewed in context, the listing of the pertinent car on the schedule of covered autos in the policy does not create ambiguity when it does not contradict the clear and unambiguous language stating that numerical symbol 2 covered autos are only those vehicles owned by the named insured or acquired by the named insured after the policy began; and (3) defendant's payment of a premium to plaintiff did not create UIM coverage for the pertinent car, but instead the language of the insurance contract controls the court's interpretation of the intention of the parties to the contract. **Pennsylvania Nat'l Mut. Ins. Co. v. Strickland, 547.**

UIM—number of policies—multiple numbers for one policy—The trial court in a declaratory judgment action properly granted summary judgment for plaintiff Allstate in a UIM action in which the question was the number of insurance policies issued by Allstate insuring five vehicles. Allstate consistently and without contradiction maintained both before and after the accident in question that it had issued but a single policy, with the use of two policy numbers being a concession to computer limitations. **Allstate Ins. Co. v. Stilwell, 738.**

JUDGES

Partiality—questioning witnesses directly—The trial court in a contested will case did not display partiality by questioning two witnesses directly, and caveator is not entitled to a new trial on this basis, because: (1) the judge's questions were neither biased toward one party nor were they geared toward eliciting particular answers from the witnesses; and (2) the probable effect the exchanges had on the jury was clarification. **In re Will of Yelverton, 267.**

JURISDICTION

Motions for extension of time and substitution of counsel—not general appearances—Motions for an extension of time to answer and for substitution of counsel were not general appearances which waived an objection to personal jurisdiction. Defendant did not seek any determination on the merits nor did he participate in any actions invoking the adjudicatory powers of the court. **Rauch v. Urgent Care Pharm., Inc., 510.**

Minium contacts—president of company—contacts insufficient—Nonresident defendant pharmacy president did not have sufficient minimum contacts with North Carolina such that a court in North Carolina could exercise personal jurisdiction over him individually without violating his due process rights in a negligence and products liability action. **Rauch v. Urgent Care Pharm., Inc., 510.**

Setting hearing after remand—not the exercise of jurisdiction—There is no authority that setting a matter for hearing constitutes the exercise of jurisdiction. Although two courts cannot have jurisdiction over the same order at the same time, the action in issue in this case was the setting of the case for hearing after a Court of Appeals remand but before the certification to the trial court. **In re T.S., III & S.M., 110.**

JUVENILES

Probation violation—commitment not permissible disposition at Level 2—The trial court erred by committing a juvenile to a youth development center for an indefinite term on 1 June 2004 based on his probation violations in a 6 May 2004 order, because: (1) the pertinent question with respect to the probation violation was not how many points the juvenile had, but rather what dispositional alternatives were statutorily authorized for a Level 2 disposition; and (2) our case law and the pertinent statutes establish that commitment is not a statutorily permissible disposition at Level 2 under N.C.G.S. § 7B-2506(1) through (23) when it is addressed by N.C.G.S. § 7B-2506(24). **In re T.B., 542.**

OPEN MEETINGS

Mediation between city and county—one representative of each—not an official meeting—A mediation between the City of Asheville and Buncombe County was not an official meeting within the Open Meetings law because it was attended by only one representative from each entity rather than a majority. Furthermore, the mediation was not held to evade the spirit or purpose of the Open Meetings Law. **Gannett Pacific Corp. v. City of Asheville, 711.**

PARTIES

Necessary parties—res judicata—piercing the corporate veil—alternative remedies—The trial court erred by dismissing plaintiff's complaint seeking to hold the individual defendants liable for an earlier judgment rendered in plaintiffs' favor against a corporation for a refund of a deposit for the purchase of a manufactured home from the corporation because: (1) defendants, the sole shareholders, directors, and officers of the corporation, were not necessary parties to the first action under N.C.G.S. § 1A-1, Rule 19 when there was no basis at the time of the prior action to attempt to pierce the corporate veil and name the

PARTIES—Continued

individuals as defendants; and (2) res judicata does not bar the present suit when the prior action sought recovery of a deposit and the present action seeks to pierce the corporate veil and determine whether defendants should be held liable for the corporate debt based on their alleged actions of selling off corporate assets for personal gain after the successful conclusion of plaintiffs' prior suit. **Blair v. Robinson, 357.**

PHYSICIANS AND SURGEONS

Non-compete agreements—not against public policy—Medical non-compete agreements were not against public policy where the physicians were able to pay the liquidated damages and had no plans to leave the area. **Calhoun v. WHA Med. Clinic, PLLC, 585.**

PLEADINGS

Denial of motion to amend—no abuse of discretion—The trial court did not abuse its discretion by denying plaintiff's motion to amend its complaint to allege a violation of the Open Meetings Law where defendant was not given notice of the purported violation and was not prepared to respond to it. There was likewise no abuse of discretion in the denial of costs and fees. **Carter-Hubbard Pub'lg Co. v. WRMC Hosp. Operating Corp., 621.**

POLICE OFFICERS

Discontinuance of special allowance for retirement from county's police force—absence of preaudit certificate—The trial court did not err in a breach of contract case by granting summary judgment in favor of defendant county in an action for breach of contract for its failure to continue paying plaintiff a special allowance based on her retirement from the county's police force, because: (1) an agreement with a county requiring the payment of money is not enforceable in the absence of the preaudit certificate mandated by N.C.G.S. § 159-28(a); (2) the agreement in this case that is the subject of this appeal is for the payment of money, and thus, *Lee v. Wake County*, 165 N.C. App. 154 (2004), is inapplicable; and (3) the pertinent memorandum is not enforceable under principles of estoppel since to permit a party to use estoppel to render a county contractually bound despite the absence of the certificate would effectively negate N.C.G.S. § 159-28(a). **Finger v. Gaston Cty., 367.**

PUBLIC OFFICERS AND EMPLOYEES

Rehiring after reduction in force—priority—years of service—A state employee with more than ten years of general service with the State who was subjected to a reduction in force did not have a priority under N.C.G.S. § 126-7.1(c2) over another employee who had also been reduced in force with approximately four years of state service. The trial erroneously held that the statutory phrase "in the same or related position classification" applies to employees with less than ten years of service but not to employees with more than ten years of service. **Wilkins v. N.C. State Univ., 377.**

PUBLIC RECORDS

Hospital's contract to purchase medical practice—not competitive health care information—A public hospital's contract to purchase the practice of the only gastroenterologist in the county was not exempt from the Public Records Act as containing competitive health care information, and the trial court correctly granted summary judgment for plaintiff newspaper. The legislature did not intend to keep confidential dealings such as this, which do not involve trade secret information or competitive price lists. **Carter-Hubbard Pub'lg Co. v. WRMC Hosp. Operating Corp.**, 621.

RAPE

Child under thirteen—failure to repeat full instruction for each charge—plain error analysis—The trial court did not commit plain error in a multiple first-degree rape of a child under thirteen case by failing to repeat the full jury instructions for each of the eleven counts, because: (1) the trial court instructed the jury on each of the three elements of statutory rape as to each of the eleven offenses; and (2) the jury was charged as to the offenses contained in the indictment, including the alleged date of each offense. **State v. Bullock**, 460.

Child under thirteen—instruction—variation between allegation and proof as to time—The trial court did not err in a multiple first-degree rape of a child under thirteen case by allegedly instructing the jury on theories of guilt not alleged in one of the indictments, because: (1) variance between allegation and proof as to time is not material where no statute of limitations is involved, and particularly when allegations of sexual abuse of a child are involved; and (2) even assuming arguendo that a variation exists between the indictment and the charge, it does not require a new trial on this count. **State v. Bullock**, 460.

Child under thirteen—motion to dismiss—sufficiency of evidence—The trial court did not err in a multiple first-degree rape of a child under thirteen case by failing to dismiss the charges against defendant at the close of the State's evidence and the close of all evidence, because: (1) the State's evidence tended to show that for the entire period encompassed by the indictments defendant was having sexual intercourse with the victim more than twice a week; and (2) although defendant moved to another county from March 2001 until October 2001, the victim testified that he visited her home frequently, that defendant lived with them for a period during that time even though his address was in another county, and that their sexual contact did not diminish during this period. **State v. Bullock**, 460.

Child under thirteen—short-form indictments—double jeopardy—The trial court did not err in a multiple first-degree rape of a child under thirteen case by entering judgment based on short-form indictments, because: (1) short-form indictments are specifically approved for this offense under N.C.G.S. § 15-144.1(b); and (2) the indictments in the instant case state they are limited to conduct defendant committed in Wake County, defendant was not tried for any acts that defendant may have committed in Harnett County, and thus these indictments pose no danger to defendant's rights under the double jeopardy clause. **State v. Bullock**, 460.

REAL PROPERTY

Breach of installment land contract—superior title to disputed property—The trial court erred in a breach of contract case by denying plaintiffs' motion for summary judgment and by granting summary judgment in favor of defendant purchaser regarding superior title to disputed property, because: (1) the installment land contract entered into by defendant vendor and plaintiffs qualifies for protection from any subsequent purchaser for value under N.C.G.S. § 47-18; (2) plaintiffs' contract with defendant vendor entitled them to a good and sufficient deed effective upon payment in full of the purchase price; (3) defendant vendor admits after receiving the final payment from plaintiffs that the deed was never delivered to plaintiffs; (4) all parties stipulated that the contract was recorded in the county register of deeds on 8 November 1991, and also stipulated that defendant vendor conveyed the disputed property to defendant purchaser by deed eleven years later with defendant purchaser recording the deed on 3 January 2003; (5) plaintiffs possessed superior rights to the land since their contract was recorded prior to recordation by defendant purchaser; and (6) defendant purchaser is deemed under N.C.G.S. § 1A-1, Rule 36, by virtue of his failure to respond to plaintiffs' request for admissions, to have admitted he not only had both actual and constructive knowledge of plaintiffs' recorded bond for title, but also took title to the land subject to plaintiffs' recorded bond for title. **Watson v. Millers Creek Lumber Co.**, 552.

RECEIVERSHIP

Appointment—not established as matter of right—The appointment or denial of a receiver is within the discretion of the court. Plaintiffs were not entitled to a receiver as a matter of law even if they had, as they argued, established that defendant Kochhar had usurped corporate opportunities. **Barnes v. Kochhar**, 489.

SCHOOLS AND EDUCATION

Appeal of nonrenewal of teacher's contract—motion for reconsideration denied—The trial court did not abuse its discretion by not reconsidering a teacher's appeal of the decision not to renew her contract where the school board had presented erroneous information. The whole record test was properly applied. **Davis v. Macon Cty. Bd. of Educ.**, 646.

Teacher's contract—not renewed—review of basis for recommendation—A school board's inquiry satisfied its duty to determine the substantive basis for the superintendent's recommendation not to renew a teacher's contract and thus to deny her tenure and its duty to assure that the nonrenewal was not for a prohibited reason. The contract was not renewed because petitioner threatened to be a counter-productive force for morale at the school. **Davis v. Macon Cty. Bd. of Educ.**, 646.

Teacher's contract—not renewed—whole record review—evidence sufficient—The trial court did not misapply the whole record standard of review in an appeal from the school board's decision not to renew a teacher's contract. The court looked at all of the evidence, determined that there was substantial evidence to support the board's determination, and did not substitute its judgment for that of the board. **Davis v. Macon Cty. Bd. of Educ.**, 646.

SEARCH AND SEIZURE

Probable cause to search residence—binding findings—The trial court correctly determined that probable cause existed to search a murder defendant's residence where there were unchallenged findings that it was reasonable to conclude that a crime had been committed, that defendant was involved, and that his residence might contain items missing from the victim's car and the weapon used in the crime. **State v. Taylor, 395.**

Warrant—information not stale—items still useful to defendant—dates of sexual offenses against children—An affidavit is sufficient to support a search warrant if it establishes reasonable cause to believe that the proposed search will probably 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 affidavit here, supporting the warrant to search the house of a man eventually convicted of multiple sexual offenses against children, was not invalid as containing stale information. **State v. Pickard, 330.**

SENTENCING

No right to new sentencing hearing—defendant's exercise of right to appeal a prior matter—The trial court in a trafficking in cocaine by possession, transportation, and sale case did not improperly base defendant's sentence on defendant's exercise of his right to appeal a prior matter when it commented that defendant should have been required to wear shirts identifying him as a convicted drug dealer as part of his probation for a prior drug conviction in front of the same judge seven years prior. **State v. Mewborn, 281.**

SEXUAL OFFENSES

Failing to register as sex offender—sufficiency of evidence—The trial court did not err by denying defendant's motion to dismiss a charge of failing to register as a sex offender where defendant contended that there was no evidence that he had failed to change his registered address within ten days of moving, but the language of his confession, taken in the light most favorable to the State, was sufficient to permit the inference that defendant had not lived at the registered address within ten days of his arrest. **State v. Wise, 154.**

Sexual act with thirteen-year-old—evidence sufficient—The evidence was sufficient to convict defendant of a sexual act with a thirteen-year-old. **State v. Brown, 189.**

Sexual act with thirteen-year-old—variance between indictment and evidence—time of offense—There was not a fatal variance between the indictment and the evidence in a trial for a sexual act with a thirteen-year-old where defendant contended that the evidence showed that the victim was twelve years old during some of the time specified in the indictment, but the victim testified that she was thirteen when one of the offenses occurred. The trial court properly instructed the jury about what it must find to convict and defendant did not contend that he was deprived of the opportunity to present an adequate defense due to the variation. **State v. Brown, 189.**

SMALL CLAIMS

Appeal to district court—estoppel defense—failure to plead—no waiver—Defendant did not waive its affirmative defense of estoppel because it was not pled in accordance with N.C.G.S. § 1A-1, Rule 8(c) upon appeal from small claims court to the district court for a trial de novo because no affirmative defenses are required to be pled in small claims court, and a district court judge may try the case on the pleadings filed. **Don Setliff & Assocs. v. Subway Real Estate Corp.**, 385.

STATUTES OF LIMITATION AND REPOSE

Land contamination—last acts or omissions—repair work—The trial court did not err by granting defendants' motion for summary judgment in an action arising out of petroleum contamination of the soil and groundwater of plaintiffs' property based on the ten-year statute of repose under N.C.G.S. § 1-52(16), because defendants' last acts or omissions occurred more than ten years prior to the filing of this suit; the repair work defendants did in response to the North Carolina Department of Environment and Natural Resources's regulatory requirements did not begin the running of the statute of repose anew when the ten-year statute of repose had already expired prior to 2000 when these defendants took their remedial actions; and the fact that plaintiffs did not discover that their land was contaminated until after the statute of repose had expired does not extend their time for filing suit. **Hodge v. Harkey**, 222.

Statute of repose—owner exception—The trial court did not err in a negligence and breach of contract action arising out of the collapse of a pedestrian walkway by dismissing plaintiffs' third-party beneficiary claims under N.C.G.S. § 1A-1, Rule 12(b)(6) based on the statute of repose under N.C.G.S. § 1-50(5) even though plaintiffs assert there is an applicable exception under N.C.G.S. § 1-50(a)(5)(d) where defendant as owner of the Speedway knew or ought reasonably to have known of the defect in the walkway, because: (1) plaintiffs cite no authority factually comparable to the present cases in which liability for acts and omissions is equated to imputation of knowledge as a matter of law; (2) defendant Speedway's liability for the acts and omissions of Tindall (the designer and manufacturer of the prestressed concrete double tees used to construct the walkway) do not necessarily translate into an imputation of Tindall's knowledge; and (3) defendant is not collaterally estopped from asserting the statute of repose since it is separate from the issue of liability, and defendant has not previously litigated the statute of repose. **Kennedy v. Speedway Motorsports, Inc.**, 314.

TAXATION

Satellite service—sales tax—commerce clause—The statute imposing a state sales tax on providers of "direct-to-home satellite service" but not on cable television service, N.C.G.S. § 105-164.4(a)(6), does not violate the Commerce Clause of the United States Constitution either facially or in practical effect. **DIRECTV, Inc. v. State**, 659.

TERMINATION OF PARENTAL RIGHTS

Best interest of child—polar star—The trial court did not abuse its discretion in a termination of parental rights case by concluding that termination was in the

TERMINATION OF PARENTAL RIGHTS—Continued

child's best interests. While there is sympathy for the mother's mental health issues, particularly in light of a nightmarish childhood, the best interest of the child is the polar star. **In re L.A.B., 295.**

Failure to make progress in correcting conditions—findings not sufficient—The findings in a termination of parental rights order did not support the conclusion that the child's mother failed to make reasonable progress in correcting the conditions that led to the child's removal. None of the findings touched directly on the mother's ability to provide proper care, supervision, and discipline, and no finding suggests that the child would be exposed to an injurious environment with the mother. **In re J.T.W., 678.**

Failure to provide a safe home—findings supported—The transient state of the mother's housing at all times since the child's birth, along with her untreated hygiene issues, her failure to adequately supervise the child during visitation, and her failure to complete parenting classes all supported the trial court's determination that the mother lacked the ability or willingness to establish a safe home. **In re L.A.B., 295.**

Grounds—only one required—no consideration on appeal for further grounds—The trial court need only find that one statutory ground for termination of parental rights exists in order to proceed to the dispositional phase. **In re L.A.B., 295.**

Guardian ad litem for parent—not appointed at initial adjudication hearing—The trial court's failure to appoint a guardian ad litem for respondent mother for an initial adjudication hearing did not undermine the legitimacy of the trial court's findings with respect to the mother's ability or willingness to establish a safe home in a later termination of parental rights order. **In re L.A.B., 295.**

Illegitimate child—failure to show assumed burdens of parenthood—The trial court erred by denying petitioner licensed private adoption agency's petition to terminate respondent father's parental rights in light of evidence showing respondent's failure to meet the requirements of N.C.G.S. § 7B-1111(a)(5), because: (1) the intent of the legislature was not to make an illegitimate child's future welfare dependent on whether the putative father knows of the child's existence at the time the petition is filed; and (2) despite the fact that respondent may have acted consistently with acknowledging paternity, the trial court failed to make findings of fact to indicate respondent met the statutory requirements demonstrating that he assumed some of the burdens of parenthood such as attempting to establish paternity, legitimizing the child, or providing support for the biological mother or infant. **Child's Hope, LLC v. Doe, 96.**

Neglect—no finding that recurrence likely—Termination of parental rights for neglect may not be based solely on past conditions which no longer exist. The trial court here erred by concluding that a child was neglected where the child was in DSS custody and none of the court's findings indicated that neglect was likely to recur if the mother regained custody. **In re J.T.W., 678.**

Notice requirements met—jurisdiction obtained—The mandatory notice requirements of N.C.G.S. § 7B-1106.1(b) were met in a termination of parental rights proceeding, and the trial court had subject matter jurisdiction. **In re J.T.W., 678.**

TERMINATION OF PARENTAL RIGHTS—Continued

Standard of proof—sufficiently stated—While a termination of parental rights order must state that the allegations have been proven by clear and convincing evidence, there is no requirement as to how or where the statement must be included. Language in the court's conclusion that "clear, cogent, and convincing evidence exists" satisfied the requirement. **In re J.T.W., 678.**

Timeliness of hearing—prejudice not shown—The mother in a termination of parental rights proceeding did not show that scheduling the original hearing 23 days outside the statutory timetable was prejudicial (the hearing was held within the 90 day continuance period). Merely stating that she hoped to have her son in her life was not sufficient. **In re J.T.W., 678.**

UNEMPLOYMENT COMPENSATION

Employment-related misconduct—actions reasonable and taken with good cause—The superior court erred by affirming the Employment Security Commission's decision to deny unemployment benefits to petitioner under N.C.G.S. § 96-14(2) based on alleged employment-related misconduct, including her removal of a hard drive from the computer supplied to her by respondent company and assertion of a personal copyright interest in the company's catalogs and website, and the case is reversed and remanded to the Commission for additional proceedings not inconsistent with the Court of Appeals' decision. **Binney v. Banner Therapy Prods., 417.**

UTILITIES

Business judgment rule—electric co-op board—The Delaware common law standard of enhanced judicial scrutiny was not adopted in a case involving the election of electric co-op board members. The trial court did not err by applying the business judgment rule, and its determination that plaintiffs had not demonstrated bad faith was overwhelmingly supported by the evidence. **Hammonds v. Lumbee River Elec. Membership Corp., 1.**

City water—applicability of code sections—Although defendant contends plaintiff's application of Code § 23-22(d), as amended by Ordinance 1959, violates both N.C.G.S. § 160A-174 and the North Carolina Constitution, the Court of Appeals already determined that Code § 23-22(a) through (d) did not apply to defendant. **City of Lumberton v. U.S. Cold Storage, Inc., 305.**

City water—charges for well water use—The trial court's order granting summary judgment to plaintiff city regarding charges for well water use is reversed, and the case is remanded for a determination of the amount of city water consumed by defendant from 1 January 2002 to 30 June 2003 to be calculated based on the applicable rate for that time period, because no provision in the contract and no statutory authority, including Code § 23-2, existed enabling plaintiff to assess any fee for water defendant draws from its own well. The trial court's order permitting plaintiff to charge defendant for any well water subsequent to 30 June 2003 is also reversed. **City of Lumberton v. U.S. Cold Storage, Inc., 305.**

City water—historical usage billing method—The trial court's order granting summary judgment to plaintiff city regarding charges employing a historical usage billing method to well water use is reversed in part, because a portion of

UTILITIES—Continued

the judgment requiring defendant to pay \$208,067.02 was calculated from charges the Court of Appeals determined did not apply to defendant from well water use. The case is remanded for calculation of the utility fee less the amount of well water defendant used from February 1996 to January 2002. **City of Lumberton v. U.S. Cold Storage, Inc.**, 305.

Electric co-op—board election—preliminary injunction not violated—The board of an electric membership co-op did not violate the terms of a preliminary injunction against further board elections by creating and filling two new boards seats. Reading applicable statutes in para materia, it is plain that the board had the authority to fill vacant director positions, including those created by increasing the number of directors. **Hammonds v. Lumbee River Elec. Membership Corp.**, 1.

Electric co-op—board members—community diversity—Plaintiffs did not present evidence of a violation of any diversity rule in Chapter 117 of the General Statutes regarding electric co-op boards where plaintiffs contended that the election of board members did not reflect the diversity of the communities served by the co-op. There are no provisions in the General Statutes requiring electric membership corporations to reflect community diversity. **Hammonds v. Lumbee River Elec. Membership Corp.**, 1.

Electric co-op—bylaws—election of board members—racial discrimination not proven—The evidence fully supported the opinion of a trial judge, sitting without a jury, that plaintiffs had failed to prove racial discrimination in the election of the board members for an electric co-op, even assuming that a statement printed in the bylaws constituted an actual bylaw. **Hammonds v. Lumbee River Elec. Membership Corp.**, 1.

Tampering with public sanitary sewer system—sufficiency of findings of fact—The trial court's order granting summary judgment regarding defendant's alleged tampering with plaintiff's public sanitary sewer system in violation of Code § 23-1 is reversed, and the case is remanded for more findings of fact, because: (1) if findings of fact are necessary to resolve an issue of material fact, summary judgment is improper; and (2) although plaintiff's director of inspections inspected defendant's facility and determined the original feed connecting plaintiff's water to defendant's cooling tower had been disconnected, the director's deposition does not provide all the facts and requires findings of fact to determine the process for disconnecting the original feed. **City of Lumberton v. U.S. Cold Storage, Inc.**, 305.

WILLS

Caveat—missing will—evidence that destruction not by testator—sufficiency—The caveators in a case with multiple wills presented a genuine issue of fact that should have gone to the jury. Viewing the evidence in the light most favorable to the caveators, they presented evidence that the loss or destruction of the subsequent will was not due to action by the testator. **In re Will of McFayden**, 704.

Caveat—trifurcated proceeding—not an abuse of discretion—The trial court did not abuse its discretion by trifurcating a caveat proceeding involving multiple wills (1995 and 2002), and it was not manifestly unreasonable to try the

WILLS—Continued

1995 will first. Submission to the jury of the 1995 will referring to the last will and testament of the deceased was not an error. **In re Will of McFayden, 704.**

Motion for new trial—sufficiency of evidence—self-proved will—attesting witnesses—The trial court did not err by denying caveator's motion for a new trial based on insufficiency of the evidence, because: (1) propounder offered both evidence of a self-proved will and evidence from attesting witnesses regarding the circumstances surrounding the execution and witnessing of the will; and (2) caveator failed to show the trial court abused its discretion. **In re Will of Yelverton, 267.**

WITNESSES

Last-minute—not abuse of discretion—The trial court did not abuse its discretion in a first-degree murder prosecution by admitting testimony from a “surprise witness,” a telephone company manager who retrieved text messages between the victim's telephone number and one assigned to defendant. **State v. Taylor, 395.**

WORKERS' COMPENSATION

Aggravation of existing back injury—fall at home not an intervening event—A fall at home by a workers' compensation plaintiff aggravated his existing compensable back injury and was not an intervening event that barred further compensation. **Davis v. Harrah's Cherokee Casino, 605.**

Back injury—degenerative changes following surgery—causation—findings—The evidence supported the Industrial Commission's finding that the narrowing of the spinal canal of a workers' compensation plaintiff with a back injury was caused by the prominence of a primary spinal ligament (the ligamentum flavum) and scarring from surgery. **Davis v. Harrah's Cherokee Casino, 605.**

Back injury—release for work but not from medical care—continued pain—findings supported by evidence—Findings in a workers' compensation back case that plaintiff had been released for work but not from medical care and that he continued to suffer pain were supported by medical notes and testimony. **Davis v. Harrah's Cherokee Casino, 605.**

Back injury—second surgery compensable—supported by findings—The Industrial Commission's conclusion that a workers' compensation plaintiff's second back surgery was a consequence of his compensable injury was supported by the findings. Testimony about degenerative changes was not addressed, given the viable finding that plaintiff's stenosis was caused by scar tissue from his first surgery. **Davis v. Harrah's Cherokee Casino, 605.**

Credibility—Industrial Commission as sole judge—The Industrial Commission is the sole judge of credibility in workers' compensation cases. A finding that plaintiff's testimony was credible was upheld. **Davis v. Harrah's Cherokee Casino, 605.**

Death benefits—causation—The Industrial Commission did not err by finding no causal relationship between a truck driver's compensable injury, which left

WORKERS' COMPENSATION—Continued

him quadriplegic, and his subsequent death from an enlarged heart. **Booker-Douglas v. J & S Truck Serv., Inc.**, 174.

Disability ended—not based on maximum medical improvement—The Industrial Commission ended plaintiff's disability because he had not proven continuing total disability, not because he had reached maximum medical improvement. **Ramsey v. Southern Indus. Constr'srs, Inc.**, 25.

Employee attacked at motel—injuries arising out of employment—A workers' compensation plaintiff suffered injuries arising out of his employment where he was attacked in the motel at which he was staying while he worked out-of-town. The risk to which plaintiff was exposed was not something to which he would have been equally exposed apart from his employment-required travel. **Ramsey v. Southern Indus. Constr'srs, Inc.**, 25.

Findings—general and specific—propensity to degenerative back disease following surgery—There was no evidence in the record to support the Industrial Commission's specific finding about this plaintiff's propensity to develop degenerative disease following back surgery, although there was competent evidence to support the Industrial Commission's general statement of such a propensity. **Davis v. Harrah's Cherokee Casino**, 605.

Findings—more than recitation of evidence required—A workers' compensation finding was adequate where the last sentence reflected the Industrial Commission's consideration of the evidence. Recitations of a physician's testimony and written surgery notes would not in themselves constitute a finding of fact. **Davis v. Harrah's Cherokee Casino**, 605.

Hearsay—911 report with unknown callers—present sense impression—The Industrial Commission did not err in a workers' compensation proceeding involving a truck accident by admitting a 911 dispatch report that contained statements from unknown callers. The Rules of Evidence do not strictly apply in workers' compensation cases. Even so, these calls were admitted as present sense impressions; the callers may not have seen the accident, but they saw the aftermath and reported this event or condition. **Wooten v. Newcon Transp., Inc.**, 698.

Ongoing disability—findings—The Industrial Commission properly concluded that a workers' compensation plaintiff suffered an ongoing disability. The Commission found that a physician had written plaintiff out of work, that he was injured in a fall on ice, that the medical testimony was that a person who has undergone spinal surgery is more likely to suffer worse symptoms from an injury to the back and that plaintiff's activity was limited by pain. Plaintiff testified about the effect the pain had on his ability to work as well as his qualification for social security disability, and the Commission found plaintiff's testimony to be credible and sufficient to prove the ongoing nature of his disability. **Davis v. Harrah's Cherokee Casino**, 605.

Pickrell presumption—truck driver dying of heart attack—The Industrial Commission did not err in a workers' compensation case by finding that plaintiff was entitled to a presumption of compensability under *Pickrell v. Motor Convoy, Inc.*, 322 N.C. 363, (that death was work related when the causal connection between the work and the death was unknown) where her truck-driver husband

WORKERS' COMPENSATION—Continued

died of a heart attack either before or during a traffic accident. **Wooten v. Newcon Transp., Inc., 698.**

Total disability—inability to work—not proven—The Industrial Commission did not err by concluding that a workers' compensation plaintiff had not met his burden of proving total disability where there was no presumption from a prior award or agreement, no medical evidence that plaintiff was unable to work at any employment, and the receipt of Social Security disability benefits is not alone sufficient to establish that it would be futile to seek alternative employment. **Ramsey v. Southern Indus. Constr's, Inc., 25.**

Traveling employee rule—employee attacked at motel—An electrician was a traveling employee for workers' compensation purposes when he was beaten and robbed at the Richmond, Virginia motel at which he was staying while on a job. The traveling employee rule should not be confused with the coming and going rule. **Ramsey v. Southern Indus. Constr's, Inc., 25.**

Truck driver dying of heart attack—Pickrell presumption—not rebutted—The Industrial Commission correctly concluded that the *Pickrell* presumption of compensability was not rebutted by defendants in a workers' compensation case where the decedent, a truck driver, died of a heart attack either before or during a traffic accident. **Wooten v. Newcon Transp., Inc., 698.**

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